THE NUTS AND BOLTS OF THE OPENING BRIEF: STATEMENT OF APPEALABILITY, STATEMENT OF CASE AND FACTS AND ARGUMENT

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Introduction

A criminal appellate brief always begins with the Three Statements: of the Case, of Appealability and of the Facts, followed by the argument. The basic rules governing each of these sections of the brief, as well as other components (cover page, table of contents and table of authorities), are found in rule 8.204, California Rules of Court. Even though the meat of your brief will be the argument do not treat the statements lightly, particularly the statement of facts. A well-written statement of facts can set the stage for the issues argued and suggest there could be a doubt about the guilt of the defendant.

Prefatory Note on References to the Record on Appeal.

Rule 8.204(a)(1)(C) requires that any reference to a matter in the record be supported by "a citation to the volume and page number of the record where the matter appears." Courts of appeal have often emphasized the importance of this rule and voiced their displeasure with noncompliance. (See, e.g., *Landfield* v. *Gardner* (1948) 88 Cal.App.2d 320, 322-323, *People* v. *Dougherty* (1982) 138 Cal.App.3d 278, 282-283.) Do not cite to line numbers. It will take too much time and the governing rule does not require it.

If there is only one volume, one can simply refer to "RT 3" and "CT 25". In most cases you will have multiple volumes, so you must add a volume number in front. ("3RT 234; 2CT 25.) Don't leave a space between the volume number and the record cite, as it will save on your word count. If there are augmented transcripts some additional short reference will be necessary with a footnote alerting the reader to this. (See Sample No. 1, Statement

of the Case, p. 1, fn. 1.)

Most practitioners have a reference to the record after virtually every sentence in their Statements of the Case and Facts. A minority have record references at the end of each paragraph, especially in the Statement of Facts. However, if you need to later recite to a specific fact, for example in your prejudice argument, a citation to the record after each sentence will make it easier to locate the part of the record you need. Readers of legal briefs are used to citations to the record. Having one after each sentence will not affect the flow of the story.

The Statement of Appealability

Rule 8.204(a)(2)(B) states an opening brief must "State that the judgment appealed from is final, or explain why the order appealed from is appealable." Most criminal appellate advocates put in a preliminary "Statement of Appealability" before the Statement of the Case, though the rule does not require a specific location in the brief. Some put it between the Statement of the Case and the Statement of Facts.

EXAMPLES:

- If the appeal is from a jury trial: "This appeal is proper under Penal Code section 1237, since it follows a judgment that finally disposes of all issues between the parties."
- If the appeal is after a guilty plea and only raises sentencing issues: "This appeal follows a guilty plea and is authorized by Penal Code sections 1237 and 1237.5 and rule 8.304(b)(4)(B), of the California Rules of Court.[1]
- If the appeal is from the denial of a motion to suppress: "This appeal is from a final judgment stemming from a guilty plea entered after the denial of a suppression motion. It is a authorized by Penal Code sections 1237 and 1538.5, subdivision (m)."

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1. Some cite only the rule of court, but a court rule cannot be the basis for appellate jurisdiction. Only the Legislature can grant the right to appeal. Therefore, the Penal Code sections which govern appeals should also be cited.

- If the appeal is made from the denial of a motion made after judgment: "“This appeal is proper under Penal Code section 1237, subdivision (b), since it is from any order made after judgment affecting the substantial rights of the party."
- If the appeal is made after a guilty plea but the court granted a certificate of probable cause: "This appeal is proper under Penal Code section 1237.5 since it follows a guilty plea and the issuance of a certificate of probable cause by the trial court."

These are examples only. You need not recite these exact words.

THE STATEMENT OF THE CASE

Rule 8.204(a)(2)(A) provides the opening brief shall "State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from." This is the statement of the case. The statement of the case provides a brief overview of pertinent procedural facts and events in the trial court. Do not include everything which transpired below.

Keep in mind the statement of the case is the most boring part of the brief, yet it is the first thing most people read. You want to get readers through that boring part as quickly as possible and get them to the meat of your brief: your argument. The only purpose of the statement of the case is to explain the procedural posture of the case.

