MAKE A WINNING RECORD—PLEASE!

Meeting and Overcoming Evidentiary Challenges By Objections, Motions, Proffers and All You Can Do.

by

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Introduction. Trial lawyers are like surgeons. Appeals lawyers are like coroners. For most trial lawyers, the goal is to persuade the jury first, the court second (in motions, objections, instructions), and make an appellate record third. The purpose of this paper is to provide suggestions to further all three goals simultaneously so that jury persuasion is not sacrificed in the making of good trial record. Record preservation need not conflict with jury persuasion.

Record making takes time. One has to think out the strategy of the case well in advance of trial in order to know what issues to advance. Sometimes, case load may interfere with one's ability to have the time. In such cases, the discussion that follows assumes counsel has the time. See ABA Formal Opinion (06-441 May 13, 2006), "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation" which states:

> All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

See also ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) Guideline 10.3: "Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines."[1] [Hereafter cited as ABA Guidelines].

No winning record can be made when counsel waives issues through inaction. The ABA Guidelines, 10.8A(3)(c) states that every potential claim must be evaluated in light of: "the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." Subsection B(1) requires counsel to "present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and 2. Ensure that a full record is made of all legal proceedings in connection with the claim."

The ABA Guidelines describe the record making duty as a "fundamental" duty of counsel. ABA Guidelines, Commentary to 10.8, The Duty to Assert Legal Claims. Hopefully, some of what follows will be helpful in meeting that obligation.

What follows is divided into three sections: general tips on record making; suggestions for record making on common issues that arise; and record making through use of a motion for new trial.

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[1] The ABA Guidelines were first published in 1989 and were revised in 2003. See www.abanet.org/deathpenalty. Wiggins v. Smith (2003) 539 U.S. 510, 523, stated the Guidelines are defining prevailing norms of reasonable representation. *See also* Rompilla v. Beard (2005) 545 U.S. 374, 387; Strickland v. Washington (1984) 466 U.S. 668, 688 (referring to ABA Defense Function Standards).

I. GENERAL TIPS ON RECORD MAKING.

A. Talk to the Client. *See* Beavers v. Balkcom (5th Cir. 1981) 636 F.2d 114, 116 ("'informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are (the) cornerstones of (the) effective assistance of counsel'" [Citation.].) There is no substitute for information from the client in preparation for trial, and this will include information relevant to a variety of motions.

B. Know the Real Rules. *E.g.*, Cal Rules of Court, Rule 4.111, Pretrial Motions in Criminal Cases, states in (b) that the court may consider the failure without good cause of the moving party to serve and file points and authorities within the time permitted as an admission that the motion is without merit. This rule does not affect in limine motions (which are forms of evidentiary objections). By its terms, it's limited to pretrial motions.

B-1. Dealing with the Court's Individualized Rules. Trial judges like to have their own rules for the conduct of cases in their courtrooms. Unless these rules merely duplicate state law (statutes or Judicial Council Rules) or were properly vetted under the controlling state statue as local rules, they are not a basis for the imposition of any sanction. If confronted with one that could damage your case, tell this to the judge: "I wasn't aware this was a mandated rule. Has it been put through the requirements of of Code of Civ. Pro. § 575.1, Gov. Code §§ 68070, 68071, and Rule of Court 981? I'm unaware of it." (*See* Hall v. Superior Court (2005) 133 Cal. App. 4th 908 [superior court issued a rule that stated motions had to be filed and heard at least 30 days prior to trial; held invalid].)

C. File a Trial Brief. Raising and preserving issues can be difficult in the heat of battle, so "counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion." ABA Guidelines, Commentary to 10.8, The Duty to Assert Legal Claims.

To set forth your legal theory, supportive cases, anticipate evidentiary issues, and to educate the judge early on these points. To set up a motion in limine that sticks during trial, counsel must set forth a specific legal ground to exclude evidence, it must identify a particular identified body of evidence, and must be made at a time

before (or during) trial when the trial judge can determine the question in its appropriate context. (People v. Morris (1991) 53 Cal. 3d 152, 190.)

One of the purposes of bringing motions in limine is to get favorable rulings before prejudicial evidence comes before the jury. See Brodit v. Cambra, 350 F.3d 985, 1005 (9th Cir. 2003), citing Kelly v. New W. Fed. Sav., 49 Cal.App.4th 659, 56 Cal.Rptr.2d 803, 808 (1996) (noting that pretrial motions in limine to preclude the introduction of prejudicial evidence "avoid the obviously futile attempt to 'unring the bell'" once the evidence is aired before the jury).

D. Make the Prosecutors Satisfy Their Burden of Establishing the Relevance and Foundation for Evidence. If the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule are the burden of the proponent. (People v. Ramos (1997) 15 Cal.4th 1133, 1177 [proponent of hearsay bears the burden of establishing the necessary foundation for an exception].) Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. (People v. Morrison (2004) 34 Cal. 4th 698, 724 ("The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule.")

E. React to Surprise Evidence with a Motion to Exclude, and Failing That, Ask for a Continuance. (People v. Ott (1978) 84 Cal. App.3d 118.) This can occur is subtle ways. For example, assume a witness for the prosecution who was to simply lay a foundation for documents suddenly is asked questions only an expert can be asked and the prosecutor has not provided any discovery as required by law. Move to exclude it. Failing that: ask for a hearing on the discovery you've been denied and time to hire an expert to assess the information given.

In Leka v. Portuondo (2d Cir. 2001) 257 F.3d 89, 106, the government's failure to disclose the name of a crucial eyewitness with information favorable to the defense "until three business days before trial" was found to violate due process. In language correctly acknowledging the impossibility of investigating the case during trial, the court wrote:

> When such a disclosure is first made on the eve of trial, or when trial

> is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case.
>
> Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray. (Id. at 101.)
>
> For the same reasons, a disclosure made on the eve of trial (or after trial has begun) may be insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage. (Id. at 101.)

Accord U.S. v. Gil, 297 F.3d 93 (2nd Cir. 2002) (reversing a conviction for last minute, but before trial, provision of an important Brady document contained within thousands of pages of other discovery.)

F. If You Want All the Relevant Evidence, Remember Evidence Code §356.
It provides, in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party ...." The courts are not to be narrowly focused when considering the application of § 356: "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. ...' [Citations.]" (People v. Hamilton (1989) 48 Cal.3d 1142, 1174.)

G. Use Offers of Proof to Make a Record of Evidence the Court Excludes.
This is best done by declarations of witnesses, and may be even required. (People v. Sahagun (1979) 89 Cal.App.3d 1.) For there to be prejudice from the exclusion of defense evidence, there has to be something in the record to show what the witness (or excluded physical evidence) would prove. "[A]ny claim that evidence was wrongly excluded cannot be raised on appeal absent an offer of proof in the trial court. (Evid. Code, § 354.) Defendant made no offer of proof as

to how the tapes of his police interviews might correct any missimpressions allegedly created by the testimony and transcripts actually before the jury." (People v. Pride (1992) 3 Cal. 4th 195, 235.)

H. If You Want to Rely on an Objection of Co-counsel During the Trial, Fine, But Put in the Record That You Are Doing So. (People v. Brown (1980) 110 Cal. App.3d 24, 35)("On appeal, a defendant cannot take advantage of objections made by a codefendant in the absence of stipulation or understanding to that effect.") In U.S. v. Lothian (9th Cir. 1992) 976 F.2d 1257, 1268, the court agreed that such joined objections could preserve issues for appeal, but rejected it there because the non-objective counsel failed to particularize the objection concerning bad act evidence as irrelevant to his client. (The same applies when there has been a mistrial – you must either have the court reinstate the rulings in the first case *or* relitigate them. Without something in the record in the second trial, the old rulings do not exist. (People v. Richardson (2008) 43 Cal. 4th 959, 1002.)) *See* People v. Taylor (2001) 26 Cal. 4th 1155, 1171 ("The Attorney General faults defendant for failing to object to the foregoing testimony by Dr. Parsons, but as defendant observes, his codefendants did so object, and at the beginning of trial the parties stipulated that an objection by one defendant would be deemed made by all three.")

Note that after a reversal or mistrial, "absent a ruling or stipulation that objections and rulings will be deemed renewed and made in a later trial [citation], the failure to object bars consideration of the issue on appeal.… A defendant may not acquiesce in the admission of possibly excludable evidence and then claim on appeal that rulings made in a prior proceeding render objection unnecessary." (People v. Clark (1990) 50 Cal.3d 583, 623–624.)

I. Know When to: Object, Ask for an Instruction and Mistrial. Where a motion for mistrial is made in a place where a motion to strike and an instruction would cure the harm, the motion will be denied. (People v. Morgan (1978) 87 Cal.App.3d 59.)

J. Get Rulings and Get Them on the Record. Nothing is appealable if the judge did not rule. For those judges who are non-responsive to motions or objections, try to get a ruling, and failing that, say, "I take it that is denied." If the court rules in an off the record chambers or side-bar meeting, put it on the record when

proceedings resume. If rulings have been made pre-trial on evidentiary issues, make sure to have the court state that these rulings are deemed to have been made during the trial so that they need not necessitate renewal at trial.

Also, if you object, but the witness answers before the judge sustains the objection, you must quickly move to strike the answer or it is in evidence. (People v. Saam (1980) 106 Cal. App. 3d 789, 795.)

Finally, **don't** preface an objection with "for the record." Everything you say in court is on the record and the phrase telegraphs to the court that you don't expect a favorable ruling.

K. Always Make Penal Code § 1118.1 Motions at the End of the DA's case in Chief. A PC § 1118.1 motion need not specify the charge to which it applies or the element as to which proof is insufficient. (People v. Smith (1998) 64 Cal. App.4th 1458, 1468.) Accordingly, "unless the defendant has a very good reason not to do so, the close of the prosecution's case should always be followed by a nonspecific section 1118.1 motion directed at all the counts and enhancements." (Ibid.)

L. Don't Endorse the Court's General Instructions. Some trial judges will seek an on the record general endorsement of all the instructions after the instruction conference. Don't do it. Instructions are the judge's responsibility. Just say, "submitted."

This means only that your are saying the issue is ready for decision but not that you have agreed to it. In People v. Overby (2004) 124 Cal.App.4th 1237, the court assessed the meaning of the term "submit:"

> The word is often used to advise a court that a party has presented all his or her arguments and evidence and does not object to the court ruling without further debate. (In re Richard K., *supra*, 25 Cal.App.4th at p. 588 ["after the parties present evidence and argue their respective positions, they will 'submit' the matter, asking the court to rule without further argument"].)

Of course, in context, the phrase may mean a concession, but not here. The People recognized in their pleading their burden to meet the elements of Penal Code section 1360 which included a judicial hearing and a finding of trustworthiness. (*See* CT 109.) Submission here meant the defense acquiesced to the court ruling on the issue and that it could not do without meeting the elements of the statute.

If the court asks what that means, just say, "it means only that the matter is ready for your ruling." By endorsing the court's instructional package, counsel risks undermining arguments that appellate counsel finds on appeal. The State will argue the instructional error was invited because defense counsel stated on the record that the defense wanted the instructions. This does not mean that counsel should be silent in the instructional conference.

Make sure the instruction conference is on the record so that objections are noted as are defense submissions of instructions.

Insist that the court's actual reading of instructions to the jury be transcribed. Otherwise, if the written instructions vary from what is actually spoken, there is no record. (People v. DeFrance (2008) 167 Cal. App. 4th 486, 389 ["We strongly discourage the practice of not recording the oral instructions given to the jury...."].)

M. Don't Buy Into CALCRIM Unless You are Convinced It is Correct.

There are errors in CALCRIM. Counsel should consult FORECITE on all the instructions to develop objections and alternative instructions. There are tailored defense instructions to be developed and offered. Trial counsel has a duty to request proper jury instructions. (*See* People v. Sedeno (1974) 10 Cal.3d 703, 717, n, 7, *overruled on other grounds* in People v. Breverman (1998) 19 Cal.4th 142; *see also* In re Cordero (1988) 46 Cal.3d 161, 189-91 [J. Mosk, conc.]; U.S. v. Span (9th Cir. 1996) 75 F.3d 1383 [failure to request instruction on available defense was IAC].)

N. Don't Let A Court Intimidate You By Chiding that Your Argument is Frivolous Because Every Court That Has Considered it Has Rejected it.

Here's a story of why trial courts should just rule on motions and not criticize counsel for raising an issue that every court in the land has rejected except the U.S. Supreme Court. In Bousley v. United States (1998) 523 U.S. 614, the

defendant pleaded guilty to drug possession with intent to distribute and to the enhancement for "using" a firearm "during and in relation to a drug trafficking crime." He appealed his sentence, but did not challenge the guilty plea's validity. The Eighth Circuit affirmed. Subsequently, he sought habeas relief, claiming his guilty plea lacked a factual basis because neither the "evidence" nor the "plea allocation" showed a connection between the firearms in the bedroom of the house and the garage where the drug trafficking occurred. The District Court dismissed the petition. While the appeal was pending, the Supreme Court held that a conviction for using a firearm requires the Government to show "active employment of the firearm," Bailey v. United States (1995) 516 U.S. 137, 144, not mere possession. In affirming the dismissal in Bousley, the Eighth Circuit rejected petitioner's argument that Bailey should be applied retroactively, that his guilty plea was not knowing and intelligent because he was misinformed about the elements of the gun offense, that this claim was not waived by his guilty plea, and that his conviction should therefore be vacated.

The Supreme Court took the case. It held that Bousley waived his claim by not raising it on direct appeal (and thus but not arguing it at trial too). To argue his way around this default, Bousley claimed "cause and actual prejudice." He argued that the legal basis for his claim was not reasonably available to counsel at the time of his plea and that it would have been futile to attack the plea before Bailey; The Supreme Court held that while this may work when the claim "is so novel that its legal basis is not reasonably available to counsel" (Reed v. Ross (1984) 468 U.S. 1, 16), Bousley's claim does not qualify because his claim was held not "novel" because although never accepted by any court until Bailey (and this means rejected by every appeals court in the country), the issue was being raised. Quoting Engle v. Isaac (1982) 456 U.S. 107, the Court held that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" (Id., at 130, n. 35.) Therefore, petitioner is unable to establish cause for his default.

The long and short of this is: if any lawyer in the nation has thought of an arguable issue and pressed it, it is not "novel" and should be urged in the courts time and again until the U.S. Supreme Court either rejects or accepts it. If not so pressed, the client will default it on habeas review. So, as in Bailey**,** despite no court ever recognizing the issue as valid until the high court did so after repeated and unanimous rejections in all the courts of appeal, trial counsel should have

raised it anyway. By not doing so, the client defaulted what was a winning issue. So when a judge criticizes you for raising an oft-rejected issue, tell the judge this story and press on.

O. Going in Camera: You Go Too.

If the court wants to look at material in camera, requests the right to review it with the court under a protective order. As an officer of the court, the order could require that counsel not divulge any of the information revealed except under seal to the court to make the showing for this argument. In U.S. v. De Los Santos (5th Cir. 1987) 819 F.2d 94, 97-99, the appellate court observed that trial courts may admit defense counsel into in camera hearings on informant disclosure.

> As a final matter, we note that the Anderson [United States v. Anderson (9th Cir.1975) 509 F.2d 724] court suggested an alternative procedure for accommodating the interests of both the government and the criminal defendant that we believe is appropriate for a situation such as in the present case:
>
> > We hold that the responsibility for striking the proper balance in each case rests with the trial judge. In striking that balance the trial judge, in the exercise of his discretion, can conduct an *in camera* hearing to which the defense counsel, but not the defendant is admitted. The defense counsel could then be permitted to participate in the *in camera* proceedings and to cross-examine the *in camera* witness or witnesses. . . . The district court can and should, when appropriate, place defense counsel under enforceable orders against unwarranted disclosure of the evidence that he has heard.
>
> *Id.* at 730. The admission of defense counsel to the hearing as a method of protecting a defendant's confrontation rights has support in the cases. United States v. Miller (5th Cir.1973) 480 F.2d 1008 (airline employee testifies in absence of defendant that defendant fit hijacker profile; defense attorney present to cross-examine witnesses); United States v. Bell (2d Cir.1972) 464 F.2d 667 (defendant excluded from portion of suppressing hearing delineating parts of FAA hijacker profile; defense attorney present). *See generally*, Annotation, "Right of Accused to be Present at Suppression Hearing or at Other Hearing or Conference Between

Court and Attorneys Concerning Evidentiary Questions," 23 A.L.R. 4th 955 (1983).

