

ELUSIVE EXCEPTIONS TO WAIVER & FORFEITURE BARS

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This short Addendum supplements FDAP’s “Elusive Exceptions to Waiver & Forfeiture Bars,” originally prepared in Jan. 2004 and updated and revised through Oct. 2013. (Page references are to the 2013 revised version.) There has been no attempt here to include all the intervening cases applying the various waiver/forfeiture exceptions addressed in the previous materials. This addendum is limited to recent opinions extending or clarifying those principles or illustrating their application in different contexts.

Change in law/Futility. (See Elusive Exceptions, pp. 9-10, 12.)

- *People v. Perez* (2020) 9 Cal.5th 1 (gang expert hearsay). Supreme Court excuses failure to object to testimonial hearsay in gang expert testimony in trials conducted before *People v. Sanchez* (2016) 63 Cal.4th 665. An objection would have been futile under pre-*Sanchez* precedents that were binding on lower courts, especially a 1996 California Supreme Court opinion, *Gardeley*. The Court rejected contention that defense counsel should have anticipated change in the law and objected based on criticisms of *Gardeley* and opinions on other confrontation issues. “This ... is beyond what we have required and too amorphous a standard to place on trial counsel.” *Sanchez* at 13. “[A] defendant need not predict subsequent substantive changes in law in order to preserve objections.” *Id.* at 10.

Discretion to address clear error affecting “important issue of constitutional law or a substantive right.” (See Elusive Exceptions, pp. 10-12.)

- *People v. Anderson* (2020) 9 Cal.5th 946 (unpleaded sentence enhancements). Trial court imposed vicarious firearm use with injury or death enhancements of 25-years-to-life (§ 12022.53(d)-(e)) on several robbery counts, although information had only pleaded lesser firearm

enhancements (§§ 12022.5(a), 12022.53(b).) Trial counsel did not object on the ground that the greater enhancements had not been pleaded as to those counts. However, the Supreme Court exercised its discretion “to decide an otherwise forfeited claim where the trial court has made an error affecting ‘an important issue of constitutional law or a substantial right.’” *Anderson* at 963. The *Anderson* opinion draws together several of the considerations relevant to discretion to review such unpreserved claims: “First of all, *the error here is clear and obvious*. Second, *the error affected substantial rights* by depriving Anderson of timely notice of the potential sentence he faced. And finally, the error was one that goes to *the overall fairness of the proceeding*.” *Ibid.* (emphasis added).

- Although it exercised discretion to review the claim, the *Anderson* Court held that the unpleaded enhancement scenario there did *not* represent an “unauthorized sentence” under the Court’s 2000 *Mancebo* opinion (discussed in *Elusive Exceptions*, pp. 2-3). “*Mancebo* does not stand for the broad proposition that imposition of an unpleaded enhancement necessarily results in an unauthorized sentence that may be raised, and corrected for the first time on appeal.” *Anderson*, 9 Cal.5th at 962.

Cautionary instructions and other instructions on certain categories of evidence. See *Elusive Exceptions*, p. 4.

- **Cautionary instructions on oral admissions not sua sponte; must be requested.** *People v. Diaz* (2015) 60 Cal.4th 1176, 1188-1195. Most cautionary, limiting, and “pinpoint” instructions do *not* come within a trial court’s sua sponte instructional duties. However, for years, California case law did require a court to instruct sua sponte that evidence of a defendant’s oral admissions or other incriminating statements should be viewed with caution if the statement was not recorded. See CALCRIM 358. In *Diaz*, the Supreme Court overruled these prior authorities and held that a court is only required to deliver a cautionary instruction on oral admissions if the defense specifically requests such an instruction.

- **Accomplice instructions still within sua sponte duties.** In contrast, the Supreme Court continues to require sua sponte instructions on the principles governing review of accomplice testimony where there is sufficient evidence to support a finding that a prosecution witness was an accomplice to the charged offense. *Diaz*, 60 Cal.4th at 1193-1194; see *People v. Guinan* (1998) 18 Cal.4th 558 (discussed in *Diaz*). These include the rules requiring corroboration of accomplice testimony and the admonition that such testimony should be viewed with “care and caution.” See CALCRIM 334-335.

Discretion to review prosecutorial misconduct. See Elusive Exceptions, p. 11.

- E.g., *People v. Denard* (2015) 242 Cal.App.4th 1012, 1092 (appellate court exercises discretion to consider unobjected-to misconduct affecting “substantial rights” – prosecutor’s argument that defendant “does not want to take responsibility for his actions” amounted to comment on his failure to testify, *Griffin* error).

Discretion to review error where circumstances impeded counsel’s opportunity to object.

- *People v. Young* (2017) 17 Cal.App.5th 451, 461-463. Due to defense counsel’s illness, only “stand-in counsel,” who was not familiar with case, was present when court announced it had excused a juror who hadn’t arrived and substituted an alternative. Although defense counsel did not object to the removal when she returned the following day, the forfeiture question was difficult because counsel may have believed that it would have been futile to do so after the fact. Because the removal of the juror affected the defendant’s constitutional rights, the appellate court exercised its discretion to review the issue.