A. **The Typical Statement of the Case:** The statement of the case should generally only cover four topics, in chronological order:

1. **The charges:** Summarize the information, including any enhancement allegations and prior convictions alleged, with citations to the relevant code sections. Do not provide details of the charges (victim's name, date of offense). This will be part of the statement of facts. Do not list each count separately. If there are ten counts of robbery state, "Defendant was charged with ten counts of robbery" rather than, "Count One: robbery; Count Two, robbery, etc." Sometimes you might have to provide more detail. For example, in a multiple defendant case different defendants

may face different charges. Also, enhancements may apply to some counts but not others. If detail is necessary to precisely describe all the charges and enhancements, provide it. Strive to keep it short.

If the information was amended several times, you should usually only list the charges in the last amended information, the one for which the defendant was tried. However, if the amendment was objected to and you will argue this issue on appeal it would be appropriate to list the charges before the amendment, the motion to amend, the objection, and how the charges changed after the amendment. Also, it should be noted if charges were amended as part of a plea bargain.

2. **How the charges were resolved**: by dismissal of some counts, by jury or court trial or by plea. If by jury trial, it is enough to state when the trial began and when the jury returned it's verdicts. If by court trial, you should include a reference to the waiver of the right to jury trial, since that is an important procedural right. You may choose to include an important event you intent to argue on appeal (e.g. the denial of a motion to suppress a defendant's statement), but this is generally not necessary since you will provide the details in your argument. If the case was resolve by a plea you should briefly summarize the terms of the plea bargain. In more complicated situations – e.g., a slow plea, guilty pleas as to some but not all charges, etc. – Take a little more time describing what occurred. In describing a jury's verdicts, if the defendant was conviction on all counts you can simply state that without repeating each charge. Otherwise briefly explain when charges were dismissed or your client was acquitted on some charges and convicted of others.

3. **The sentence imposed:** Briefly describe the components of the sentence. If you have determined there are no sentencing issues, you could simply list the total sentence imposed without all the details. Do not list credits, or fines and fees imposed. None of this is essential to the statement of the case. Even if you argue an issue involving a fine or credits, you don't have to list it in the statement of the case. Sometimes

avoiding details protects the client's interests since details might alert the court or attorney general about a possible unauthorized sentence. (See Sample # 2, Statement of Case) Even where a claim of sentencing error is raised, it is usually not necessary to spell out all the sentencing details. You will provide the necessary information in your argument.

4. **Notice of Appeal**: just state a timely notice of appeal was filed on ____.

In sum, a short statement of the case will keep the reader's attention focused on the brief. Try to avoid long recitations of irrelevant procedural facts which will only make the reader's eyes glaze over.

B. **Optional Case-by-Case Matters**

1. **Motions**

If you are raising the denial of a specific motion as error on appeal – e.g., pretrial motions to suppress or sever, trial motions such as *Wheeler* or mistrial motions – the Statement of the Case should identify the nature of the motion, the date it occurred, and the court's ruling. Only scant detail need be included; more thorough discussion of the procedural history of the motion belongs in the introduction to the argument on this point. (See Sample #2, Statement of Case, p. 2.) There is rarely any reason to mention motions decided favorably to the defense, or ones where the rulings do not give rise to an issue on appeal.

2. **Extraordinary Events**

During the course of a criminal trial any number of events might occur which could give rise to an issue on appeal: e.g., defendant being forcibly removed from the courtroom or compelled to be tried in jail clothes, a juror being excused for illness or misconduct, a lawyer being held in contempt, etc. Where these form the basis for an issue on appeal, they should be briefly mentioned in the Statement of the Case. Wait until the argument section of your brief to describe the underlying facts in detail.

There is usually no need to recount ordinary trial events (e.g., objections to the admission of evidence), which form the basis for a claim of error on appeal. This is better handled in the first part of the argument of the issue. A tactical exception can lie where there is only a single issue on appeal, or a primary one; in such cases, you can sometimes use the Statement of the Case as an introduction to the argument.

3. **Close Case Indicators**

You can often include procedural events which indicate the case was close. For example, you can mention that the jury deliberations were long ("After deliberating for over thirteen hours over three days, the jury found appellant guilty of first degree murder. (RT 248-259)"); that the court stated its difficulty in deciding a particular issue (i.e., "After opining that the evidence presented a `very close case,' the court denied the new trial motion. (RT 26)".); or that there was a previous hung jury (i.e., "On January 26, 1992, the court declared a mistrial after the jury deadlocked at 9 to 3 in favor of acquittal. Retrial began on March 5, 1992. (CT 185)") These comments should be made sparingly, and are no substitute for the need to emphasize these favorable procedural facts in your discussion of prejudice in the argument portion of the brief.