P. Federalize Every Objection and Motion.

I have been giving out my "mantra motion," a pre-trial motion for every criminal case going to trial, for years. It contains several motions useful in every case, capital or non-capital, including short motions to stop the prosecutor from referring to the complaining witness as a "victim," to stop the prosecutor from referring to him or herself as representing the "People," an argument to have the words "evidentiary certainty" put into the reasonable doubt instruction, and an argument to "federalize" every objection made in the trial court so that counsel does not have to articulate for the record an explicit federal constitutional basis for an objection. The motion can be downloaded from my website at www.charlessevilla.com (go to the publications page).

II. RECORD MAKING ON SPECIFIC ISSUES

A. Making a Record of Batson v. Kentucky (1986) 476 U.S. 79 Challenges.[2]

"[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (**step one**), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (**step two**). If a race-neutral explanation is tendered, the trial court must then decide (**step three**) whether the opponent of the strike has proved purposeful racial discrimination." (Purkett v. Elem (1995) 514 U.S. 765, 767.)

1. Step One - Defense Burden - as soon as you recognize a potential Batson problem, make a Batson motion stating what it is that one may base an inference of intentional discrimination based on race or gender in the prosecutor's challenge. (People v. Buchanan (2006) 143 Cal. App. 4th 139, 141: "It should surprise no one that, as a reviewing court, we are only able to consider matters adequately raised in the record. Other than the list of names suggesting the challenged jurors were Hispanic, there was nothing in this record regarding ethnicity of potential, challenged, or seated jurors. Here, numerous persons with similar names remained

[2] The California Supreme Court has held that People v. Wheeler (1978) 22 Cal.3d 258, imposes the same standard as Batson**.** (People v. Box (2000) 23 Cal.4th 1153, 1188, fn. 7.)

on the panel. In short, the record was not good enough to preserve the issue."

Make the record: state the ethnicity of the challenged juror and that of previous challenges and argue the makeup of the remaining jury is relatively devoid of minorities. In People v. Gonzales (2008) 165 Cal. App. 4th 620, the court found Batson error based on the prosecutor's reason to excuse Spanish speaking jurors – they might not follow the translator's version. This was not a race neutral reason. Also, remind the court that record making is important. As the Supreme Court stated: "Nevertheless, in exercising that discretion, trial courts should seek to balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (People v. Lenix (2008) 44 Cal. 4th. 602, 625, fn. 16.)

2. Step Two - Prosecutor's Burden to list "race neutral" reasons for the challenge. Listen carefully and be ready to compare the objections with those used (or not used) on similarly situated non-minority jurors. Also, question whether the reason is a make-weight rationalization for what really is going on. (*See* Kesser v. Cambra (9th Cir. 2006) 465 F.3d 351 [DA kicked off Native American and Asian jurors. The 9th Circuit reverses under Batson finding, by comparative analysis the DA's explanations did not hold water].)

Argue the reason as pretextual. If possible, argue comparisons – that the juror challenged had about the same background of non-minority jurors who the prosecutor did not challenge.

3. Step Three - Court's burden to determine the credibility of the prosecutor's reason. The best defense argument will be that the record contradicts or does not support the prosecutor. Miller-El v. Dretke (2004) 545 U.S. 231 appears to require comparative analysis for Batson challenges on appeal. The judge must determine the credibility of the prosecutor's proffered explanation. (McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209, 1220, cited with approval in People v. Silva (2001) 25 Cal.4th 345, 385.)

NOTE: What about a case where counsel is denied a cause challenge of a juror?. How is this issue preserved? In People v. Weaver (2001) 26 Cal. 4th 876, 910-911, the California Supreme Court noted that a "defendant challenging on appeal the denial of a challenge for cause must fulfill a trio of procedural requirements:

(1) the defense must exercise a peremptory challenge to remove the juror in question; (2) the defense must exhaust all available peremptory challenges; and (3) the defense must express dissatisfaction with the jury as finally constituted." If counsel is out of peremptory challenges when the cause challenge is denied, to preserve a claim on appeal, "failure to seek an additional peremptory challenge, especially when coupled with no indication of dissatisfaction with the jury as constituted, will be deemed waiver of a claim of prejudice from the erroneous denial of a challenge for cause." (People v. Terry (1994) 30 Cal. App. 4th 97, 104.)

Note: Disputed Witherspoon excusals in capital voir dire require objections. People v. McKinnon, 52 Cal.4th 610, 643 (2011)(where juror is excused for views against death penalty; objections must be made to preserve issue.)

B. Dealing with Video and Audio Tape Prosecution Evidence

1. Get a Transcript Well Before Trial. If the prosecution wants to play such a tape to the jury, make sure they provide you with an accurate transcript well in advance and file it in the record. *See* Calif. Rules of Court, Rule 2.1040(a), requiring such a transcript before electronic recordings may be admitted.

2. Check the Transcript Against the Tape and Flag All the Objectionable Material. (In re Cordero (1988) 46 Cal.3d 161, 188 [tape of defendant's interrogation included an officer's statement that the judge who signs the arrest warrant was convinced the defendant killed the victim, as noted in the concurring opinion]; Sager v. Maass, 907 F. Supp. 1412 (D.C. Ore. 1995) ["a competent defense attorney would have listened to the tape before it was played to the jury and sought to remove the irrelevant, inflammatory references to petitioner."]) *See also* Aguilar v. Alexander (9th Cir.1997) 125 F.3d 815, 819 ["We cannot ignore, however, that Aguilar's counsel apparently did not herself, or have others, review more than one of the twelve two-hour tapes. It surely was her professional duty to know the contents of the tapes before counseling Aguilar to waive his privilege."])

3. Make a Motion to Redact. Move to redact everything arguably inadmissible, *e.g.*, the comments are inflammatory, irrelevant, not questions, and commentary unrelated to any answer. *See* People v. Sanders (1977) 75 Cal.App.3d 501, 507-508["The People argue that the officer's narrative statements

were admissible as adoptive admissions (Evid. Code § 1221). We disagree. It is fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences -- particularly where the statements are not in question form"].) Examples of matter to redact:

a. Expressions of the officer's belief in the guilt of a defendant. (E.g., U. S. v. Harber (9th Cir. 1995) 53 F.3d 236 [reversal required where a case agent's report containing a summary of his investigation and his opinion that the suspects were guilty was mistakenly given the jurors]; People v. Torres (1995) 33 Cal.App.4th 37 [peace officer's opinion that defendant committed the crimes did not assist jury and was not beyond common juror experience]; People v. Brown (1981) 116 Cal.App.3d 820, 829-830 [officer's testimony that defendant acted as a runner of drugs, and thus was as guilty as a seller, was reversible error].)

b. Expressions by the officer that the "victim" is telling the truth. (People v. Sergill (1982) 138 Cal.App.3d 34, 39-40(reversible error for officer to testify that child victim was telling the truth); U.S. v. Binder (9th Cir. 1985) 769 F.2d 595, 602 [it is an invasion of the jury's responsibility to determine the facts and witness credibility]; Maurer v. Dept. of Corrections (8th Cir. 1994) 32 F.3d 1286, 1287 [denial of due process of law to admit testimony from witnesses, including two police officers, that the victim was "sincere" in her claim of rape]; Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284, 287-288 [officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unfair" trial].)

c. References to prior crimes or bad acts. See People v. Guizar (1986) 180 Cal.App.3d 487 [the court found defense counsel incompetent for failing to redact a tape of a witness' statement which included references to the defendant's previous murders].)

4. Federalize the Motion to Redact. Redaction is required to avoid a denial of a federal due process fair trial in violation of the U.S. Constitutional guarantees of the Fifth and Fourteenth Amendments, and (in state courts) article I, sections 7 & 15 of the California Constitution. It is also implicates basic confrontation rights under the Sixth Amendment. *See* Crawford v. Washington (2004) 541 U.S. 36. Also, argue Evidence Code 352, or Fed. Rule Evidence 403.

An example of the terrible impact of not-federalizing is Castillo v. McFadden (9th Cir. 2004) 399 F.3d 993, where a videotaped interrogation was played to the jury in an alleged baby shaking case. The tape was full of police accusations of lying and assertions of "scientific proof" of guilt. The trial judge regretted allowing it to be played and instructed the jury that the police statements were not admitted for proof of guilt. For failure to federalize the issue in state court, the majority panel opinion would not rule of the due process issue and held it not exhausted. But the dissent would have reached the merits and reversed the conviction based on the constitutional violation! The defendant is doing 20 years. *See also* Dubria v. Smith (9th Cir. en banc 1999) 224 F.3d 995 (finding of no constitutional error in playing tape where officer opined about evidence of guilt, reversing 197 F.3d 390, initial opinion reversing conviction based on IAC.

5. Argue That No Limiting Instruction Can Alleviate Prejudice. Telling a jury, for example, to pay no attention to the investigating police officers' statements that they believe the defendant is "conclusively" guilty is obviously no cure for prejudice. Even if cautionary jury instructions are close to the mark, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. U.S. (1968) 391 U.S. 123, 135; *also cited in* Gray v. Maryland (1998) 523 U.S. 185, 190; *see also* Berger v. U.S. (1935) 295 U.S. 78, 85 ["It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken"].)

6. Cite the Supporting Case Law. Many of the helpful cases in this area of redaction are appellate reversals finding defense counsel incompetent for not redacting tapes. (People v. Guizar (1986) 180 Cal.App.3d 487, 492 ["Ignoring other possible objections, it is inconceivable to us that defense counsel did not object to the introduction of this portion of the tape and transcripts on the ground that it was more prejudicial than probative"].) *See also* Sager v. Maass (9th Cir. 1996) 84 F.3d 1212, *affirming* 907 F.Supp. 1412 (D.Or. 1995) [defense counsel was held ineffective in part for failing to object to a 911 tape which contained negative comments about the defendant]; People v. Sundlee (1977) 70 Cal.App.3d 477 [counsel's failure to object to police surveillance tape containing inadmissible hearsay held ineffective assistance].)

7. Object to the Tape or Transcript Going to the Jury in Deliberations if some or all of the offending questions are admitted because of the risk that the comments will be given undue emphasis. (*See* People v. Sundlee, *supra* at 485 ["Each juror had a transcript of the inadmissible radio conversations and took it into the jury room, where it may have played a powerful and influential role, dwarfing the admissible eyewitness testimony"]; U.S. v. Hernandez (9th Cir. 1994) 27 F.3d 1403, 1408 [error prejudicial to give jurors transcript of witness testimony where few precautions are taken to insure jury does not give the transcript undue significance].) *Compare* U.S. v. Richard (9th Cir. 2007) 504 F.3d 1109 [reversible error to play back in open court only a portion of testimony (direct) over objection].

8. All of the Above Apply to Video Interview Evidence. Often, in child abuse cases, the child is interviewed and the prosecution seeks to play the tape before the jury. Unless there is an evidentiary exception to the hearsay rule, it should not come in. A social worker interview is subject to a pretrial motion to exclude because it is pure hearsay and often contains contaminants such as multiple hearsay and prejudicial comments by the social worker, *e.g.*, "We will make sure he doesn't hurt anyone else." (*See* Webb v. Lewis (9th Cir. 1994) 44 F.3d 1387 [admission of videotaped violated Confrontation Clause where the tape did not fall within any recognized exception to the hearsay rule].)

Even if some parts are admitted, and unless tactics dictate otherwise, never let the videotape go back to the jury room during deliberations. This is like having the accuser appear "live" during deliberations in the most credibility supportive context. (*See* the following cases supportive of exclusion of such tapes in the jury room during jury deliberations: U.S. v. Binder (9th Cir. 1985) 769 F.2d 595, 600-601, *overruled on other grounds by* U.S. v. Morales (9th Cir. 1997) 108 F.3d 1031, 1035, fn.1.; Chambers v. State (Wyo. 1986) 726 P.2d 1269, 1276, 1277; Taylor v. State (1986) 727 P.2d 274, 277; Martin v. State (Okla. 1987) 747 P.2d 316, 319-20; People v. Montoya (Colo. 1989) 773 P.2d 623, 626, *superceded on other grounds as stated in* People v. Pahlavan (2003) 83 P.3d 1138; State v. Michaels (N.J. 1993) 264 N.J. Super. 579, 643-644; Summage v. State (2004) 248 Ga. App. 559, 561; Tullis v. State (Fla. 1998) 716 So. 2d 819, 820; Young v. State (1994) 645 So. 2d 965, 968.)

9. Tale of the Tapes. Tapes can be damaging evidence but they often contain material that a jury should never hear. Being attentive to the record means being vigilant to contain taped evidence. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issues of guilt or innocence." (Bruton v. U.S. (1968) 391 U.S. 123, 131, fn. 6. Thus, in a recent Watson murder case, showing the jury the videos of crashes/victim testimonials that the defendant saw while on probation for DUI Was reversible error. (People v. Diaz (2014) 227 Cal. App. 4th 362 [good discussion of the error and the prejudice from it].)

With the above in mind, the above checklist can be used to guarantee clients their right to be tried upon relevant evidence and not opinions smuggled into the trial through taped evidence.

C. Making a Record with Evidentiary Objections: Overcoming a § 352 Objection to Get Your Evidence Admitted.

No statute is cited more frequently in the criminal courts to exclude defense evidence than Evidence Code section 352. It reads:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Excluding defense evidence is a serious matter and judges need to be impressed with the law stating that § 352 cannot be blithely employed to bar relevant evidence. Judges too often exercise discretion to utter “352" as if it were the magic “abracadabra” to make evidence vanish. When faced with this reaction, break down the elements of §352 and offer legal arguments to overcome it. Even if you make the argument and it fails, you have done the client a service by making a record for appeal. But let’s think positively. These arguments will prevail.

1. Probative Value**.** The first requirement is that your proffered evidence have probative value; that is, is it relevant to some issue in the case? We need rules of relevance because, as Oliver Wendell Holmes said, they are "the necessary concession to the shortness of life." But what is relevant? As defined by Cal. Evid. Code § 210:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Given the breadth of the "any tendency in reason" language, you should have no difficulty showing your evidence is relevant.

2. The Constitutional Imperative. Once the relevancy hurdle is met, your evidence now is entitled to an escort into court in the strong arms of statutory and constitutional mandates. With certain exceptions, "all relevant evidence is admissible," states art. I, § 28(f)(2) of the California Constitution. Cal. Evid. Code § 351 says the same. Further, the defense has a federal constitutional right to compulsory process and to put on a defense case. (Washington v. Texas (1967) 388 U.S. 14; Holmes v. South Carolina (2006) 126 S.Ct. 1727.

These protections may be violated when relevant defense evidence is excluded. Remind the court: "[E]vidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." (People v. Reeder (1978) 82 Cal. App. 3d 543, 553; see also Fowler v. Sacramento County Sheriff's Department (9th Cir. 2005) 421 F.3d 1027 [granting federal habeas for misuse of 352 to denying confrontation evidence against complaining witness]; accord Slovik v. Yates (9th Cir. 2008) 545 F.3d 1181 [trial court's invocation of section 352 to preclude defendant from cross-examining a prosecution witness about his untruthful denial under oath that he was on probation violated the Sixth/Fourteenth Amendment right of confrontation].)

3. Judicial Mandate. Finally, if this weren't enough to get your relevant evidence admitted, urge the court to read this passage from People v. Wright (1985) 39 Cal.3d 576, 584-585:

> We first reiterate, from a unanimous opinion of this court, the "[wise] advice for trial judges in criminal cases (and for prosecuting attorneys) [that] was articulated long ago: 'Questions as to the admissibility of evidence frequently arise, and in the hurry of a . . . trial the best Judge may err. . . . [Whenever] the evidence proposed by the defense is not plainly inadmissible, it is better to let it go in, since, in nine cases out of ten, a single equivocal fact, of doubtful bearing upon the case, would have no effect upon the judgment of the jurors, who are usually disposed to pass . . . upon the general merits. . . .' In other words, trial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence as well as in determining its weight." (People v. Murphy (1963) 59 Cal.2d 818, 829 [31 Cal. Rptr. 306, 382 P.2d 346].)

In sum, the trial court's exercise of discretion under Section 352 "should favor the defendant in cases of doubt." (People v. De Larco (1983) 142 Cal. App. 3d 294, 306).