4. **Wende Case**

One exception to the rule of succinctness is when you file a *Wende* brief. When you have found no issue to argue, it is important to list all procedural events and to detail all that happened in a case. This will show the court you indeed carefully reviewed the record to search for arguable issues.

C. **Events Which Are Rarely Included**

1. **Municipal Court Proceedings**

As a general rule the proceedings before a preliminary hearing - filing of the complaint, the preliminary hearing itself, etc. – have no bearing on the appeal and should not be mentioned in the Statement of the Case. As with all general rules there are exceptions.

You need to note if your client waived preliminary hearing and pled guilty to a felony.

Sometimes the fact that certain events occurred prior to the preliminary hearing is critical to raising a particular error on appeal. For example, if *Brady* error occurred in your case, you may want to mention that an appropriate discovery motion was filed in the municipal court case. The fact that a *Faretta* motion or a *Marsden* motion was brought in municipal court may strengthen your argument that denial of the same motion in superior court was error. However, such matters are best discussed in your argument. It is not necessary to list them in the statement of the case.

There are countless possibilities depending upon the peculiarities of the facts in a particular case. The rule of thumb is: don't include it unless it is relevant to an issue you are raising on appeal, and even then consider whether it is important or whether it is going to unnecessarily lengthen the statement of the case.

2. The Names of the Players

It is normally not necessary or proper to include the names of the judge, the prosecutor or the defense attorney in the Statement of the Case. It is usually not a good practice to do this in the Argument portion of the brief either, as it is usually best to not personalize errors.

D. Common Errors

1. Too Much Information/Not Enough Information

While it is important to keep your Statement of the Case as short as possible, it is equally important to provide sufficient information to apprise the court of the basic nature of the case and the critical events at or before trial. Section A, above, lists information which should always be included. Before filing an opening brief check your Statement of the Case to make sure these essentials are included.

Sections B and C above outline the various information which may or may not be included in your Statement of the Case depending on the particulars of your case. The

operative rule is, do not include procedural matters in the Statement of the Case unless there is a specific and compelling reason to do so. A Statement of the Case which includes irrelevant procedural details will be boring at best and extremely irritating at worst.

2. **Overly Verbose Descriptions**

Remember, the Statement of the Case is not a mere toss-off; rather, it is the judge or clerk's first entree into your client's case and the arguments by which you hope to persuade them to reverse the judgment. Thus, as with the entire brief, the Statement of the Case requires careful editing as to content and form. Keep an eye out for long or overly detailed descriptions of the procedures, and delete them (or move them to the procedural section of your substantive arguments) when you find them. Your reader is more likely to become interested in the Statement, and therefore read and absorb it, if your writing is clear and to the point.

THE STATEMENT OF FACTS

As counsel for appellant in a criminal case you have the burden of persuading two of three judges to reverse either the verdict of twelve citizens after jury trial, the verdict of one of their brethren after court trial, or a sentence imposed on an individual convicted of a crime. Your first shot at meeting that burden is the Statement of Facts in the opening brief. Indeed, the court's understanding (or lack of understanding) of the facts frequently determines the outcome of the case.

The primary purpose of the fact statement is to let the court know what the case is about. A well crafted fact statement does much more. It is the means by which you take control of the case by setting up the legal issues you will be raising on appeal – by humanizing your client and/or mitigating the crime, by demonstrating the inadequacies of the prosecution's proof or the reasons why particular errors were prejudicial, and by establishing your credibility with the court.

A. **Get Organized**

The first step towards creating a persuasive Statement of Facts is to read the record carefully and to take comprehensive notes with page citations. That way, you will not have to reread the record as your notes will suffice. If possible, read the record all in one sitting or, with a long record, in one block of time. Most appellate lawyers agree that the best practice is to take careful, even copious notes when you read the trial portion of the record. While the transcripts ultimately will be sent to the client, there is no rule which prohibits marking them up while you have them. Use a highlighter when you read to emphasize the important parts of the testimony. Many practitioners now scan the record, convert it to a readable document, and highlight and make notes on the document on the computer. To get an overview, you might choose to read and highlight the record, and then go back and take notes on what you marked as important.

There are two principal theories about when to write the Statement of Facts. Many practitioners recommend that you write a rough draft of the factual statement as soon as you have completed reading the record, while the facts are fresh in your mind. In such a draft, you should err on the side of over-inclusiveness, then edit out irrelevant matters and refine your language after you have had the chance to formulate the issues and do your legal research. If you cannot do a rough draft right away, do it as soon as you can. The longer the span of time between the reading of the record and the writing of the facts, the more likely it is that you will waste precious, and perhaps unbillable, time rereading portions of the record. It is also more likely that you will forget details or nuances that you originally intended to include.

Other practitioners believe that the best Statement of Facts will be written after you have figured out, at least tentatively, what issues you will be raising on appeal, as the shape of the issues affects how you will organize your fact statement. For example, if lots of evidence was presented as to the identity of the perpetrator, but your issues on appeal all have to do with the instructions on homicide, you will need only the briefest summary of the identification evidence, and will want to pay a lot of attention to the circumstances

surrounding the killing. If you choose, like me, to draft your fact statement when you are writing the rest of your opening brief, it is even more imperative that you make very careful, detailed notes when you review the record, which will hopefully be adequate to refresh your mind about the details of the case after the all-too-often long delay between review of the record and preparation of the opening brief.

After time, you will usually have a rough idea of potential issues, and often an idea of which ones are arguable, after reading the clerk's and reporter's transcripts, even before you conduct any research. If you read the record and highlight testimony, motions, objects and rulings, when you begin to write even a rough statement of facts you should have some idea of what you intend to argue. This may change after you do some research, but you will always go back and edit your statement of facts. For example, upon reading and highlighting a gang expert's testimony, you may already believe there is nothing to challenge. If so, just include a short paragraph about the evidence relevant to the gang enhancement. Don't write pages and pages about every opinion if you already believe there is nothing to argue.

Whichever approach you utilize, when your notes fail you or confuse you on some key point (or when you can't read your own handwriting), *always* go back to the record itself to find out what actually happened or was said. One advantage of scanning your record and creating a readable document is you might remember something that was said and you can search for a specific word you recall.

B. **Matters Usually Excluded From the Statement of Facts**

In most cases, the Statement of Facts summarizes the facts *of the offenses* presented at the trial, not an account of the trial proceedings. The content of pretrial motions, arguments held outside the presence of the jury, opening and closing statements, discussions of jury instructions, the text of jury instructions, and the sentencing hearing and/or matters included in the probation report should not be included. If you plan to raise an error which occurred during one or more of the proceedings just mentioned you can describe the

predicate facts in the argument section of the brief where that error is argued.

In a plea case your statement of facts should generally be taken from the probation report since that is the source of facts the court considers in imposing sentence.

Remember the compensation guidelines require a special reason for reading the preliminary hearing transcript. The most common reason is if a motion to suppress was litigated during that hearing. In a rare case (e.g., defendant waives the probation report and is immediately sentenced) the preliminary hearing transcript may be the only document in the appellate record which contains the facts.

The facts generally should not include lengthy verbatim quotes from the record. A sentence or key phrase may occasionally be quoted directly. But where the precise wording of a witness's testimony or ruling or jury admonition by the court is necessary to explain the basis of a legal error, the specifics of that testimony or ruling, including crucial verbatim quotes, can be presented in the argument section of the brief where the error is raised.[2]

C. **Be Clear, Concise and Engaging**

It is almost impossible to persuade a reader of anything with dull, dry writing. Likewise, when a fact statement is too long, complicated or confusing, all hope of persuasion is lost. It is thus very important to make your Statement of Facts as understand-able, short and interesting as possible.

Unlike the sterile procedures outlined in the Statement of the Case, the human situations played out in trials of criminal cases are inherently interesting, sometimes even gripping. A well-written statement of facts succeeds when it concisely tells the story of the case in a humanizing, compelling manner.