4. Substantially outweighed. Assuming the court is determined to engage in the weighing process and consider exclusion, the court must make a finding supported by the record (People v. Clair (1992) 2 Cal. 4th 629, 660), that the value of the evidence is "substantially outweighed" by the "a" and "b" factors discussed next. It is helpful to make your argument on the record to encourage the court to go through a 352 reasoning process. One of the weighing factors is the concept of "substantial." In baseball, if the Giants beat the Dodgers by 14 runs, they have won by a "substantial" margin. If they win by one or two runs, that's not substantial. Only a lopsided outweighing warrants exclusion. Anything close goes to the defendant.

Now let's consider the 352 factors that must substantially outweigh the relevance of the evidence to warrant exclusion.

5. Necessitates undue consumption of time. The production of all evidence takes time, so the focus has to be an "undue" consumption of time. For example, in Andrews v. City and County of San Francisco (1988) 205 Cal. App.3d 938, the trial judge was reversed for disallowing prior bad acts evidence of a law enforcement officer in a suit by a prisoner concerning his mishandling while in

custody. The trial judge would not allow the other acts of misconduct to be introduced because it would require time consuming "mini-trials" on those issues. Reversed: "the fact that the jury must resolve conflicting versions cannot justify the exclusion of all such evidence on this [352] ground alone." (Id. at 947.)

Cumulative Evidence. This is a common argument to exclude evidence under § 352 for taking too much time. But there is a reason for putting on cumulative evidence. Evidence that corroborates is necessary to make more credible the issue and thus can't be excluded as merely cumulative. (People v. Brown (1995) 35 Cal. App.4th 1585, 1595-1597.) Additional evidence may be of more probative value than previous versions. "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value. [Citation.]" (People v. Mattson (1990) 50 Cal.3d 826, 871.)

6. Creates substantial danger of undue prejudice. The best evidence is always "prejudicial" to the other side. *See* People v. Jackson (1991) 235 Cal. App. 3d 1670, 1679 (the evidence "was prejudicial only in the sense that it cast doubt on the prosecution's case against defendant.") Prejudice does not mean damaging. It means that the evidence has very little relevance and a great potential for unfairly prejudicing the other side. "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (People v. Karis (1988) 46 Cal. 3d 612, 638; People v. Yu (1983) 143 Cal.App.3d 358, 377.)

To warrant exclusion on this ground, the weighing process requires a finding of lopsidedness such that relevance is minimal and unique prejudice to the State is maximal.

7. Confusing the issues, or of misleading the jury. It is difficult to conceive of relevant evidence that is minimally relevant while being so potent it would substantially confuse the issues or mislead a jury. *See* People v Mayfield (1972) 23 Cal App 3d 236 (reversing for exclusion of testimony by a superior officer concerning the credibility of a deceased undercover policeman; held an abuse of discretion that resulted in a denial of due process.) Instructions to the jury could rectify the potential for confusion.

Use the above as aids in fighting for the admission of your evidence and make every effort to have the court make its analysis on the record. On a motion invoking section 352 the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value. This may be done by implication, but given this mandate, counsel can urge that it be done on the record. (People v. Wash (1993) 6 Cal. 4th 215, 246.)

D. Fighting §1054 to Get Your Impeachment or Late Coming Evidence In.

A troubling issue for trial counsel under discovery law is this: when does counsel know or "reasonably anticipate" calling a witness to trial so as to be required to turn over the name to the other side thirty days before trial?

Under 1054(a), the prosecution must give the defense: "The names and addresses of persons the prosecutor intends to call as witnesses at trial." This includes, "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses." (Id. at (f).) 1054.3(a) puts a similar requirement on the defense. (In re Littlefield (1993) 5 Cal.4th 122, 129 (names and addresses required to be provided.) Failure to abide by the statute may lead to sanctions including "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter." Exclusion is not to be ordered unless all else has been tried. (1054.5(c).)

In the abstract, the requirement seems clear, but both sides, and especially the defense, face difficulties in "knowing" when one is going to call a witness. Because the prosecution has to put on a case, it knows the names of needed witnesses. But the defense need not call witnesses. Whether to do so may depend on the strength of the prosecution testimony. With "reader" preliminary hearings, it is sometimes difficult to assess the strength of the prosecution case, and thus some witness decisions must await trial. But waiting runs the risk of sanctions.

The statutory trigger to a discovery turn-over thirty days prior to trial is when one "intends to call" the witness. In People v. Izazaga (1991) 54 Cal.3d 356, 376, n.11, the court described this as "including 'all witnesses ... [the party] reasonably anticipates it is likely to call....'" (adopting a standard from an Ohio case). Izazaga also made it clear that the DA must give timely discovery of its witnesses regardless of whether they are case-in-chief or rebuttal witnesses.

(People v. Hammond (1994) 22 Cal. App. 4th 1611, 1621.)

As the following cases show, “intends to call” can be a difficult standard. How does one prove to a doubting judge that one did not intend to call the witnesses until something at trial occurred warranting a change in direction? Consider People v. Jackson (1993) 15 Cal.App.4th 1197, where the Court of Appeal approved the exclusion of defense testimony as a sanction for discovery non-compliance because "the... [trial] judge refused to believe defense counsel did not seriously consider calling the witness until moments before he did." **(**Id**.** at 1203.)

In Sandeffer v. Superior Court (1993) 18 Cal.App.4th 672, 678, the Court of Appeal acknowledged the difficulties in trial counsel making absolute determinations thirty days prior to trial about the witnesses to be called: "Even when counsel appears to the court to be unreasonably delaying the publication of his decision to call a witness, it cannot be within the province of the trial judge to step into his shoes.... [T]he court... is limited to the remedies provided in the act for such stonewalling." This was a case involving the issue of whether disclosure of a defense expert witness's reports was required before the defense decided whether to call the expert. Answer: no.

In People v. Walton (1996) 42 Cal.App.4th 1004, the prosecution discovered a new eyewitness during jury selection and promptly turned over the statement to the defense. No continuance was requested and the trial court refused to bar the witness from testifying. The appellate court held no abuse of discretion because:

> until the prosecutor was able to locate the witness she could not "intend to call" him as a witness. (§ 1054.1.) Once she did locate him she promptly fulfilled her disclosure duty. Moreover, appellant was provided with the witness's statement and was afforded an opportunity to interview the witness before he testified. If appellant required additional time to prepare for the witness's testimony he neglected to request it. (Id**.** at 1017.)

In People v. Hammond, *supra*, the court held that the belated turn-over by the DA of a rebuttal witness’s name and address was justified by the failure of the

defense to timely provide the name and address of the defense witness whom the rebuttal witness impeached.

In People v. Gonzales (1994) 22 Cal. App. 4th 1744, the court reversed a conviction for the exclusion of a proffered defendant's cellmate who was only revealed to the DA during trial. In reversing, the court ruled that if exclusion is to be based on prejudice to the other side, "we conclude that the prejudice would necessarily have to be substantial and irremediable," while if punishment is the basis for the sanction, then "absent a showing of significant prejudice and willful conduct, exclusion of testimony is not appropriate as punishment." Under the facts of the case, the court of appeal found neither justification to exist to exclude the witness and reversed the conviction.

In re Thomas F. (2003) 113 Cal. App. 4th 1249, the trial court barred four defense witnesses from testifying because counsel provided the names on the second day of the jurisdictional hearing. Only the lack of an express order for reciprocal discovery by the juvenile court saved the day here to bring about a reversal because 1054's provisions do not automatically apply to a delinquency proceeding. A specific discovery order is required in juvenile cases and none was entered here.

Remember that these discovery rules do not apply to witness impeachment evidence. *See* Izazaga, *supra*, at fn. 14: "the defense is not required to disclose any statements it obtains from prosecution witnesses that it may use to refute the prosecution's case during cross-examination. Were this otherwise, we would be presented with a significant issue of reciprocity." *(See* People v. Tillis (1998) 18 Cal.4th 284 (prosecutor did not violate discovery statute by failing to disclose impeachment evidence it possessed of a defense expert); Hubbard v. Superior Court (1997) 66 Cal. App. 4th 1163 (same rule for the defense).)

For the defense, Gonzales and Walton are good cases to have at the ready if the DA argues that the defense is late in giving it the names and addresses of defense witnesses. As appropriate, argue per Walton that one cannot turn over the name of a witness one has not found and interviewed. Or, argue per Gonzales there was no willful violation and/or no irremediable prejudice to the state. Finally, if all else fails, the statute has a hierarchy of sanctions (listed above) and the non-exclusionary sanctions are to be exhausted before exclusion can be

applied.

If the court finds the evidence should have been turned over earlier, the sanction should be a short continuance for the other side and not exclusion. The court *cannot instruct* the jury to find that counsel's late turnover should be attributed to the defendant to support negative inferences about the evidence. (*See* People v. Saucedo (2004) 121 Cal. App. 4th 937, 943; People v. Cabral (2004) 121 Cal. App. 4th 748, 753; People v. Bell (2004) 118 Cal. App. 4th 249, 257.)

E. Fighting to Make a Record of the State's Investigative Misconduct

1. Kyles. In a significant number of cases we defend, we come across unethical and/or grossly negligent police or prosecution investigation fouled or lost evidence. Because of Arizona v. Youngblood (1988) 488 U.S. 51, it is almost impossible to get a court sanction of suppression or dismissal. However, Kyles v. Whitely (1995) 514 U.S. 419, permits an instructional sanction which may provide a formidable tool in final argument. Kyles, at p. 446 n.15, states: "when . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."

Here are the record-making steps to be taken to allow you to argue that the jury must the State's evidence to have no inculpatory value, and, in fact, the jury must find it exculpatory. By showing in cross-examination of the police that they were sloppy, negligent or acted in bad faith, you will be entitled to instruction telling the jury that if it finds the investigation as such, they may use that fact alone to disregard evidence so produced.

In U.S. v. Sager (2000) 227 F.3d 1138, 1145, the court said, relying on Kyles: "We agree with Sager that the district court committed plain error and abused its discretion by instructing the jury not to "grade" the investigation. In one breath, the court made clear that the jury was to decide questions of fact, but in the other, the court muddled the issue by informing the jury that it could not consider possible defects in Morris's investigation. To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury

potentially relevant information."

A sample instruction to proffer when there is evidence of a sloppy or bad faith investigation:

DEFENDANT'S PROPOSED INSTRUCTION

> The defense has presented evidence that the prosecution's investigation of this case has been negligent, or purposefully distorted, and not done in good faith. For example, there has been testimony about [list the problems developed in the testimony concerning certain evidence]. With respect to these items of evidence, the probative value of that evidence depends on the circumstances in which it was [or was not] obtained [tested] [maintained]. If the circumstances raise a reasonable belief of bad faith, fraud or negligence, you may consider that in determining the credibility of the witnesses and the weight, if any, that you chose to give that evidence.
>
> Remember, under the instructions I have given you, if the evidence permits two reasonable interpretations, you must adopt that interpretation which favors the defendant.

Then, in final argument counsel can argue to the jury that with respect to any evidence related to the sloppy, negligent or bad faith investigation, the jury MUST make inferences which favor the defense version. This is because Kyles and Sager say you are entitled to such an instruction permitting the inferences, and CalCrim 225 (or CALJIC 2.02) say that if inferences about a fact point in two equally reasonable directions, the jury MUST find for the defense.

2. Invasion of the Defense Camp. On a showing the prosecution planted informants or the like in the defense camp, sanctions will be imposed. (Barber v. Municipal Court (1979) 24 Cal.3d 742; Morrow v. Superior Court (1994) 30 Cal.App.4th 1252; Boulas v. Superior Court (1986) 188 Cal.App.3d 422; People v. Moore (1976) 57 Cal.App.3d 437.) *See* U.S. v. Danielson (9th Cir. 2003) 325 F.3d 1054, 1059 ("The prosecution team in this case deliberately and affirmatively took steps, while Danielson was represented by counsel, that resulted in the

prosecution team's obtaining privileged information about Danielson's trial strategy.") *See also* U.S. v. Marshank, 777 F.Supp. 1507, 1519 (N.D. CA 1991) (case involving the prosecutor's use and manipulation of defendant's attorney: "The government was aware of this conflict and took advantage of it. ... [It] is not entitled to take advantage of conflicts of interest of which the defendant and the court are unaware.")

With recordation being ever present, counsel must be alert to the problem of invasions by government eavesdropping. Most often, this arises in phone calls from jail or prison. It is a felony to eavesdrop or record the conversation of one in custody and that person's attorney (or religious adviser, or doctor). (Penal Code § 636(a).) But jails and prisons routinely record phone conversations made by inmates in outgoing calls. They would argue that the warnings that the call is, or may be, monitored is sufficient to permit the recording. However, section 636(a) requires the "permission from all parties to the conversation" and such a warning is not either an express or implied permission. In San Diego, recordings of attorney - client calls has been routine since 2003, but only recently (upon the defense from the prosecution receiving discovery including attorney-client conversations) has the issue been met. The Sheriff has stated it has programmed its computers with the office phone numbers of attorneys to prevent recording attorney client calls. San Diego attorneys Chris Plourd and Don Levine are litigating the issue in the context of a capital case, People v. Brown.

3. Inadvertent Disclosure and Exploitation by the Prosecution. In Rico v. Mitsubishi (2007) 42 Cal. 4th 807, the Supreme Court dealt with an issue of the inadvertent disclosure of work product to one's adversary. The context was a motion to disqualify counsel in a civil case because the latter innocently obtained written work product of the other side and then used it. The rule announced in the case was this: an attorney who receives a privileged document of an adversary through inadvertence *may not read it any more closely than is necessary to ascertain it is privileged*. Once that threshold is reached, the attorney must notify the other side and try to resolve the situation. This rule applies even if the documents are not marked privileged and the other side was negligent in divulging the material.

F. Fighting to Make A Record When Your Witness No Shows

1. Invoke the Power of the Court to Enforce the Subpoena. First enlist the aid of the court to enforce the subpoena. While a defendant may have no remedy when the Marshal has done his or her job in attempting to serve a warrant based upon a failure of the witness to obey a subpoena (*e.g.*, People v. Avila (1967) 253 Cal.App.2d 308, 330), that does not mean nothing can be done. In People v. Bossert (1910) 14 Cal.App. 111, a defendant moved the trial court for compulsory process at the commencement of his trial after he learned that some of his witnesses were not present. Instead of issuing process, the court acceded to the prosecutor's suggestion and read the witnesses' previous testimony to the jury. In reversing, the appellate court stated:

> The defendant in the case at bar had regularly subpoenaed the witnesses in question; their testimony was material and important to him. Nevertheless the court held that he was not entitled to the process of the court compelling their attendance, and forced the defendant to submit his case to the jury without the benefit of their oral testimony. By this ruling it is clear that the defendant was deprived of a constitutional right, for which the judgment and order must be reversed. (Id. at 1116.)

2. If the Marshal Won't or Can't, Get a Continuance. Failing to successfully invoke the power of the court to enforce the subpoena, counsel should request a continuance for the day. (*See e.g.*, Adoption of Michael D. (1989) 209 Cal.App.3d 122, 137 ["Trial counsel did not subpoena or obtain declarations from the people Steven claims he contacted. Nor did he seek a continuance to do so when the trial judge indicated such evidence would be important to the defense"].)

In arguing for a continuance, the record should reflect: (a) a particular named and obtainable witness; (b) materiality of the evidence; (c) the necessity of his testimony; and (d) diligence to obtain his attendance. (People v. Valladares (1984) 162 Cal.App.3d 312, 319.)

Relevant factors in a court's assessment include (1) the defendant's diligence in securing the attendance of the witness; (2) the defendant's use of available alternative means to obtain the desired evidence; (3) the defendant's fault

for the witness's nonappearance; and (4) the nature of the testimony expected from the witness and its probable effect on the outcome of the trial. (People v. Dunn (2016) 205 Cal.App.4th 1086, 1094.)

The failure to secure the attendance of key witnesses is ineffective assistance of counsel. (People v. Rodriguez (1977) 73 Cal.App.3d 1023); see also People v. Shaw (1984) 35 Cal.3d 535; In re Hall (1981) 30 Cal.3d 408); cf., People v. Marquez (1992) 1 Cal.4th 553.)

3. Failing The Above, Counsel Should Have The Witness Declared Unavailable and Have Previously Testimony of the Witness Read to the Jury. This alternative is less attractive, but at least it would put before the jury the critical testimony of the defense witness in the case. See Evidence Code sections 1290-91 (admission of former testimony of unavailable witness); section 1230 (statement against interest).