In complex, long-record cases, it will often be impossible and unwise to edit the facts down to keep the Statement relatively short. Never leave out important details for the sake

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2. Even there, caution is advised. Too lengthy verbatim record quotes can bore or distract the reader, a point we know from reading the attorney general's briefs. It is usually better to paraphrase all but the most crucial part of key testimony or procedure.

of brevity. When a complex, long-record case necessitates a lengthy fact statement (i.e., more than 10-15 pages), it is all the more important to make the discussion as clear, readable, and "novelistic" as possible.

1. **Avoid Witness-By-Witness Summaries**

The best approach to organizing a factual summary is to provide a chronological description of the underlying facts of the case (i.e. the facts of the offense(s) charged and the defense(s) presented). The worst approach, generally speaking, is a chronological description of how the evidence was presented at trial. In other words, avoid writing a seriatim, witness-by-witness summary of trial testimony. Very often witnesses are called out of context or out of order at trial. A chronological rendition of trial testimony that was out of sequence in the first place creates a confusing, sometimes misleading and usually very uninteresting picture of the facts of the case. There is nothing worse than having to leaf back and forth between the pages of a Statement of Facts just to figure out what happened. Although some appellate practitioners prepare their fact statements this way the "witness-by-witness" account is a frequent "pet peeve" of appellate judges and their law clerks, and is almost always a bad idea for you and your client.

This is not to say that a witness-by-witness summaries are always unwise. Some cases lend themselves to this approach. For example, there may be three testifying eyewitnesses in the case, who describe very different events in their testimony and gave very different descriptions to the police. In such a case, it is almost impossible to give a single summary of what they saw collectively, and a witness-by-witness account serves to emphasize the differences in their testimony. In other cases, you can strengthen your factual summary with witness-by-witness accounts of discrete portions of the trial evidence (e.g., eyewitness testimony concerning the shooting incident, or divergent psychological evaluations of your client), with the rest of the fact statement organized into a chronological summary of the evidence.

With that said, it should be reemphasized that it is almost always best to organize the

facts so that your summary comes as close as it can to simply telling a story.

2. **Use Subsections When Helpful**

It is often a good idea, especially in factually complex cases, to break down your summary into subsections to enhance the reader's ability to remember what happened. For example, when an insanity defense is presented you may want to summarize the evidence of the crime under one subsection heading and the evidence regarding appellant's mental illness under another subsection.

In longer, more complex record cases, you can help keep the reader's attention by breaking your fact statements up into chronological "chapters": e.g., "Background to Crime," "Planning the Crime," "The Crime," "After the Crime," "Police Investigation and Arrest of Appellant."

Finally, as suggested above, in cases where several witnesses testify to the same events, but each offers a different version, you can enhance your reader's understanding of the factual conflicts at trial by presenting the testimony of each witness under a separate subsection heading (i.e., Joan Kelly's testimony; Frank Walton's testimony).

3. **Identify the Players**

An important function of the Statement of Facts is to clearly identify the various players in your case so the reader can keep track of them.

In most cases this is relatively simple because there are only a few people involved; your client, two eyewitnesses, the arresting officer and the officer who took your client' statement. When there are many players, however, make sure you have carefully identified them. If four of the witnesses are members of your client's family and they all have the same last name, identify who they are initially so that the reader knows who testified to what. Sometimes, after initially identifying the players by name, a more streamlined and less distracting factual summary can be produced if you refer to them thereafter by first or last names, or by their roles – e.g., the bartender, the bouncer, the arresting officer. However,

when you do this, remember to be consistent throughout your brief.

One important side-issue is how to identify your *client* in the fact statement. Many very capable advocates use the generic “appellant” to refer to their client almost without fail in their briefing. Others, including this writer, believe you are almost always better off making some effort to humanize your client by referring to him or her by name in the fact statement, in the same way you refer to all the other people involved. If you refer to each witness by last name, do the same with your client.

A second concern about identifying your client arises in cases where identity is the key issue. In such instances, it is rarely helpful to do what the attorney general invariably does, which is to simply refer to the perpetrator as “appellant.” When identity is not clearly established by eyewitness testimony or the defendant’s admission, it is far more useful to describe this person as “the robber,” “the shooter,” or “the attacker.”

A special rule applies in juvenile cases or to juvenile witnesses. Rule 8.401(a)(1) states that to protect the anonymity of juveniles “a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used.”

4. **Be Complete**

When organizing your factual statement, be sure to provide an honest and complete picture of what happened at trial. You must include all relevant facts, regardless of whether they are good or bad for your client. If your client presented an alibi, but some portion of that alibi was disputed by a prosecution rebuttal witness, you must include that rebuttal testimony. If you do not, the Attorney General surely will, and you will lose credibility with the court. The rule with relevant “bad” facts is not to omit them; rather do what you can to mitigate them.

Along the same lines, make sure you don’t inadvertently omit facts which are favorable to your client. If that same rebuttal witness admitted on cross-examination that he or she was offered a favorable deal in a pending case after agreeing to testify against your

client, that fact should be in your brief because it suggests the witness's rebuttal testimony was unreliable.

5. **Emphasis May Vary Depending on Issues Raised**

One reason to have some idea of the issues you will argue before you write your statement of facts is that the slant in your factual statement may change depending on the issues you will argue. If one of your issues is a challenge to the sufficiency of the evidence, you should include all facts which favor the prosecution's version of events. In evaluating sufficiency of evidence the reviewing court will review the evidence "in the light most favorable to the prosecution." (*People v. Kelly* (2006) 40 Cal.4th 106, 121, fn. 4.) You must write your statement of facts with that in mind. For a sufficiency issue, it does not matter how good the defense facts are. The only question is whether there is sufficient evidence on the prosecution side to prove each element of the crime.

However, if the main issue on appeal is the court's failure to give an instruction on a defense or a lesser included offense, you should write the statement of facts to emphasize those facts which supported the instruction. "A 'court should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever.'" *People v. Eid* (2010) 187 Cal.App.4th 859, 879, citation omitted. The reviewing court must consider the evidence "viewed in defendants' favor." (*Id*. at p. 880.)

5. **Omit Unnecessary Details**

Most readers quickly lose interest with writing that contains useless details. Irrelevant details add nothing to your brief and can seriously detract from its persuasiveness. Inclusion of too many such details telegraphs to your reader that you don't know what is important and what is not. Consider this carefully when determining what facts to include in your summary of the evidence.

It is rarely necessary, for example, to include the exact address of the scene of the crime, or the direction in which the perpetrator fled when he ran from the store, the titles and ranks of the arresting officers, the chain of custody of evidence, or the exact location items

of evidence were found at the crime scene.

Sometimes the entire testimony of witnesses that is critical for purposes of trial, is completely irrelevant on appeal and should be excluded wholesale. This frequently occurs with expert testimony. For example, pages of expert ballistic testimony, which established that your client's gun was the murder weapon, can be excluded from the facts on appeal if there is no dispute about the expert's conclusion. A simple statement that expert testimony established that the bullet found in the victim came from appellant's gun will suffice.

If a series of witnesses testify to the same general events, (for example, three friends of the defendant Jones all testify that he was with them at a party at the time of the burglary charged against him) don't laboriously detail the testimony of each. Just write, "According to three of his friends, Jones was with them between 1 and 3 a.m."

Of course, there will always be a tension between the need to be complete and the imperative of avoiding unnecessary details. The best approach is to err on the side of over-inclusiveness in your first draft of the fact statement, then whittle it down appropriately later on, when you know precisely which issues are being raised on appeal and which factual matters are significant in the case.

6. **Do Not Present Your Client in a Bad Light**

Always be vigilant about the manner in which you refer to your client or the manner in which you characterize the facts of your case so that you do not unnecessarily portray your client in a bad light. For example, if your client screamed obscenities at the judge and trial counsel when a motion was denied, that irrelevant fact should be excluded. Although it occurred at the time of the motion, it adds nothing to your later legal argument that the motion was improperly denied. As always, there are exceptions to this rule. One basis for denying a motion for self-representation is that the defendant will be disruptive if he represents himself. If that is the issue, you cannot avoid noting he screamed obscenities when the court denied his request. You will have to acknowledge it and deal with it.

If your client was convicted of strangling a seventy year old invalid with drapery

cords then repeatedly hit her in the head, it is pretty hard to minimize the atrociousness of the crime, but you can avoid maximizing it. For example, rather than saying, "The evidence established that the 70 year old victim, an invalid for 20 years, was forcibly strangled with a curtain cord and then bashed repeatedly on the head," break up the information and use less colorful language. Describe the age and health of the victim in one portion of your facts, and save the description of the cause of death for a later portion. Then state simply that the victim was strangled and was hit several times, or words to that effect. You will still have a complete and accurate factual summary, but you will minimize the shock value of those facts.