G. Fighting to Make a Record of Prosecutorial Misconduct

You rise to object that the DA's argument ("defense counsel knows his client is guilty") is misconduct,[3] but the judge not only overrules your objection but announces that in his court one does not interrupt opposing counsel during the sacred hour of final argument. All objections are to be reserved for a side-bar session following arguments.

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[3] This is surely error although it has been deemed harmless error because trial courts gave curative admonitions to the jury. (U.S. v. Tutino (2nd Cir. 1989) 883 F.2d 1125[defense counsel knew his client was guilty; curative instruction given]; Homan v. U.S. (8th Cir. 1960) 279 F.2d 767 [argument that defense counsel knew defendant was guilty deemed improper and curative instruction given]; U.S. v. Kirkland (9th Cir. 1980) 637 F.2d 654 [defense counsel knew their clients were "guilty as sin;" curative instruction given]. It is "improper for the prosecutor to argue to the jury that defense counsel does not believe in his client's defense."] However, in People v. Thompson (1988) 45 Cal.3d 86, 112-114, where it was argued on appeal that such a prosecutorial comment was made because defense counsel did not object, it was held not error and could have been cured if it were.

But you know that the law requires an immediate objection or the issue is waived on appeal except for perhaps under the theory of incompetence of trial counsel.[4] You also know as a matter of common sense that allowing the prosecutor to proceed unrestrained will irretrievably corrupt the jury against you and your client. You respectfully say to the judge:

> "Since it is the lawyer's duty to make his objections and other points in his client's behalf, it must follow that he is entitled to a timely opportunity to make them. From this it necessarily follows that the judge is without power to foreclose that opportunity by any order or admonition to sit down or to be quiet or not to address the court. The power to silence an attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy has been afforded."

The above "sound principle" is a quote taken from Cooper v. Superior Court (1961) 55 Cal. 2d 291, 298. There, legendary defense counsel Grant Cooper was defending a notorious murder case. It was the second trial, the first having ended in a hung jury after long jury deliberations. Now, the second jury was out several weeks in deliberations when the judge did an extraordinary thing. Without discussion with counsel, the judge called out the jury to give them his view of the evidence which included the following: "the explanation given by the defendant Finch as to the circumstances surrounding the firing of the fatal shot to me does not sound reasonable in any of its aspects, and it appears to me to have been concocted by him in an attempt to justify what is shown by the evidence, in

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[4] There are hundreds of cases holding a claim of misconduct is waived for lack of objection. (*E.g.*, People v. Samayoa (1997) 15 Cal.4th 795, 841; People v. Gionis (1995) 9 Cal.4th 1196, 1215; People v. Green (1980) 27 Cal. 3d 1, 24.) There are rare exceptions such as in People v. Hill (1998) 17 Cal.4th 800, where the misconduct was pervasive, a few objections were made, and it would have been fruitless to continue to object. Leaving the issue to an ineffective assistance of counsel claim on appeal is not an acceptable alternative given that the standard of review changes from Chapman v. California (1967) 386 U.S. 18, where federal constitutional violations require reversal unless the beneficiary of the error can prove beyond a reasonable doubt that it did not affect the result, to the much less generous standard of Strickland v. Washington (1984) 466 U.S. 668.

my opinion, to be a willful and deliberate taking of human life." (Id. at 297.)

At this, Cooper twice sprang to object to the invasion of the province of the jury and twice the court slapped him down with contempts, stating that Cooper could make his record later outside the presence of the jury. Cooper did not take the contempts lightly. Instead, he took them to the California Supreme Court and won. The Supreme Court observed: "This was the first opportunity counsel had to object to the unusual procedure. An attempt to cure the error by again recalling the jury and instructing them to disregard the comments would be like an attempt to unblow a blown horn." (Id. at 300.)

This holding has direct application to our problem. To permit unanticipated and outrageous jury arguments by the prosecution without immediate objection and correction is extremely prejudicial to the client. Counsel is required to object and move for a judicial admonishment if not a mistrial.

Waiting until it is all over to make objections means zero likelihood of getting a ruling that can undo the damage. It is literally "all over." Further, waiting will likely waive the issue for appeal. It also may make the record appear that the comment was not so awful given the silence of defense counsel after it was made.

The example given may be extreme. Perhaps the court will say something like, "I'm going to ask the lawyers to try and avoid interrupting one another during the argument, and if either attorney should misstate the evidence or the law, and I know that neither would do that intentionally, you are to rely on the evidence as it was presented in the trial and the law as I will be giving it to you." This was the statement the trial court gave in People v. Wilson (2005) 36 Cal.4th 309, 337 n. 6. The Supreme Court held this did not relieve defense counsel from the duty to object to the misconduct during final argument because the court's statement did not specifically preclude objections during argument, it only suggested it.

Therefore, in addition to preparing your own final argument, be prepared to object when the prosecutor goes off the reservation into the land of misconduct. One way to prepare is to review the many checklists of examples of misconduct in argument. Excellent ones by Tom Havlena, Hank Hall, Kelly Babineau, and Matt Braner are available on CLARA. A copy of my paper on DA Misconduct may be

found at www.charlessevilla.com/publications. Have the list in your trial notebook.

Also, have the cites to Cooper and Wilson at the ready to explain to the court that barring objections during argument undermines counsel's duty to object immediately to stave the prejudice before it irrevocably saturates and prejudices the jury. In convincing the trial court to allow objections during argument, inform the court that it is not only the duty of the court to monitor the fairness of the trial, but when the court gives curative instructions for misconduct, it usually eliminates reversible error.[5] Judges like to have reversal proof convictions so appealing to that motivation may make them receptive to curing misconduct on the spot.

When objecting, remember: "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.]" (People v. Samayoa (1997) 15 Cal. 4th 795, 841.)

Federalize all your objections by arguing that the prosecutor's comment "so

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[5] To cure misconduct on the spot, have the court take a cure from People v. Bolton (1979) 23 Cal.3d 208, 215, fn. 5: "But when the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. He should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks. In the present case, such a counterbalancing statement might have taken the following form: 'Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks.'"

infected the trial with unfairness as to ... [be] a denial of due process" under the 14th Amendment to the U.S. Constitution. (Donnelly v. DeChristophero (1974) 416 U.S. 637, 643 [questionable argument by the prosecution that the defense wanted the jury to find guilt on a lesser deemed cured by a specific corrective jury instruction.])

Finally, it cannot be emphasized enough that this error is too often sacrificed for lack of a proper objection. The best way to prepare for making a record of misconduct is to review the common errors (many listed at the end of this paper in an addendum) and be prepared to object.

Argue the "error" as one of federal due process (federalize it). Where the error is akin to imparting non-record information to the jury, argue the analogous case law from constitutional hearsay/confrontation and jury misconduct cases. Argue how the error undermines the defense case and lightens the prosecution burden of proof.

H. Fighting to Make a Record When the Court Imposes Time Limits

In U.S. v. Jones, 982 F.2d 380 (9th Cir. 1992), the court reversed a conviction for confrontation denial deriving from the trial court's blanket prohibition of witness recross examination. *See also* U.S. v. Rutgard (9th Cir. 1997) 116 F.3d 1270, 1279 (in a 79 day trial characterized by repetitive witness examination, the trial court's *three hour* limits for each side on witness examination deemed not an abuse).

If you need more time, argue you were not able to establish credibility by corroborating it with detailed testimony and documentary support (*e.g.*, exhibits). *See* Hart v. Gomez (9th Cir. 1999) 174 F.3d 1067 (failure of counsel to use persuasive corroborating evidence to make credible a single witnesses exculpatory testimony on behalf of a defendant held prejudicial ineffective assistance of counsel.) . *See also* U.S. v. Brooke (9th Cir. 1993) 4 F.3d 1480, 1489.

I. Fighting to Make a Record of Spectator Displays before the Jury.[6]

These cases often involve families for both sides attending trial each day. It is highly advisable to anticipate problems by getting a court order banning spectator partisans from wearing buttons or other displays in or around the courtroom. Each side should be assigned seating on opposites sides of the spectator area so that there are no disputes during trial. Finally, the court should warn all spectators that any disruptions or reactions to testimony will not be tolerated.

Violations of the above must be documented on the record. This means describing in factual detail the nature of the problem and then make requests for appropriate judicial action (*e.g.*, admonitions, sanctions, mistrial) based upon the following authority. If the judge initially denies relief, continue to document for the record the problem in detail.

Due process requires that "... if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law," and "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." (Moore v. Dempsey (1923) 261 U.S. 86, 91; *see also* People v. Slocum (1975) 52 Cal. App.3d 867, 883 [the judge must prevent conduct which would obstruct administration of justice, such as expression of opinion about merits of case in jury's presence]; People v. Fleming (1913) 166 Cal. 357, 377 [judge's duty to control proceedings to insure public sentiment does not spill over to the court room]; Altemose Const. Co. and Energy Contracting Co. v. N.L.R.B. (3rd Cir. 1975) 514 F.2d 8, 12-13 [“Conducting a hearing in a mob atmosphere demeans the legal process and may well have an intimidating effect on the witnesses and influence their testimony. Such an effect may be

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[6] In Carey v. Musladin (2006) 549 U.S. 70, the court reversed a grant of relief by the Ninth Circuit where spectators wore buttons with the photo of the victim on it; the Court held that there was no existing Supreme Court decision applying its rules to non-state actors (like guards), so there was no basis for granting relief under AEDPA which requires (on federal habeas) an existing Supreme Court case controlling the issue being litigated.

incalculable...."]; Norris v. Risley (9th Cir. 1990) 878 F.2d 1178 [pre-AEDPA and Musladin conviction reversed because a group wore "Women Against Rape" buttons inside and outside the courtroom in a sexual assault trial]; *see generally* Holbrook v. Flynn (1986) 475 U.S. 560, 568 [practices that pose a threat to the fairness of the fact finding process must be subjected to close judicial scrutiny].)

J. Fight to Make a Record With Informants

History tells us that if the prosecution calls an informant to the stand, it is almost inevitable that something important about the informant's background, benefits conferred or the deal he's made will be suppressed. *See* Wefald & Sevilla, The Rat Manual (distributed at previous conferences) for the ways to make a record in such cases. Suggestion: just prior to trial file a pleading setting forth the discovery provided on the snitch by the prosecution. This will set up several issues: first, if more comes out, it will appear that either the prosecution has suppressed the evidence or the snitch has not revealed relevant evidence to the prosecutor. If new revelations occur after trial, the record will be there to prove that this was not revealed prior to or during trial.

A copy of the *Rat Manual* may be found at www.charlessevilla.com/publications.

K. Fighting to Make a Record To Exclude Prosecution Experts

Examine the nature of the prosecution's proffered expert witness. In every instance, consider challenging the expertise in a pre-trial motion under Evidence Code § 403 and 405. (*See especially* Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747.) See my article in the *CACJ Forum* on the power of bringing a Sargon motion prior to trial. "*Sargon* Challenges to Proferred Expert Testimony," Vol. 40, No. 3, p. 39 (2013).

Section 403 provides: "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact...."

Evidence Code 405 states: "(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing

evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises."

The preliminary fact to context may be whether the science is a basis to prove what it says it can prove, or whether the expert has the credentials to opine.[7]

Even if the motion fails, bringing such a motion will aid the trial attorney in preparing for the expert's trial testimony and make the record for an issue on appeal. Also, note that Penal Code section 1473(e), effective 1/15/15, has been added "For purposes of this section, 'false evidence' shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances." This adds a basis to bring the motion for a hearing to exclude given that no one can be convicted on the basis of false expert opinion testimony. (The new statute thankfully negates the contrary holding in In re Richards (2013) 55 Cal.4th 948.)

L. Fighting to Make a Record With Your Defense Mental Health Expert

1. Get Relevant Information and Witnesses to the Expert. To make a record with the expert requires providing the expert with all the tools to give meaningful, persuasive testimony. Thus, provide the basic history: medical reports, medications, drug and alcohol usage, school, military service, job records, history of bizarre behavior, victimization, prosecution discovery of case facts and defendant's interrogations, and relevant defense investigation. Also, determine whether interviews of family members, friends, and persons who witnessed the defendant's behavior before the acts in question.

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[7] The Commentary to section 405 gives examples of the types of testimony that can be challenged in this manner including the qualifications of an expert witness ("the proponent must persuade the judge that his expert is qualified, and it is error for the judge to submit the qualifications of the expert to the jury".) Two examples of the types of experts challengeable under this section are those on sanity and handwriting. "The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405...."

There is no better way to destroy the credibility of a defense expert than to withhold the damaging evidence, *e.g.*, discovery reflecting consciousness of guilt behaviors just before and after the act. (*E.g.*, Hovey v. Ayers (9th Cir. 2006) 458 F.3d 892, 928 ["This information would have prevented the prosecutor from portraying Dr. Satten as ill-prepared and foolish and thereby impugning his medical conclusions. Because Dr. Satten was not adequately prepared, the prosecution was able to demonstrate that Dr. Satten was completely ignorant of several important facts...."]; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1080-81 [counsel failed to adequately prepare mental health experts, whose testimony was, as a result, "less than persuasive at best . . . and a seeming artifice at worst"].)

2. Preparation for Trial Testimony. To get the most out of the expert, the latter must know the limits of what is permitted.[8] In guilt phase trials, the statutes forbid opinions on the capacity of the defendant to form the intent to commit the crime, and the expert may offer no opinion on whether the defendant actually formed that intent. That is the issue for the jury, so the expert's testimony will focus on the defendant's history, the diagnosis, and the consequent impairment from the disease or disorder. Examine together the chain of inferences that support the expert's opinions which will be the focus of cross-examination:

BIAS	**I N F E R E N T I A L R E A S O N I N G**			
↕ ↕	↕	↕	↕ ↕	
EXPERT	**DATA**	**DIAGNOSIS**	**IMPAIRMENT**	**LEGAL ISSUE**
training & experience	discovery Interview	DSM V	dysfunction	insanity, 1368, dim. actuality

The goal of defense psychiatric and psychological testimony is to paint a compelling picture for the jury of how the defendant's diagnosed mental disability resulted in impaired functioning in his or her everyday life. Without that testimony, the

[8] California limits on mental health testimony are set forth in Penal Code sections 25, 28 and 29. But the constitutional bottom line on excluding such evidence is not at all clear after the Supreme Court opinion in Clark v. Arizona (2006) 548 U.S. 735, which upheld the exclusion of certain guilt phase psychiatric testimony, but drew no bright lines for future guidance.

medical expert's bare opinions of a diagnosis are of little assistance in convincing the jury about the relevance of the impairment to the mental state elements of the offense. Also, the expert must talk in understandable language. Even brilliant insights will not get across to the trier of fact if communicated in jargon only Sigmund Freud would understand (*i.e.*, no psychobabble)

3. Drawing out the Impairment and its Consequences to the Defendant. To make a record, draw out of the expert's credentials and experience, then develop his/her involvement in the case: the time he/she spent with the defendant, all the data reviewed prior to reaching a diagnosis, and the diagnosis. Then it will be time to get to the essence of the opinion, *i.e,* the degree of brain/mind injury that makes the defendant different from a normal person. Ask questions to show how the impairment makes it difficult for the defendant to think, act and accurately perceive what is going on in his or her world.

! Doctor, with this impairment that you have diagnosed, can you describe how the defendant's perceptions of everyday events would be affected?
! Would the defendant have been able to weigh considerations for and against his/her conduct at the time of the alleged conduct? Why not?
! Would he have carefully thought out what he was doing? Why not?

! What role did reasoning play in his decision-making process?
! Would he have acted under the emotion of the moment rather than a reasoned decision-making process?

The answers to these questions would be followed up to extract details. The more examples the expert can use of distorted perception as a result of the brain/mind injury the better. This will meaningfully demonstrate that a person with such a mental disease, defect or disorder and resulting impairment would act (for example) under stress and emotion so as not to have appreciated the life-endangering act necessary for an express or implied malice murder. These are questions permitted by the statutes about a "mental disorder [and are] ... admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought...." (Penal Code section 28(a).)

There is authority for such far reaching expert testimony. As stated in People v. Ochoa (1998) 19 Cal. 4th 353, 430: "By its terms, [Penal Code] section 29 prohibits an

expert witness from giving an opinion about the ultimate fact whether a defendant had the required mental state for conviction of a crime. *It prohibits no more than that.*" The above questions do not seek prohibited opinions on the capacity to form malice or to premeditate or deliberate, or deal specifically with the intents for the charged crime. Rather, they seek to make real for the jury the diagnosis by describing the impairment and its consequences for the defendant from the mind/brain defect. That is the goal of the testimony – to make understandable that the diagnostic label and inform the jury why it means something -- mental impairment undermining the defendant's formation of the specific intent of the charged crime.