Along these lines, don't leave out information that makes your client look good. If your client testified to an alibi which was corroborated by two witnesses who said the same thing she did, don't exclude any mention of those witnesses just because the content of their testimony was the same as your client's. At minimum, you should state that two witnesses corroborated your client's testimony, identify the witnesses and make appropriate citations to the record.

7. **Never Use Police Jargon**

Police officers often use stilted and tortured phrases in their testimony. This police jargon has no place in an appellate brief. The police officer in your case might testify, for example, that he "responded to the scene" and immediately "exited his vehicle" so as to "detain the black male subject." Don't use such language. Change it to normal English and recount that the officer "arrived at the street corner, got out of his car and grabbed hold of Jones, detaining him."

8. **Should You Identify the Source of the Evidence, Defense or Prosecution**?

Some practitioners always specify whether the source of facts summarized comes from defense, as opposed to prosecution witnesses. Judges from the Fourth District frequently have suggested that fact statements be broken down into "Prosecution Evidence" and "Defense Evidence" sections. Others avoid this separation when it detracts from

effective story telling and/or a succinct and focused presentation of the facts. Also, if the standard of review is to view the evidence in the defendant's favor, it should not matter who the witness is.

D. **Always Be Accurate**

It is extremely important to be accurate when summarizing the facts of your case. Appellate clerks and justices rely on the factual summaries contained in the briefs in deciding the case. If they discover your summary is not accurate they will disregard it and be even more likely than normal to rely on the Attorney General's rendition of the facts. Once that happens you've lost your ability to persuade because you've lost both your credibility and the court's attention.

1. **Never Distort or Exaggerate the Facts**

As mentioned earlier, a proper Statement of Facts includes the bad facts as well as the good. It is equally important not to distort, exaggerate or mislead the court about the facts you include. If an eyewitness testified that he or she is positive your client was the robber, you must say an eyewitness identified your client. You need not emphasize that identification by repeating that the witness stated he or she "would never forget that face" or was "one hundred percent sure, no doubt about it." However, it would be highly improper to mislead the court by suggesting that the witnesses's identification was equivocal when it wasn't.

The same is true of facts helpful to the defense. If an eyewitness testified he or she believes your client was the perpetrator, but is not absolutely sure, don't exaggerate that testimony by claiming the witness was "unable to identify appellant". Give an honest description of the testimony. Save your characterization of that testimony (i.e. that the witness could not positively identify appellant) for the argument portion of your brief.

2. **Stay Within the Record: Never Present Matters in Your Factual Summary Which Are Not Part of the Record on Appeal**. Rule 8.204(a)(2)(C) of the California Rules

of Court provides that factual summaries must be "limited to matters in the record.". Never run afoul of this rule. At minimum you will incur the distaste of the judge and/or clerk who reads your brief and lose your credibility. At maximum you run the risk of opposing counsel filing a motion to strike your brief and or the offending portions of your brief.

E. **Be Persuasive, Not Argumentative**

The Statement of Facts is not the place to affirmatively argue the merits of your case. This includes the use of argumentative adjectives and adverbs in the fact statement. At the same time, a well thought out and carefully organized factual summary can present the facts in such a persuasive manner that you will be effectively "arguing" your case between the lines. Don't write, "The officer recklessly swung his baton, striking appellant in the head." Instead, you can convey the same thing by sticking to the facts adduced in the testimony: "Moments after appellant put his arms behind his head, Officer Jones hit him in the head with his baton."

1. **Organize the Facts To Emphasize Good Points and Downplay Bad Ones**.

In your zeal to avoid being argumentative, you should avoid the opposite trap: making a fact statement read like respondent's sufficiency of evidence argument. A fact statement need not be presented "in a light most favorable to the prosecution"; rather, it must be an accurate, thorough, fact-based summary by an advocate on behalf of his client. If you have a case in which various witnesses offered conflicting evidence, don't summarize the conflict in a way which favors the prosecution's proof on the counts of conviction. Instead, emphasize the conflicts in the manner you organize the facts. You can persuasively show how this makes the prosecution's evidence weak and the ultimate verdict questionable without ever arguing these points.