Another avenue for getting at this goal is the **hypothetical question** put to the expert. People v. Coddington (2000) 23 Cal.4th 529, 582-583, found that the trial court committed error, albeit harmless, in restricting defendant's psychiatric testimony at guilt phase. The opinion held that defendant was entitled to have his psychiatrist describe any particular mental illness suffered by defendant and explain that this "form of mental illness can lead to impulsive behavior . . . ." (Ibid.)

The court also did not dispute that the expert *could answer hypothetical questions* concerning "what a person who had a bi-polar disorder or was a paranoid schizophrenic could or could not do . . . [and] tie the disease to [defendant's] conduct . . . ." (Id. at p. 583.)[9] While the court assumed that the exclusion of the hypotheticals was error in the course of finding any error harmless, previous decisions make it clear that a defendant is allowed to elicit expert testimony about "defendant's mental disorders at the time of the commission of the crimes, or a correlation of the evidence of the crimes to the experts' test results. . . ." (People v. Samayoa (1997) 15 Cal.4th 795, 837.)

As held in People v. Nunn (1996) 50 Cal.App.4th 1357, 1365, it is permissible to present "*detailed* expert testimony relevant to whether a defendant harbored a required mental state or intent at the time he acted." For example, an expert must be permitted to express his or her opinion that defendant, "because of his history of psychological trauma, tended to overreact to stress and apprehension." (Ibid.) The expert may not only

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[9] Jackson v. Calderon (9th Cir. 2000) 211 F.3d 1148, states: "Counsel's means of avoiding the problem posed by Cal. Penal Code § 29 was to rely on hypothetical questions posed to Dr. Aniline, the one medical expert who did testify." (Id. at 1159.) Counsel posed a hypothetical question to Dr. Aniline as to whether the hypothetical psychological counterpart of defendant Jackson could premeditate. (Ibid.) Whether you can go that far is unlikely, but worth trying.

describe defendant's psychological or psychiatric condition, including at the time of the homicide, but must be permitted "to testify such condition could result in [defendant] acting impulsively under certain particular circumstances." (Ibid.) The expert can "evaluate[] the psychological setting of [defendant's] claimed encounter with the [decedent(s)] and . . . offer[] an opinion concerning whether that encounter was the type that could result in an impulsive reaction from one with [defendant's] mental condition."

Take the mental health testimony to the limits in order to convince the jury and also make the record. If curtailed in the effort, the appeal will have issues pertaining to exclusion of relevant, exculpatory evidence. The better alternative is get the testimony admitted, of course, and the cases above provide a road map for doing it.

M. Fighting to Make a Record With An Eyewitness/Mistaken ID Defense

First, investigate the identification. For example, if the officers used a photo six pack, find out if they administered it "blind," *i.e.*, no knowing the suspect. Find out the techniques used so that an expert can counsel you on their weaknesses and then be called to show its unreliability and support instructions on those points.

Second, move to hire the identification expert. In People v. McDonald (1984) 37 Cal.3d 351, overruled on other grounds in People v. Mendoza (2000) 23 Cal. 4th 896, the court considered a similar issue concerning whether an expert could testify to specific factors in a case tending to undermine an accurate eyewitness identification. In that case, the defense proffered the expert, Dr. Shomer, but his testimony was entirely excluded by the trial court. The Supreme Court held that such expert testimony which simply informs the jury of certain factors that may impair the accuracy of eyewitness identifications "falls well within the broad statutory description of 'any matter that has any tendency in reason' to bear on the credibility of a witness." (Id. at 366.) This testimony concerns matters sufficiently beyond common experience so that it can assist the trier of fact, and thus passes the test of Evidence Code §801. (Id. at p. 369.) The error in entirely excluding the expert testimony was deemed reversible because of the closeness of the case and the critical issue of identification.

The expert "may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness." (Id., at pp. 370-371.)

Third, adduce the testimony to, at a minimum, make meaningful the specific factor instructions in CALCRIM 315 on eyewitness identification which do not explicitly state that they are factors that undermine an accurate identification. Write and offer tailored instructions to support the expert.

N. Fighting for Your Tailored Instructions.

Except for advocating for your own instructions and objecting to those that are wrong, a prudence silence (or saying "submitted") is best when the court asks for the defense position on other instructions. But when you have instructions you want, here's a riff to argue to the court that they must be given.

It is settled in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (People v. Edwards (1985) 39 Cal.3d 107, 117.) The general principles of law are those closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (People v. Sedeno (1974) 10 Cal.3d 703, 715, *overruled on other grounds,* People v. Breverman (1998) 19 Cal.4th 142 [standard of prejudice in not giving a *sua sponte* lesser included instruction changed to the state harmless error standard.]) Here, the instructions are requested and premised on principles of law connected with the facts before the jury. (*See* People v. Moore (1954) 43 Cal.2d 517, 526-27 [reversing where refusal to give defense requested instructions on self-defense resulted in rules of law being stated exclusively from the viewpoint of the prosecution.])

1. In evaluating proffered instructions, a court must view the supporting evidence in a light most favorable to the party requesting the instruction. For the purposes of determining whether the instructions proffered by defense counsel should have been given, "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (People v. Wilson (1967) 66 Cal. 2d 749, 763; People v. Ramirez (1990) 50 Cal.3d 1158, 1180; People v. Flannel (1979) 25 Cal.3d 668, 684 ["trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task exclusively relegated to the jury"].)

2. Court must instruct on supported defense theories. The court has "an affirmative duty to give, *sua sponte*, a correctly phrased instruction on defendant's theory." (People v. Stewart (1976) 16 Cal.3d 133, 140). This includes an "obligation to

instruct on defenses...and on the relationship of these defenses to the elements of the charged offense.... [Citations]." (Ibid.) If the court has such a *sua sponte* duty, its duty is even greater when the instructions are requested. "The trial court should have allowed the jury to determine the self-defense issue by instructing upon it when requested." (People v. Elize (1999) 71 Cal. App. 4th 605, 616.)

3. Test for giving requested instructions. A requested instruction must be given if the accused presents evidence sufficient to "deserve consideration by the jury, *i.e.*, evidence from which a jury "composed of reasonable men could have concluded" the particular facts underlying the instruction existed. (People v. Flannel (1979) 25 Cal.3d 668, 684.) People v. Sedeno, *supra* "expressly states that when evidence supports a defense and the defendant 'relies' on that defense and requests an instruction on it, the instruction should be given." (People v. Elize (1999) 71 Cal. App. 4th 605, 614.)

4. A defendant need not testify to be entitled to instructions. The test is not whether the defendant testifies, but whether the record shows substantial evidence to support the requested instruction. "The element of intent is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence." (People v. Kuykendall (1955) 134 Cal. App. 2d 642, 645; *see also* People v. Anderson (1983) 144 Cal. App. 3d 55, 62 ["It is elementary that a defendant's state of mind is most often shown through circumstantial evidence which often prevails over the direct testimony of the defendant to the contrary"].)[10]

5. The proferred instruction is not inconsistent and, in any event, a defendant is entitled to inconsistent defenses. A trial court's duty to instruct, even *sua sponte,* on particular defenses arises "if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not

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[10] Hence, even if the defendant did not testify, the trial court has a *sua sponte* duty to give self-defense instruction if there is substantial circumstantial evidence of self-defense, either complete or imperfect. (*See* People v. DeLeon (1992) 10 Cal. App. 4th 815, 824, citing People v. Wickersham (1982) 32 Cal. 3d 307, 326.) "Substantial evidence of a defendant's state of mind, including an 'honest but unreasonable belief in the necessity to defend against imminent peril to life' (CALJIC 5.17), may be present without the defendant's testimony. [Citations.] [Original emphasis.]" (DeLeon, *supra,* at 824.)

inconsistent with the defendant's theory of the case." (People v. Barton (1995) 12 Cal.4th 186, 195.) Under Barton, the court had a duty to give the requested instructions because appellant explicitly relied on them. But "[i]nconsistent defenses are normally permitted in criminal as well as civil cases; *e.g.*, not guilty and insanity; denial of act and self-defense. [Citations.]." (People v. Atchison (1978) 22 Cal.3d 181, 183 [quoting 1 Witkin, Cal. Crimes, § 177, subd. (1).])

6. Failure to instruct upon a defendant's theory of the case supported by substantial evidence violates the defendant's constitutional right to defend himself. The right to present a defense is guaranteed by the Sixth Amendment right to trial by jury, the Fourteenth Amendment right to due process of law, and state constitutional due process and jury trial protections. (Cal. Const., art. I, section 7, and 15).[11]

In Holmes v. South Carolina (2006) 547 U.S. 319, the Supreme Court unanimously struck down a state law involving the denial of the right to present evidence in support of the defense that someone else committed the crime, stating, "It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.' [Citations]." (Id. at 1735.) The right to a present a defense is meaningless without instructions telling the jury it exists; thus "a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense." (U.S. v. Sayetsitty (9th Cir. 1997) 107 F.3d 1405, 1414; *see also* Taylor v. Withrow (6th Cir. 2002) 288 F.3d 846, 851 ("We hold that the right of a defendant in a criminal trial to assert self-defense is one of those fundamental rights, and that failure to instruct a jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge violates a criminal defendant's rights under the due process clause.")

Whether the issue be considered as part of the right to present a defense, the right to pursue a defense theory of the case, the required instructions to fully inform the jury of the elements of the charge, or an arbitrary deprivation of a state guaranteed right, the issue is of federal constitutional magnitude. (*See* Beardslee v. Woodford (9th Cir. 2003) 358 F.3d 560, 577 ["Failure to instruct on the defense theory of the case is reversible

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[11] "The trial court has a duty to instruct on all applicable principles of law, including defenses. The right to present a defense is a component of the federal guarantee of due process of law." (People v. Woodward (2004) 116 Cal. App.4th 821, 834, *citing* Crane v. Kentucky (1986) 476 U.S. 683, 690.)

error if the theory is legally sound and evidence in the case makes it applicable"]; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [federal constitutional error for failure to instruct on the entrapment defense]; Davis v. Strick (2nd Cir. 2001) 270 F.3d. 111, 123 [under New York homicide law, a defendant is entitled to have the jury instructed on justification and withholding of the instructions denies the opportunity to present his defense and constitutes a denial of 14th Amendment due process]; Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-740 [federal constitutional error to fail to instruct on included offense of simple kidnaping]; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867, 875-76 [instructional error on the state law of justification of constitutional dimension]; U.S. v. Douglas (7th Cir. 1987) 818 F.2d 1317, 1320-1321 ["failure to include an instruction on the defendant's theory of the case [that he was a mere purchaser of drugs and not a conspirator] ... would deny the defendant a fair trial. (Citation.)]"; U.S. v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1201 [giving the defense its theory instructions is basic to a fair trial].)

7. For readbacks, getting an instruction that the jury not view the readback in isolation. In U.S. v. Richard, 504 F.3d 1109 (9th Cir. 2007), the trial court denied the defense's request that the jury hear the entire testimony of a witness, rather than a selected part. The court failed to admonish the jury against the undue emphasis in the selected readback. The appellate court held that the trial court's actions amounted to an abuse of discretion, stating "certain precautions must generally be taken to avoid the inherent risk of undue emphasis from a readback: (1) preferably the readback or replay should take place in open court with all present; (2) the jury should ordinarily be provided with the witnesses's entire testimony, direct and cross- examination; and (3) the jury should be admonished to weigh all the evidence and not just one part." Id. at 1116-1117. A jury's request for only a portion of the witnesses's testimony for readback does not lessen the risk of overemphasis; instead, it "crystalizes it, triggering the court's obligation to take measures to ameliorate the risk." Ibid.

In U.S. v. Newhoff, 627 F.3d 1163 (9th Cir. 2010), the court again stressed the need for admonishment against jury overemphasis of reread testimony. Citing Richard, the court held that although Richard seems to allow for exceptions, the general rule is that if a jury requests a readback and the court allows it, the court should make the jury hear the entirety of the testimony in open court, with counsel for both sides and the defendant present, and should preface the readback with an adequate admonition akin to the Richard admonition. Id. at 1168

O. Fighting to Make a Record on Media Misconduct by Law Enforcement.

In notorious cases that become high profile in the city, region, state, nation or world, prosecutors and law enforcement may release large amounts of damning information about the client over time. Sometimes, this may be from "a source close to the investigation." After an arrest, the defendant may be filmed going into the jail or walking down a courtroom hallway in chains (the "perp. walk"). This may well continue in the period from arrest to and during trial. In this, presumption of innocence may be lost in the community before the first prospective juror is called during voir dire.

There are two arenas in which responses should be made. One is that the defense must be read to deal with the media to counteract the damage that has been done. (*See* Semel & Sevilla, "Talk to the Media about Your Client? Think Again," NACDL Champion (Nov. 1997) pp. 10 et seq (from which the ideas for this excerpt are taken).) How to deal with the media is not discussed further here because it is not directly related to record making, except to say that responses need to be made, but not so as to intensify the media attention.

When the media has been fed by the prosecution and law enforcement to damn the defendant, defense attention to it must be taken to the courtroom. Record making tasks include collecting all press and television coverage of the case. If the leaks are bad enough, "consider using the press revelations by 'a source closely connected to the investigation' as a basis for a gag order, and spending the rest of the case seeking evidentiary hearings on the inevitable violations of the court's order by the prosecutor or prosecutorial agents.[12] This, and the threat of a contempt sanction, may stop future leaks.

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[12] Courts examining claims of prejudice arising from adverse pretrial publicity will consider whether that publicity is generated by acts of the prosecution or its agents. *See* Delaney v. United States (1st Cir. 1952) 199 F.2d 107, 113-115(it is an important consideration whether the government was responsible for the publication of the objectionable material or if it emanated from independent sources); Silverthorne v. United States (9th Cir. 1968) 400 F.2d 627, 633 (" . . . federal courts have been sensitive to claims of prejudice arising from publicity when that publicity is created by acts of the Government."); United States v. Denno (2nd Cir. 1963) 313 F.2d 364, 373 ["The publicity partly sponsored by the prosecution, created opinions of guilt long before trial . . . ."]; Coleman v. Kemp (11th Cir. 1985) 778 F.2d 1487, 1539 ["significantly, the community's ranking law enforcement officer made widely reported and

(continued...)

"Further, filing pleadings and litigation over pretrial publicity will also pave the way for *voir dire* on prejudicial publicity, if not a change of venue motion. And while a measured defense response to the media is warranted pragmatically and under ethical rules, a vigorous litigation strategy in the face of prosecutorial misuse of the press also serves the client's interests where it may count the most -- in the courtroom." (Semel & Sevilla, *supra* at p. 65.)

P. Fighting to Make a Record of Judicial Misconduct.

When doing the course of trial, the judge makes clear to the jury that he/she is biased in favor of the prosecution and/or dislikes defense counsel, the problem must be addressed quickly. Nothing undermines a fair trial more than for it to be presided over by a judge favoring the prosecution. But how to make a record (and better yet, stop the biased conduct) is a delicate matter. One cannot, by protesting in front of the jury, provoke more unhelpful judicial comments. But objections have to be made.

Because of the wide varieties of misconduct that may occur, this paper is not the place to discuss them all. (*See* discussion of many of them in Sevilla, "Protecting the Client, the Case and Yourself From an Unruly Jurist," NACDL Champion (Aug. 2004), pp. 28 *et seq* which has plentiful citations to case law covering a wide variety of judicial no-nos and how to deal with them.)

Suffice it to say here that the remedial action for most judicial misconduct is to make a federalized objection, detail the misconduct in writing if possible and with other witness declarations attached if they can be mustered, perhaps a request for a curative instruction to the jury, and/or a mistrial. Failure to do so will likely result in a waiver.

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[12](...continued)
outrageous statements . . ."]; State v. Bell (Sup Ct. La. 1975) 315 So.2d 307, 31 [prosecution-emanated publicity considered in reversing trial court's venue decision]; State v. Stiltner (1971) 491 P.2d 1043, 80 Wash.2d 47, 52 n. 1 [conviction reversed after "astonishing" fact that state released prejudicial material to news media]; People v. Martin (1963) 19 A.D.2d 804, 243 N.Y.S.2d 343, 344 [change of venue ordered after police sponsored televised media interrogation of defendants].)

Q. Fighting to Make a Record in Sex Offense Cases: Selected Scenarios

These are the toughest of cases to defend. As noted in Kennedy v. Louisiana (2008) 554 U.S. 407; 128 S. Ct. 2641, 2663, where Justice Kennedy, writing for the Court in holding the death penalty for a child rape not involving a death violative of the Eighth Amendment, the difficulties in cases where children accuse adults of the most heinous offenses are immense:

> Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement. [Citations.] Similar criticisms pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed. [Citations] ...These matters are subject to fabrication or exaggeration, or both. [Citation]. (Id. at 443, 444.)

These are crimes "that in many cases will overwhelm a decent person's judgment." (Id., at 439.) That said, counsel must do all that can be done to prepare a defense. *See* my paper in CAC's Forum, "No Danger of A Fair Trial: the State of Abuse and Molest Cases in California, 2006, pp. 11-21. Other scenarios to prepare for include:

1. The Child witness with the teddy bear or other props. Believe it or not, there are good cases out there that see this for what it is: cloaking the witness with props to create a patina of innocence. (*See* State v. Palabay (1992) 9 Haw. App. 414, 844 P.2d 1 [error for trial court to allow the complaining witness, age 12, in sexual assault case to testify holding a teddy bear]; State v. Harper (1983) 35 Wn. App. 855, 670 P.2d 296 ["It is unlikely, on retrial, that other alleged errors will recur, particularly the child victim's carrying a 'Teddy Bear' onto the witness stand while testifying"]; State v. Gevrez (Ariz. 1944) 61 Ariz. 296, 148 P.2d 829 [where prosecution arranged for the victim's daughter to hold a doll which had belonged to her deceased mother as a trial tactic, case reversed].) To be sure, there are cases permitting the use of Teddy Bears, but these were permitted for children under the age of 12. (*E.g.*, State v. Cliff (Idaho Ct. App. 1989) 116 Idaho 921, 782 P.2d 44 [eight year old child with demonstrated difficulties dealing with testimony allowed to take doll to the stand].)

As to the use of therapy dogs, *see* People v. Chenault (2014) 227 Cal. App. 4th 1503 (a support dog may be present while child sexual abuse victims testify at trial where dog could assist them to recall events and give clearer testimony).

To make a record of a denied motion to bar such props, ask to take a photograph for the record of the witness with the props on the stand. If that fails, then describe in great detail the dimensions, color and content of the props. During the testimony, if the props become activated (e.g., hiding the face of the witness), make a record.

2. Using social media entries to impeach the child/teen witness.

According to a MySpace publication, "MySpace.com Law Enforcement Investigators Guide (June 23, 2006):

> MySpace is a free online social networking service that allows users to create their own profile pages, which can include lists of their favorite musicians, books and movies, photos of themselves and friends, and links to pages within and outside the MySpace environment. (P. 4.)
>
> * * * * * *
>
> ...MySpace receives a number of requests for information that is publicly available and can be obtained without the need for legal process or assistance from MySpace. MySpace profiles can be searched directly from the MySpace.com home page. (Ibid.)
>
> * * * * * *
>
> ...For public profiles, the publicly available information includes journal entries (unless the profile owner has elected to make the specific entry "private"), images, user comments, friend lists and public profile information such as first name, headline, music, movies, books and all other public sections on a MySpace profile. (Id. at 5.)

Check the witness out on MySpace.com or Facebook or any other social network. You may find devastating impeachment such as bragging about drug use, alcohol intoxication, theft, course language, lying, etc. It may also be used to impeach the innocent demeanor of the witness. (U.S. v. Hinkson (9th Cir. 2008) 526 F. 3d 1262; *see also* People v. Jackson (1989) 49 Cal. 3d 1170, 1205-1206 [prosecutor's comment referring to defendant's demeanor while on the witness stand was proper because Evidence Code § 780(a) states demeanor and manner of the witness testifying are relevant factors in considering credibility].) It could be used to impeach any character witnesses called on behalf of the complaining witness.

3. Prior false accusations. Case law is specifically developed in the area of prior false molest allegations which are deemed relevant to the credibility of the current allegations. (*See* People v. Franklin (1994) 25 Cal. App. 4th 328, 335 [evidence of prior

false molest accusations relevant]; Franklin v. Henry (9th Cir. 1997) 122 F.3d 1270 [denial of 14th Amendment due process to exclude false accusation by alleged molest victim against her mother]; *see also* People v. Hayes (1992) 3 Cal. App. 4th 1238, 1244-1245; People v. Adams (1988) 198 Cal. App. 3d 10, 18-19; People v. Burrell-Hart (1987) 192 Cal. App. 3d 593, 597-598; People v. Wall (1979) 95 Cal.App.3d 978, 984-989; People v. Randle (1982) 130 Cal.App.3d 286.)

4. Prior sexual contact with others to explain knowledge of sexual terms. "In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant." (People v. Daggett (1990) 225 Cal. App. 3d 751, 757.)

5. Language in the courtroom: victim, grooming, disclosures. Unless stopped, the prosecutor will refer to the children as "groomed victims" whose accusatory statements are "disclosures." These terms are argumentative and prejudicial. Imagine the uproar if defense counsel repeatedly addressed the defendant during trial as "the falsely accused" and referred to the defendant's denials to police as the "truth revealed." Victims, by state statute, are defined as individuals against whom a crime has been committed. (Penal Code § 679.01(b).) There is plenty of case law to support restricting use of the term to final argument and to exclude it in opening statement and during the trial. (People v. Williams (1860) 17 Cal. 142, 147 [trial court erred using the word "victim" to the jury: "The word victim, in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused."]) Other state courts agree. (*See* Jackson v. State (Del. 1991) 600 A.2d 21, 24; Allen v. State (Del. 1994) 644 A.2d 982, 983 n.1; Veteto v. State (Tex. App. 2000) 8 S.W.3d 805, 816-817; State v. Wright (Ohio Ct. App., 2003) 2003 Ohio 3511, P6 ["we are compelled to note that the trial court should refrain from using the term "victim," as it suggests a bias against the defendant before the State has proven a 'victim' truly exists"].) Use of the term "disclosure" has the same prejudicial impact in implying that the "revealed truth" has been released.

III. MAKING A RECORD WITH MOTIONS FOR NEW TRIAL

Motions for new trial can be used for a variety of purposes: testing the sufficiency of evidence (People v. Carter (2014) 227 Cal. App. 4th 322, People v. Robarge (1953) 41 Cal.2d 628, 634), litigating jury misconduct, raising ineffective assistance of trial counsel, paving the way for bail on appeal, to name a few. The latter two are discussed in this section, but the requirements of each case and the demands of record building will

include many other bases.

A. Jury Misconduct. Talk to the jurors as soon as you can. Inquiry may reveal that your client did not receive a fair trial. It may reveal, for example, improper contacts by the bailiff (Parker v. Gladden (1966) 385 U.S. 363), or attempts to bribe a juror (Remmer v. United States (1954) 347 U.S. 227), a juror playing expert and misinforming the jury on the law (In re Stankewitz (1985) 40 Cal.3d 391), or the facts **(**McDonald v. Southern Pacific Transportation Co. (1999) 71 Cal.App.4th 256), that a juror castigated the defendant based on rumors heard about her heard at a local bar (People v. Nesler (1997) 16 Cal. 4th 561), or imported information from her manicurist (People v. Ault (2004) 33 Cal. 4th 1250), or read negative matter about the defendant in the newspaper. (People v. Holloway (1990) 50 Cal.3d 1098.)

If you don't ask, you will never find out if your client was convicted not based on the evidence at trial, but on misconduct by a juror. So the imperative of inquiry is there assuming the trial court has not prohibited all juror contact. (Townsel v. Superior Court (1999) 20 Cal. 4th 1084 (affirming order of trial court prohibiting appellate counsel from such contacts except through the court.)

By law, jurors names are not of record. The names, addresses and telephone numbers of jurors shall be sealed automatically following completion of a criminal trial. (CCP § 237, subd. (a)(2).) So, if you miss the chance to do hallway interviews, even if only to get a name and phone number to talk later, there likely will not be another opportunity.

If you don't have the names, any thought of juror interviews requires a petition for release of juror information. That petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. If a prima facie showing of good cause is made, and there is no showing that establishes a compelling interest against disclosure, the court is to set the matter for hearing. (CCP § 237(b).)

This is an huge obstacle and without good cause, you won't get the names. Conduct the hallway interview. Get as many names and numbers as you can from willing jurors. Then you can talk when you are in a better frame of mind and in a more hospitable setting.

There are rules about juror interviews. First, if you and/or an investigator are to talk to a juror from your trial, it is imperative that you do so very carefully, candidly and unobtrusively. Reason: if the juror gives you a favorable declaration, rest assured that the other side will automatically argue "foul" -- that you and your investigator somehow

coerced the declaration. Care must be taken to act so that there is no realistic opportunity to give credence to the accusation. (*See, e.g.,* In re Hamilton (1999) 20 Cal. 4th 273, 303, fn. 23.)

There are rules concerning the contact. They are permitted by statute as long as they are consensual and done at the juror's convenience (i.e., a reasonable date and time). (CCP § 206b.) Any discussion with the juror may not include questions or comments intended to harass or embarrass the juror, or influence the juror's actions in future jury service. (Rules of Prof. Conduct 5-320.) Nothing can be said to the juror that could likely influence his state of mind for current or future jury service. (Ibid.) That's all common sense.

Any interview occurring 24 hours after the verdict requires that prior to the discussion the interviewer inform the juror of the identity of the case, the party in the case on whose behalf the discussion is sought, the subject of the discussion, the juror's absolute right to discuss or not discuss the jury's deliberation or verdict with the person seeking the discussion, and, if one is prepared, the juror's right to review and have a copy of any declaration filed with the court. (CCP 206c.)

At any interview, some suggested generic areas for questioning include (per PC 1181 grounds for a new trial):

! §(2) "When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property;"

! §(3) "When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented;"

! §(4) "When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;"

Other areas of inquiry during the interview should include, but not necessarily be limited to:

♦ Was any decision-making by the jury done in an arbitrary fashion (e.g., coin flip)?

♦ Were there any discussions about the case with any court personnel such as the bailiff, court reporter, clerk, judge, or alternates?

♦ Premature discussion by a juror indicating that the juror's belief in the defendant's guilt before the case had been submitted to the jury.

♦ Was there anyone or anything other than jurors and admitted exhibits present in

the jury room during deliberations?

♦ Did any juror have contact with media information about the case or case related issues, whether by television, newspaper, magazine, or personal contacts with reporters?

♦ Was any information related by a fellow juror about investigation, experiments, dictionary usage, or contacts with outside persons about the case?

♦ Were there any revelations by any juror about matters concerning the juror but which were not revealed in voir dire and should have been made known to the court (e.g., the juror was the victim of the same or similar type of crime)?

♦ Were there any medications, drugs or alcohol used by any juror which might have impacted upon deliberations?

♦ If there were exhibits or tapes or testimony translated by a court interpreter, did any juror give a different meaning to the court interpreter's translation?

♦ Were there revelations by any juror about "evidence" not admitted in the case?

♦ Did any juror express opinions to get other jurors to a unanimous verdict that if they made a mistake, not to worry about it because the defendant could always appeal.

♦ Any mention of gangs? Or race?

♦ Any mention of the cost of retrial to pressure the holdout to give up his/her position?

♦ Ask the juror a final question about anything about the case or jury deliberations he or she is uncomfortable with.

♦ Anything else that seems relevant?

By far, issues of jury misconduct are best brought in a hearing at the motion for new trial when with memories are fresh on the issue. The longer between the trial and raising this issue, the less credible it will be due to possible contamination and deteriorating memory. As Emerson said, "time turns to scintillating ether the solid angularity of fact."

B. Documenting Trial IAC: The motion for new trial may be used to develop an IAC issue. (People v. Fosselman (1983) 33 Cal.3d 572.) Fosselman's trial attorney failed to object to the prosecutor's improper argument to the jury, thus waiving the issue. The Supreme Court held the issue cognizable in a motion for new trial if the error denied Fosselman effective assistance of counsel.

> Thus, in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so. The court should have done so in the case at bar. (33 Cal.3d at p. 582-583).

C. Better Yet, Show the Futility of Making a Trial Objection. The MNT can also be used to make up for the lack of a proper objection during trial by showing it was futile to have made the objection because the court would have overruled it anyway. "The rule that failure to object bars appellate review applies only if a timely objection or request for admonition would have cured the harm. (Citation.) In the present case the trial judge made clear in his ruling *on the motion to modify the verdict* that he, too, believed the absence of evidence of a mitigating factor rendered that factor aggravating. (See post, pp. 1186-1187.) Thus an objection by defense counsel would almost certainly have been overruled, and consequently would have failed to cure the effect of the prosecutor's argument." (People v. Hamilton (1989) 48 Cal.3d 1142, 1184 fn. 27; italics added.)

D. Using the Motion for New Trial to Put in Evidence Missing from the Trial Record. For example, if there were rulings made off the record, make a record of them and reiterate the challenge. Were proffered instructions not put in the record? Put them in. In post-trial interviews, did a juror state that the jury saw the defendant in shackles? Make the record. Note that the burden of proof at the motion is proving a probability of a better result which could the "reasonable chance" of a hung jury. (People v. Soojian (2010) 190 Cal.App.4th 491.)

E. Alerting the Trial Court to Issues for Appeal. Arguing the motion may prove futile because court's seldom will second guess their own trial rulings. But the MNT may prove valuable in convincing the court there are arguable issues for the appeal. This motion should be in writing, but you can raise it orally (not advisable) as well. (*E.g.*, People v. Lopez (2013) 216 Cal.App.4th 411, 416; People v. Braxton (2004) 34 Cal.4th 798, 807 [a new trial motion may be made any time before sentence].) The use of issues raised would be to add issues you may have considered too late for the written motion.

IV. POTPOURRI: VICS PIX, GUNS, RE-ENACTMENTS, EXPERTS, VIC IMPACT, AND OTHER EVIDENTIARY SCENARIOS

Here are a number short evidentiary issues to be prepared for your next case, all involving prosecution introduction of: a) "victim in life" photos in a homicide case; b) guns associated with the defendant but not the crime; c) taped re-enactments of a crime; and d) expert testimony on the credibility of the victim; e) victim impact at guilt phase; f) the explanatory hearsay problem. (Of course, always object to the use of argumentative terms like "victim" in cases pitting a complaining witness against the accused.)

A. In a Homicide Case, Introducing a Photo of the Deceased While Alive.

As the 18th Century philosopher David Hume would have put it, reason is but the slave to emotion. Cases are decided not on reasoning from cold facts but on feelings generated from whatever is put before the jury. Prosecutors know this. They try to inject as much emotion as possible into a case. One way to do this in a homicide case is to produce for the jury a "victim in life" photograph. Object.

In O'Meara v. Haiden (1928) 204 Cal. 354, 366, a wrongful death action, the photograph of the young decedent was identified by a parent and introduced into evidence. The Supreme Court held this error: "There was no dispute as to the identity of the boy injured. Just what was the purpose of offering in evidence his photograph is not apparent from the record, unless it was to unduly prejudice the jury in favor of the plaintiff. The reporter's transcript shows that the mother wept as she identified her son's picture. The effect of such procedure cannot aid in the rendition of a just and fair verdict by the jury, which should be the purpose of all trials by jury. To permit the introduction of the dead boy's photograph under the circumstances shown in this action was undoubtedly error...."

In criminal cases, it has been held error (but harmless) to introduce such photos untethered to a relevant point. (People v. Hendricks (1987) 43 Cal. 3d 584, 594-595; People v. Ramos (1982) 30 Cal. 3d 553, 577-578; but see People v. Cole (2004) 33 Cal. 4th 1158, 1198 [holding that the life picture was relevant in a torture-murder by fire case to show the extent of the harm caused, a relevant issue on the torture issue]; People v. Smithey (1999) 20 Cal. 4th 936, 974-975 [some relevance such as the bloodstain on the driver's license]; People v. Hovey (1988) 44 Cal. 3d 543, 571 [not likely to have a prejudicial impact].)

When the proffered photograph has no bearing on a contested issue in the case, it should be resisted by way of objection.