For example, if a damaging prosecution witness testifies to a series of things, some of which were impeached by testimony presented by another prosecution and/or defense witness, you can, in effect, "argue" that this witness should not be believed merely by the

manner in which you put together the factual summary of this evidence. After each of the items claimed by such a witness you can immediately note the contrary testimony presented later at trial.

> "White described the burglar as 6 feet tall and weighing over 200 pounds. [cite] Jones Green and Wilson, however, all agreed the man was of slight build, no taller than 5'5", no heavier than 150 pounds. [cite] White claimed the burglar had a large gun in his hand. [cite] None of the other witnesses to the crime agreed with her. Green and Wilson were sure the burglar had no weapon. Jones did not see the burglar's hands, but believed he would have seen a gun had the burglar been brandishing one. [cite]")

2. **Avoid Editorial Comments and Personalities**

Editorial comments about the weight or sufficiency of the evidence have no place in your factual summary. ("Ms. Wilson, a patently incredible witness, stated that. . . .") Characterizations of the personalities or actions of the players at trial are equally improper. ("After repeatedly badgering Smith, the prosecutor finally elicited testimony that. . . .") Instead, make the same points through the organization of your facts or through the careful use of language, and save the choice judgmental comments for proper argument.

Pay attention as well to the manner in which you describe the various players at trial, trying to avoid lending undue respectability, and therefore credibility, to a witness you want to discredit. For example, if a police officer testifies he or she is the detective in charge of the Sonoma County Narcotics Eradication Task Force, you should just call him or her "officer." There is no need to emphasize the accomplishments or titles of such witnesses.

For the same reason, it is also a good stylistic point to refer to the prosecutor as "the prosecutor," never "the People."

3. **Use the Facts to Set Up Your Legal Arguments**

When you sit down to write or edit the final version of your factual summary you will know what legal issues you plan to raise. Make sure that your facts include those items of evidence necessary to set the scene for your legal arguments. If you plan to argue the

evidence was insufficient to sustain the conviction, for example, your factual statement will generally need to be more detailed and include every fact which favors the prosecution on the element you plan to challenge. You want the Court of Appeal to have a comprehensive knowledge of the entire record when it determines the merits of your issue. The same rule holds for most claims of trial error, where you will often need to summarize the entire factual record in the case to argue that the case against appellant was not strong. If you plan to challenge the trial court's denial of a motion to exclude certain evidence, your factual statement should include the testimony or exhibits which resulted in introduction of the offending evidence at trial, sometimes combined with an indication about the defense objection (if there was one). But remember, though, that it is usually inappropriate to highlight procedural facts, e.g., a defense objection, into a fact statement. Do it obliquely: "The letter, admitted over defense objection, detailed the codefendant's advice to the appellant about handling police inquiries. (RT 445)"

When there is no dispute about a particular event, you can simply concede that event on appeal. For example, in a mistaken identification case where there is no disagreement that the crime occurred and the argument on appeal concerns faulty eyewitness identification instructions, don't belabor the details of the crime. Describe it generally, concede it if appropriate, and focus instead on the specific conflicts between the descriptions of the perpetrator or other facts which indicate the identification was unreliable. Conversely, if your issue is the failure to instruct on self-defense or some other defense, you want to highlight the evidence, typically the defendant's own testimony, which supported that defense. "*However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true*." (*People v. Carmen* (1951) 36 Cal.2d 768, 773, emphasis in original.)

Conclusion

This document attempts to describe important "do's and "don'ts" in preparing the introductory statements, giving some sense of various options employed by different

advocates where there is not a uniformity of views. Hopefully these ground rules and suggestions will help you do this important preliminary work in writing effective opening briefs. Probably no subject in appellate advocacy receives less attention for all its importance to quality brief-writing. Ultimately you will develop your own stylistic ways of approaching many of the matters addressed in this summary. But If, as many believe, cases are generally won or lost with the opening brief, the Statements of Appealability, Case and Facts, especially the Statement of Facts, are the crucial first salvos in which you must strive to effectively summarize the procedural and factual underpinnings of the appeal, establish your own skill and credibility as an advocate, and make significant steps toward demonstrating that an injustice deserving redress occurred in your client's case. Here's hoping the foregoing discussion is helpful to you in this key part of your very important work.