B. Defendant Owns a Lot of Guns! Wow! Here They Are!

The admission of guns, but not a gun allegedly used in an offense, is usually irrelevant evidence and can be "highly prejudicial in nature." (People v. Henderson (1976) 58 Cal.App.3d 349, 360; People v. De La Plane (1979) 88 Cal.App.3d 223, 240; People v. Hamilton (1985) 41 Cal.3d 408, 430). The Supreme Court has long stated the rule that:

> When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his [the appellant's] possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons [citations omitted].

(People v. Riser (1956) 47 Cal.2d 566, 577, *overruled o.g.*, People v. Morse (1964) 60 Cal. 2d 631).

Of course, there are cases going the other way upon a showing of some relevance. *See, e.g.*, People v. Sassounian (1986) 182 Cal.App.3d 361, 400-401 [photographs of the defendant using various weapons were introduced to prove he had knowledge of and the means to commit the crime; further, the photos corroborated the testimony of a major prosecution witness].)

C. Your Crime's on TV! Oppose Videotape Re-enactments of the Crime

Many TV or cable networks will film a crime re-enactment for the public even before the trial takes place. There may be nothing one can do about that, but when the prosecution does it and brings in the product to put on its own TV version of the crime for the jury, it's time to object.

The California Supreme Court addressed the issue of video re-enactments in People v. Dabb (1948) 32 Cal.2d 491, 498-99, and although it found the film before it admissible because the defendant voluntarily took part in the re-enactment, the court expressed the following concerns:

> A motion picture of the artificial recreation of an event may unduly accentuate certain phases of the happening, and because of the forceful impression made upon the minds of the jurors by this kind of evidence, it should be received with caution. . . . [S]uch a portrayal of an event is apt to cause a person to forget that "it is merely what certain witnesses say was the thing that happened, and may "impress the jury with the convincing

impartiality of Nature herself." (3 Wigmore, Evidence [3d ed.], §798a, p. 203.)

Dabb went on to find that the above concerns were not raised by the re-enactment in question because the defendant participated in the re-enactments of his crimes. Further, there was a foundational hearing where the witnesses testified that the film accurately portrayed the re-enactment. In such a situation "there is little, if any, danger of misleading emphasis which is unfavorable to him [the defendant]." (Ibid.).

The danger in taped re-enactments is the creation for the jury of an image of something never witnessed, making the video the jury's reality. The argument to make is that the video does not represent that which it says it does, and that any minimal relationship is more than offset by the prejudice in making it the jury's reality. (Hale v. Firestone Tire & Rubber Co. (8th Cir. 1985) 756 F.2d 1322 [trial court committed reversible error by admitting filmed recreation of an accident not made under substantially the same circumstances]; Miller v. State (Tex. Crim. App. 1987) 741 S.W.2d 382, 388 ["We agree in principle with what the Fort Worth Court of Appeals stated in its opinion of Lopez v. State, 651 S.W.2d 413 ... that `any staged re-enacted criminal acts or defensive issues involving human beings are impossible to duplicate in every minute detail and are therefore inherently dangerous, offer little in substance and the impact of re-enactments is too highly prejudicial to insure the State or the defendant a fair trial'"].)

We live in an era where many, if not most jurors obtain their news and entertainment from the television. Televised images are potent and when distortion is passed to the jury as fact, the prospect for prejudice is high.

D. Experts on Credibility of a Class of Witnesses

No expert should be allowed to opine on credibility of a specific witness or class of witnesses. This is a very good reason to file an Evidence Code section 402/405 pre-trial motion to exclude “experienced based” experts. Even if unsuccessful, one can tie down their testimony to that which is admissible.

If given the opportunity, the expert may expand his/her opinions beyond any foundation made and outside the limits of permissible testimony. In a case I'm doing, the prosecution called an expert in domestic violence (DV) cases to opine that the contradictions or contractions of initial statements by DV complaining witnesses are consistent with being victimized. That is the routine evidence these experts give, but this one went much further in saying the first complaint by the alleged victim to the

authorities is the most truthful.

Expert witnesses cannot offer an expert opinion that either a party has told the truth, or, that a class of victims are truthful when reporting crimes to the police. Obviously, an "expert's" assessment of the veracity of DV complaining witnesses is intended to show that complaining witness spouse (who has since denied making the allegation) gave the truthful version in her initial incriminating complaints to the authorities. Such expert opinion goes to the heart of the issue in these cases and is a denial of 14th Amendment due process of law as noted in several federal cases. (*See* Snowden v. Singletary (11th Cir. 1998) 135 F.3d 732, 737-738 [allowing expert testimony that 99.5% of child sexual abuse victims tell the truth usurped the jury's fact-finding role and made the trial fundamentally unfair]; Mach v. Stewart (9th Cir. 1998) 137 F.3d 630 [reversal for a venireperson, a social worker with child protective services, to state in the presence of the rest of the jury panel, that in her experience, children did not lie about being sexually abused; Maurer v. Minn. Dept. of Corrections (8th Cir. 1994) 32 F.3d 1286, 1287-89; Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284, 287-288.) Object.

E. Victim Impact Evidence During the Guilt Phase

"[E]vidence of a crime's effect on the victim is generally not admissible during the guilt phase of a trial." Sager v. Maass (D.C. Ore. 1995) 907 F. Supp. 1412, 1420, affirmed, 84 F.3d 1212 (9th Cir. 1996), citing inter alia U.S. v. Copple (3d Cir. 1994) 24 F.3d 535, 545-46[error to admit victims' testimony about fraudulent scheme's harm to their health and savings]; Armstrong v. State, 826 P.2d 1106, 1116 (Wyo. 1992) ["Consideration of victim-impact testimony or argument remains inappropriate during proceedings determining the guilt of an accused"]; Stavinoha v. State (Tex. Crim. App. 1991) 808 S.W.2d 76, 78; People v. Hobley (1994) 159 Ill. 2d 272, 637 N.E.2d 992, 1011; Ex parte Crymes (Ala. 1993) 630 So. 2d 125, 126; People v. Hobley (1994) 159 Ill. 2d 272, 637 N.E.2d 992, 1011.

Be alert to this type of testimony from guilt phase witnesses. and quickly move to strike it and seek a judicial admonition telling the jury to disregard it.

F. Dealing with Case Agent Witnesses.

1. The agent's "explanatory" hearsay. You've heard it before. The agent is on the stand and is asked what a witness told him just before he/she took a certain action. You object. It's hearsay. The prosecutor responds, "Judge, it's not introduced for the truth of the matter, but only to explain the agent's subsequent conduct after the statement was

made." Overruled, says the judge, repeating the limitation to the jury. Then, out comes a prejudicial statement made by a declarant who may never testify.

There are responses to this scenario. First, argue what someone told the officer is probably irrelevant to explain the agent's subsequent actions. Who cares why the agent did what he did? The relevance is the action taken, not the motivation. If this fails, ask for a proffer of what the statement is. Then, repeat the irrelevance objection and add alternatively that the probative value is far less than its prejudicial impact. If that fails, have these cases ready to cite:

"While officers generally should be allowed to explain the context in which they act, the use of out-of-court statements to show background has been identified as an area of 'widespread abuse.'" U.S. v. Sallins, 993 F.2d 344, 346 (3rd Cir. 1993); U.S. v. Meserve (1st Cir. 2001) 271 F.3d 314, 320.) Further, cases have held such evidence is prejudicial hearsay even with the explanation it is offered only to explain the officer's subsequent conduct. U.S. v. Arbolaez, 450 F.3d 1283, 1290 (11th Cir. 2006).

2. The case agent as law-giver. Another are of abuse, especially in complicated fraud cases, is to have the agent explain the law to the jury. I have a case now where the investigator informed the jury of the Medicare administrative and statutory law even though the controlling law was at issue and there were conflicting arguments. Never let the agent tell the jury what the law is. That is what the judges are to do. "It is ordinarily improper to have a witness testify regarding what the applicable law is; it is the trial judge's duty to inform the jury on the matter. Specht v. Jensen, 853 F.2d 805, 807-08 (10th Cir. en banc 1988); U.S. v. Vreeken, 803 F.2d 1085, 1091 (10th Cir.1986)." U.S. v. Lake, 472 F.3d 1247, 1263 (10th Cir. 2007).

3. The Agent as Profiler**.** In another fraud case, the agent was permitted to testify to the "fraud profile" the defendant purportedly met. Indeed, the agent said all the conduct of the defendant (most of which was perfectly innocent) met the "profile." In the area of the drug courier profile, courts have been cautious in admitting such profiles as trial evidence because they "are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers..." U.S. v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); *see also* U.S. v. Beltran-Rios, 878 F.2d 1208, 1210 (9th Cir. 1989); U.S. v. Jones, 913 F.2d 174, 177 (4th Cir. 1990). In U.S. v. Lui, 941 F.2d 844, 848 (9th Cir. 1991), the government argued its "expert" properly testified to a drug courier profile to explain the modus operandi of the defendant. The Ninth Circuit disagreed, finding its admission error because no complex scheme was involved that warranted the testimony, and because by providing such testimony and

tying it to Lui, Agent Wood took items that were perfectly innocent - use of a hard-sided suitcase, traveling for the stated purpose of visiting a relative - and turned them into evidence of guilt. Nor were the jurors provided with any limiting instruction to prevent them from using the profile evidence as a basis for finding guilt. Id. at 848. Further, the Circuit "denounced the use of drug courier profile evidence as substantive evidence of a defendant's innocence or guilt." Lui, 941 F.2d at 847.

See also People v. Martinez (1992) 10 Cal.App.4th 1001, 1006) (rejecting use of drug courier profile evidence in the case of a defendant arrested while driving a stolen truck). The profile "expertise" has reached even to crimes of violence. In People v. Robbie (2001) 92 Cal.App.4th 1075, 1084, the court rejected testimony about a rape profile. In sum, "every defendant has the right to be tried based on evidence tying him to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile." People v. Castaneda (1997) 55 Cal.App.4th 1067, 1072.)

In People v. Covarrubias (2011) 202 Cal.App.4th 1, the court held it error to allow an agent to testify to the structure of major drug organizations in a case where the defendant was not charged with conspiracy, relying on U.S. v. Vallejo (9th Cir. 2001) 237 F.3d 1008. It found it the equivalent of profile evidence.

4. Agent as credibility decider. Sometimes the agents will slip in their views of the credibility of a witness. This too is forbidden territory and should be the subject of a prompt objection. See People v. Sergill (1982) 138 Cal.App.3d 34, 39-40 (reversible error for officer to testify that child victim was telling the truth); People v. Smith (1989) 214 Cal.App.3d 904, 915-916 (officer's comment on the veracity of a dying declaration is inadmissible as it invades the province of the jury); Maurer v. Dept. of Corrections (8th Cir. 1994) 32 F.3d 1286, 1287 (denial of due process of law to admit testimony from witnesses, including two police officers, labeling the victim as "sincere" in her claim of rape); Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284, 287-288 (officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unfair" trial).

5. The agent as Liar. In making the argument for a finding that the officer's testimony is incredible, make appeals to common sense and remind the trial judge he or she cannot: "insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision

whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." (Anderson v. Bessemer City (1985) 470 U.S. 564, 575-576.)

There are published cases in which trial and appeal courts have refused to swallow police mendacity as truth. The follow examples will give you ideas for avenues of attack and should be cited to convince the court that fabrications, even those heavily dosed in the combined perfume of the witness's oath, the officer's uniform and prosecutorial endorsement, should be rejected. In any forum, including California, major effort must be expended to convince the trial court on the issue because the standard on appeal is extremely difficult once a trial judge finds the officer credible. (*See* People v. Cudjo (1993) 6 Cal.4th 585, 609 ["Except in … rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution"].)

Here are the examples:

1. In Jackson v. United States (D.C. Cir. 1965) 353 F.2d 862, 865-867, the appeals court considered the testimony of a police officer named Bello who asserted he had probable cause for a search of the defendant. The trial court denied the motion to suppress. The Court of Appeal reversed based on its disbelief of Bello's testimony:

"Our conviction that Bello's testimony should have been discredited, however, is primarily based on the fact that it contains internal contradictions and is contrary to human experience. The doctrine that appellate courts must reverse findings based upon "inherently incredible" testimony has long been accepted in this jurisdiction. Sometimes, it is possible to disprove testimony as a matter of logic by the uncontradicted facts or by scientific evidence. E.g., The Telephone Cases (Dolbear v. American Bell Tel. Co.), 126 U.S. 1, 567, 8 S. Ct. 778, 31 L. Ed. 863 (1888). But the doctrine of inherent incredibility does not require such positive proof. It is enough to invoke the doctrine if the person whose testimony is under scrutiny made allegations which seem highly questionable in the light of common experience and knowledge, or behaved in a manner strongly at variance with the way in which we would normally expect a similarly situated person to behave."

2. In United States v. $191,910 in United States Currency (N.D. Cal. 1991) 772 F. Supp. 473, aff'd 16 F.3d 1051 (9th Cir. 1994), Morgan, the claimant, sought to obtain

seized monies found in his luggage. The luggage was detained for approximately two hours before being subjected to a dog sniff. This delay violated guidelines requiring the return of luggage within ninety minutes of detention. Agent O'Malley had, contemporaneous to the dog sniff, stated the dog alert occurred at 3:20 p.m.--approximately two hours after the bags were detained. At the hearing for the return of money, the government contended the dog sniff actually took place only 45 to 60 minutes after the bags were detained. This assertion was based on a "correction" O'Malley made to his deposition a year after the incident. The trial court gave the suspiciously revised statement no weight:

"We agree with Morgan that this 'correction' to O'Malley's deposition deserves little credence. Not only is it remote in time from the incident, and contradictory to all other statements concerning the time of the dog sniff, including statements under oath, but, as counsel for the government conceded at argument, the reason given above for the time change is a non sequitur that fails to explain the basis for O'Malley's revision."

(Id. at 479.)

3. In United States v. De La Jara (9th Cir. 1992) 973 F.2d 746, the issue was whether the defendant had invoked his Miranda rights by requesting to speak with counsel. Officer Perez wrote in a police report authored within days of the interrogation that he heard the defendant say he wanted to call his attorney and that he told another officer "that it sounded like DELAJARA was invoking his rights because he just asked to call his attorney." (Id. at 751.) Five or six months later, to escape the consequences of suppression, Perez backtracked in a declaration prepared for him by the prosecutor. Now, he said that he only heard the words "speak to an attorney" and that it only "sounded like" the defendant was invoking his right to counsel. The trial court obligingly swallowed the revision and declined to suppress. The Court of Appeal, in reversing the trial court, stated:

"The district court, without elaboration, rejected Officer Perez' contemporaneous report in favor of his in-court testimony, which followed the version of events recited in the declaration drafted in preparation of the motion to suppress. We are left with a definite and firm conviction that the court erred in doing so....We find incredible the government's subsequent attempts, made while appellant's motion to suppress was pending, to inflect Perez' [original] statement with dubiety. (Id. at 751-752.)

4. In United States v. Higareda-Santa Cruz (D. Or. 1993) 826 F.Supp. 355, the district court followed De la Jara in rejecting a police officer's testimony that differed

from his contemporaneous written report in such a way as to make his traffic stop legitimate. "[Officer] Hagen's report, written the next day, stated that defendant's tires had touched the lane lines, which would not violate any traffic laws. However, at the hearing, Hagen testified that he independently recalled that defendant's tires had crossed the lane lines, a traffic infraction.... I find Hagen's testimony that defendant crossed the lane lines incredible because it conflicts with his contemporaneous report of the arrest. See United States v. de la Jara, 973 F.2d 746, 751-52 (9th Cir. 1992) (district court committed clear error by crediting police officer's in-court testimony while rejecting the officer's conflicting contemporaneous report)."

5. Kelly v. United States (D.C. Cir. 1952) 194 F.2d 150, involved an alleged invitation by the defendant to an undercover officer to engage in sodomy. The court said that the testimony of the officer should be received and considered with great caution. It reversed the conviction because the sole testimony of the cop, corroborated only by the peripheral, non-incriminating facts, was insufficient to prove guilt beyond a reasonable doubt: "It seems to us that the uncorroborated word of this particular officer under these particular circumstances could not establish beyond a reasonable doubt that this defendant was guilty of this offense. The inescapable doubts are reasonable ones." (Id. at 156.)

As noted above, winning credibility issues on appeal is difficult in the extreme, but if worked up at the trial level, there may be the kind of record to support appellate relief. (Better yet, you may win with the trial judge.) In People v. Headlee (1941) 18 Cal.2d 266, the court granted relief in a case involving convictions for three counts of kidnaping for purposes of robbery and rape. On appeal, the defendant challenged the sufficiency of the evidence claiming that the "rape" scenario was really a scam by a pimp and two prostitutes created because they got caught in the act of servicing a "John." Analyzing all the testimony, the appellate court concluded: "It is not the function of appellate courts to weigh evidence. [Citations] Where, however, the evidence relied upon by the prosecution is so improbable as to be incredible, and amounts to no evidence, a question of law is presented which authorizes an appellate court to set aside a conviction. [Citation] Under such circumstances an appellate court will assume that the verdict was the result of passion and prejudice. [Citation] To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable. [Citations] In this case the inherent improbability of the testimony of the principal witnesses is readily apparent from an examination of the record. The five charges contained in the information arose out of a sequence of alleged acts purportedly occurring within a few

hours. In considering the evidence it is relevant to consider the evidence addressed to the two charges of which the defendant stands acquitted, for it contributes to the improbability of the evidence addressed to the three charges of which the defendant stands convicted." (Id. at 267-268.)

G. Keeping out Gang Evidence

The Supreme Court has stated, "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact. (See generally People v. Cardenas (1982) 31 Cal.3d 897, 904-905, 184 Cal.Rptr 165, 647 P.2d 569; see also Williams v. Superior Court (1984) 36 Cal.3d 441, 450, fn. 8, 204 Cal.Rptr 700, 683 P.2d 699.)" (People v. Cox (1991) 53 Cal.3d 618, 660, 280 Cal.Rptr 692, 809 P.2d 351.) Convictions will be overturned when the prosecution throws into evidence gang membership which has only marginal relevance. (E.g., People v. Maestas (1993) 20 Cal.App.4th 1482, 25 Cal.Rptr.2d 644.)

It has been held that trial courts must weigh the admission of gang evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effect its admission would have on the defense. (People v. Gibson (1976) 56 Cal.App.3d 119, 128 Cal.Rptr. 302; People v. Haston (1968) 69 Cal.2d 233, 70 Cal.Rptr. 419, 444 P.2d 91.)

It is fair to say that when the word "gang" is used in Los Angeles County, one does not have visions of the characters from the "Our Little Gang" series. The word gang as used in the case at bench connotes opprobrious implications. The trial judge in Zammora [referring to People v. Zammora (1944) 66 Cal.App.2d 166, 214 [152 P.2d 180] recognized that the use of the word "gang" takes on a sinister meaning when it is associated with activities. In the case at bench, gang membership was allowed to be associated with gang activities to the prejudice of the defendant. (People v. Perez (1981) 114 Cal.App.3d 470, 479, 170 Cal.Rptr. 619.)

People v. Champion (1995) 9 Cal.4th 879, 922, recognizes such "evidence" of gang membership may have a highly inflammatory impact on juries: "Because evidence that a criminal defendant is a member of a juvenile gang may have a "highly inflammatory impact" on the jury (People v. Cox (1991) 53 Cal.3d 618, 660 [280 Cal.Rptr. 692, 809 P.2d 351]), trial courts should carefully scrutinize such evidence before admitting it."

In People v. Partida (2005) 37 Cal. 4th 428, the defendant raised and Evidence Code section 352 argument that the trial court should have excluded gang evidence. On appeal, he argued the error violated his right to due process. The California Supreme Court held that he could raise the due process argument only on the factual basis argued at trial (prejudice outweighed probative value). No other argument that due process required the trial court to exclude the evidence would be heard. The Supreme Court held that the error in admitting the gang evidence was harmless under state law and did not render defendant's trial fundamentally unfair so as to deny due process.

If there is anything the U.S. Constitution forbids, it is a conviction won with **guilt by association** evidence. (See U.S. v. Polasek (5th Cir. 1998) 162 F.3d 878, 884 [summarizing the near universal rejection of such evidence]; see also U.S. v. Garcia (9th Cir. 1998) 151 F.3d 1243, 1244-46 [in reversing a conviction, the court stated it would be contrary to the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members].) See also U.S. ex rel Imari Clemons v. Walls (N.D. Ill. 2002) 202 F. Supp. 2d 767 (due process violated in "gang" evidence.)

"Legions of cases and other legal authorities have recognized the prejudicial effect of gang evidence upon jurors. [Citations.]" (People v. Albarran (2007) 149 Cal.App.4th 214, 231, fn. 17 [57 Cal.Rptr.3d 92].) That prejudice not only affects the jurors' assessment of the defendants' credibility, but also taints their view of events with the inference of defendants' criminal disposition. "We have recognized that admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. [Citations.]" (People v. Williams, supra, 16 Cal.4th 153, 193.) Here that taint was particularly prejudicial as the outcome of this case depended heavily on questions of defendants' mental state. (People v. Memory (2010) Cal. App.4th .)

Note that mere conclusions by the police gang expert are not enough for the gang enhancement. The police gang "expert" will testify everything done by the defendant was for the benefit of the gang. Appellate courts aren't accepting mere claims that the crime was done for the gang. This was a carjacking case and the expert testified that it was for the gang's benefit. Apart from that conclusory claim, there wasn't any evidence: there was no display of gang signs or anything else. The carjacking could benefit the gang, but there was no evidence that it actually did so. This opinions says: "The gang

enhancement cannot be sustained solely on defendant's status as a member of the gang and his subsequent commission of crimes." (People v. Ochoa (2009) 179 Cal.App.4th 650.)

V. GETTING IMMUNITY FOR YOUR WITNESSES

How often do you try a case where one of more of the prosecution witnesses have made deals: guilty pleas and some beneficial accommodation in reduced charges or sentencing? The more serious the case, the more likely this happens.

You have a witness who can refute the prosecution witnesses but is very reluctant. In fact, he's "lawyered up" and his attorney says he's taking the Fifth if called as a defense witness because he could possibly put himself in jeopardy by testifying. In a dream world, you would confer immunity on that witness and he would testify for your client.

It's not a dream world, but you have a tool to pull out from your tool box to level the playing field a bit. It's called court ordered, constitutionally compelled use immunity.

In United States v. Straub, 538 F.3d 1147 (9th Cir. 2008), the Ninth Circuit held that use immunity must be offered a defense witness when: a) the testimony is relevant (*i.e.*, would impeach the prosecution witness granted immunity); b) where the prosecution has offered it to its witnesses (or a variant such as a favorable plea or sentence bargain); and c) without it being granted, the resulting an unfair distribution of immunity would distort the fact-finding process. (Id. at 1162.) How the latter criterion is met is discussed below.

The facts of Straub are: the defendant was charged and convicted of narcotic, robbery and shooting offenses. The prosecution gave immunity or plea bargain incentives to eleven (yes, 11) of its twelve (12) witnesses. The defense wanted to call a witness named Bauman to impeach one of the major prosecution witnesses named Adams. Adams would testify that Bauman had admitted to him in a bar that Adams was the one that shot the victim. Unsurprisingly, the prosecution refused to give Bauman immunity even though it stated it had no interest in prosecuting him. The trial court didn't force the issue and Straub was convicted without Adam's testimony. (Id. at 1150-56.)

On appeal, the Circuit found that the district court erred in denying Straub's request to compel use immunity. Bauman's testimony was relevant and "directly contradicted" the only government witness's testimony (Adams) that could put Straub at

the scene. (Id. at 1166.)

The Straub test: For a defendant to compel use immunity, the defendant must show that: (1) the defense witness's testimony was relevant (impeaching or directly exculpatory); and **(2)** either **(a)** the prosecution intentionally caused the defense witness to invoke the Fifth Amendment with the purpose of distorting the fact-finding process; **or (b)** the prosecution granted immunity to a government witnesses in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fair trial. (Id. at 1162.)

Example 2a: this is where the prosecution intentionally causes the defense witness to invoke the Fifth Amendment. It means that the prosecutor acted with the purpose of distorting the fact-finding process. A case example is United States v. Lord, 711 F.2d 887 (9th Cir. 1983), a cocaine conviction where the prosecutor told a witness named Cook that whether he would be prosecuted depended on what he would say when he testified. (Id. at 889.) Cook was vulnerable to prosecution given that he helped Lord deliver drugs, *i.e.*, he could have been a "target" and the prosecutor told him that while he viewed his role as "minor," he would prosecute depending on his testimony. (Ibid.) Because the prosecution's notion of fairness was that if Cook testified for the government, that was truthful testimony, and if he testified for the defense, he would be in trouble, the case was remanded for a hearing for clarification of what the prosecutor told Cook. If the prosecutor's statements to Cook pressured him to invoke the Fifth (and thus deny Lord favorable evidence) then a sanction would be in order – the trial court was ordered to enter a judgment of acquittal unless the prosecutor agreed to immunize the witness. (Id. at 891-892.)

On the ways in which misconduct has been recognized in the context of prosecution witness intimidation, *see* In re Martin (1987) 44 Cal. 3d 1, 30-31. There, three defense witnesses were intimidated and refused to testify. Requests for immunity were denied. Some prosecution concessions had been made to the prosecution's star witness (the murderer) and another witness and kept from the jury at trial. (Id. at 25.) This case formed an excellent foundation for the grant of immunity to the defense witnesses at trial on both 2a and 2b grounds. First, the witnesses had been intimated by the prosecution. Second, the prosecution had conferred benefits to its major witness and another witness (a form a immunity) while denying it to the defense witness. Following the conviction and after all this was aired out in an evidentiary hearing on habeas, the sanction was a reversal of the murder conviction.

Example 2b: This is where the prosecution grants immunity to a government witness to obtain that witness's testimony, but denies immunity to a defense witness whose testimony would have directly contradicted that of the government witness. These are the facts of Straub and form a second basis for obtaining witness immunity.

Note the difference between the two examples: In example 2a, the prosecution is shown to have acted with an intent to distort the fact finding process by coercing the witness to take the Fifth and be beyond the reach of the defense as a witness. This "amount[s] to something akin to prosecutorial misconduct." (U.S. v. Straub, *supra* at 1157.)

However, in the 2b example, the only requirement is that the prosecutor acted with the "effect" of distorting the process by the discriminate use of immunity grants. Under this example, "a showing that the selective denial of immunity had the effect of distorting the fact-finding process is sufficient." Id., at 1158.

See e.g., U.S. v. Westerdahl, 945 F.2d 1083, 1087 (9th Cir. 1991) ("The government's case relied heavily on circumstantial evidence provided by the testimony of two witnesses who had been granted use immunity by the government, and one witness who testified as part of a plea bargain in which a host of felony charges pending against him were dropped. The use of this testimony, while effectively denying Westerdahl the right to contradict it with [his witness] Goldsberry's testimony, may have distorted the fact-finding process, and an evidentiary hearing should have been held to determine whether the denial of use immunity for Goldsberry denied Westerdahl his due process rights.")

Remedies: Under the Lord example, the court can enter a judgment of acquittal unless the prosecution asks the district court to extend use immunity to the defense witness at a new trial. Another option exists in the Straub example: the government can, at a new trial, attempt to proceed without the witness whose testimony would have been contradicted by the defense witness. (Id. at 1161.)

The Prosecution Wiggle out Maneuver. The prosecution may argue that the witness for whom the defense seeks issue for immunity is a potential target of prosecution and use that as a checkmate move to forestall immunity. As stated in Williams v. Woodford, 384 F.3d 567, 602 (9th Cir. 2004): "[T]he prosecution does not abuse its discretion when it refuses to grant use immunity to a defense witness who has been indicted or is the subject of a criminal investigation. *See* United States v. Croft, 124 F.3d 1109, 1117 (9th Cir. 1997) ('declining to adopt a rule that would require the

government to grant transactional immunity to an indicted co-conspirator, or to a more marginal witness indicted on related charges'); United States v. Condo, 741 F.2d 238, 239 (9th Cir. 1984) (the denial of immunity for defense witnesses that were themselves the target of prosecutorial investigation did not deprive the defendant of a fair trial)."

If the mere statement that the witness was a "target" was sufficient, a defendant could never obtain immunity for a witness. Courts must closely examine whether this statement is just another means of withholding exculpatory evidence from the defendant though bad faith and thus more prosecution misconduct. Thus, where the "target" immunity nullifier is brought into play by the prosecutor, the court should consider the following: how long has the government been considering this person for prosecution? What is the known status of the evidence against him/her? How long has the investigation been on-going concerning this witness? Has the government interviewed the witness? Have other witnesses stated what the witness did or said? When? Has the prosecution already exercised its discretion not to prosecute this witness and only now trots out the "target" argument to foil the defense motion for a grant of immunity?

Further, the case for which the witness is an alleged "target" has to be the case in which he'll testify. In United States v. Young, 86 F.3d 944 (9th Cir. 1996), the defendants were convicted for conspiracy to distribute cocaine. As in Straub, the prosecution had given all of the principal government witnesses immunity or some other favorable bargain treatment. The defense wanted to call a witness (Delfs) but he invoked the Fifth Amendment. (Id. at 947.) The trial court denied the defense motion to compel immunity for Delfs. (Ibid.) The prosecution refused to grant Delfs immunity because Delfs was under indictment in a separate firearms case. (Id. at 948.) There was no linkage between the firearms case and the case for which Young was on trial. (Ibid.) The Court of Appeal remanded the case to the trial court with instructions for an evidentiary hearing to determine if the government had intentionally distorted the judicial fact-finding process by its refusal to grant immunity based on the unrelated firearms case. (Id. at 948.)

Demand an Evidentiary Hearing. One will note that a number of these cases did not have the benefit of an evidentiary hearing at trial to allow the defense to prove the criteria for gaining immunity. They were remanded for that purpose. *E.g.*, U.S. v. Lord, *supra*; U.S. v. Westerdahl, *supra*, U.S. v. Young, *supra*. Counsel must demand the right to prove the basis for gaining witness immunity through the production of evidence. As with most matters, this issue is one for which the defense must make a record in order to gain relief either at trial or on appeal.

14th Amendment Due Process Basis for Relief. In Straub, the court ruled that "the fact-finding process may be so distorted through the prosecution's decisions to grant immunity to its own witness while denying immunity to a witness with directly contradictory testimony that the defendant's due process right to a fair trial is violated." (U.S. v. Straub, *supra* at 1166.)

California Law. Penal Code § 1324 states that in "any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated thereby, and if the district attorney of the county or any other prosecuting agency in writing requests the court, in and for that county, to order that person to answer the question or produce the evidence" the court shall hold a hearing and may grant immunity in order to compel the witness to answer.

Given the due process grounding of Straub, the rationale supports motions for defense witness immunity in state cases when the two exceptions showing prosecution coercion or unfair selectivity in giving immunity to its witnesses. The California Supreme Court, while not enthusiastically proclaiming the defense right to immunity for intimidated witnesses, has acknowledged: "[W]e have expressed reservations concerning claims that trial courts possess inherent authority to grant immunity [Citation], and even assuming the court possesses such authority, it has been recognized only when the defense has made a showing that a *defense* witness should be afforded immunity in order to provide clearly exculpatory testimony. [Citation.]" (People v. Williams (2008) 43 Cal.4th 584, 622-623, original italics.)

See also People v. Stewart (2004) 33 Cal.4th 425, 468 ("We acknowledged in Hunter [People v. Hunter (1997) 49 Cal.3d 957, 974] that it was "possible to hypothesize cases" in which "a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial." As noted in In re Martin, *supra*, where the trial court denied immunity for the defense witnesses despite the prosecution conferral of benefits to its witnesses, reversal after conviction was the remedy. Obviously, policy considerations would mandate the trial court to act to preserve the fair trial rights of the defendant while the trial is progressing.

Here, the basis for the motion is not only the showing of exculpatory testimony, but also prosecution abuse of its immunity powers by conferring it only to get the testimony it wants. *See* "The State of Federal Prosecution: The Defense Witness Immunity Doctrine: The Time Has Come to Give it Strength to Address Prosecutorial Overreaching," 43 Am. Crim. L. Rev. 1189 (2006); Right of defendant in criminal

proceeding to have immunity from prosecution granted to defense witness, 4 A.L.R.4th 617.

CONCLUSION

Attention to making an evidentiary record when dealing with the above evidentiary challenges is absolutely essential. You have a right to make your record. (Spector v. Superior Court (1961) 55 Cal. 2d 839, 844 [“Refusal to permit counsel for petitioner to present evidence and make a reasonable argument in support of his client's position was not a mere error in procedure. It amounted to a deprival of a substantial statutory right....”].) The above suggestions, by no means exhaustive, are meant to aid in that effort while improving trial counsel’s goal of winning at trial.