MAKING A PRIMA FACIE CASE ON APPEAL

By: Jonathan Grossman and Dallas Sacher

I.

STATEMENT OF APPEALABILITY

The statement of appealability should be formulaic. I have on a template just about all of the possible statements of appealability I could use. They are:

This is an appeal from a final judgment of conviction following a jury trial. It is appealable under Penal Code section 1237.

This appeal is from a final judgment following a guilty plea and is based on the sentence imposed. It is authorized by Penal Code section 1237.5 and California Rules of Court, rule 8.304(b)(4).

This appeal is from a final judgment following a guilty plea after denial of a Penal Code section 1538.5 motion and is authorized by Penal Code section 1538.5, subdivision (m), and California Rules of Court, rule 8.304(b)(4).

This appeal is from a final judgment following a plea of guilty and issuance of a certificate of a probable cause. It is authorized by Penal Code section 1237.5 and California Rules of Court, rule 8.304(b)(4).

This is an appeal from an order after judgment affecting appellant's substantial rights and finally resolves the issues between the parties; thus an appeal is authorized by Penal Code section 1237, subdivision (b).

This appeal is from a final judgment entered pursuant to

Welfare and Institutions Code section 602 and is authorized by Welfare and Institutions Code section 800.

This appeal is from an order after judgment affecting the parties' substantial rights. The appeal is authorized by Welfare and Institutions Code section 800.

This appeal is from an order transferring the matter from the juvenile court to the adult court. The appeal is authorized by Welfare and Institutions Code section 801.

This appeal is from a judgment under Welfare and Institutions Code section 300 following a dispositional hearing and is authorized by Welfare and Institutions Code section 395.

This appeal is from an order under Welfare and Institutions Code section _____ and is authorized by Welfare and Institutions Code section 395 as an order after judgment.

This appeal is from a judgment terminating parental rights pursuant to Welfare and Institutions Code section 366.26 and is authorized by Welfare and Institutions Code section 395.

This appeal is from a judgment establishing a conservatorship under Welfare and Institutions Code section 5350 and is authorized by Welfare and Institutions Code section 5001, subdivision (d).

This appeal is from a final judgment ordering an involuntary commitment following a jury trial under the Sexually Violent Predators Act. (Welf. & Inst. Code, § 6600, et seq.) It is appealable under Code Civil Procedure section 904.1, subdivision (a)(1).

Please note that some appellate districts, such as the

Second District, want to see in the statement of appealability what the order being appealed from is, when it was made, and when the notice of appeal was filed. Aside from this, nothing else belongs in the statement of appealability section of the brief.

II.

STATEMENT OF CASE AND STATEMENT OF FACTS

A. Statement of the Case

The statement of the case should be short. In a typical case, it should state when the information, indictment, or complaint (if there was not an information) was filed and what charges were alleged; what the defendant was convicted of and whether there was a trial or plea; what the sentence was and when; and when the notice of appeal was filed.

The first paragraph describes the charges. One should avoid jargon. It is usually enough to say someone was charged with domestic violence or rape, as opposed to the legalese that is found in the charging document. One should always give the statute number the first time the offense is mentioned, but one does not need to say count one, count two, etc. unless it is necessary for future reference in the brief. It is not necessary to say the defendant pled not guilty.

The next paragraph describes how the defendant was convicted. Some people add how long a trial was. This is sometimes helpful to understand how big the case was, and the relevant information is how long it took to present the evidence. If there was not a trial, it is sufficient to say the defendant pled guilty (or no contest) to which charges and how long the agreed sentence or sentence range was, if any.

The next paragraph describes the sentence. It is good to first give the global sentence and then break down how the sentence was calculated. In most situations, it is better to say what the conviction was, not the count. This avoids the need for the reader to flip around the brief to know what count belonged to which charge. If any allegations were dismissed, struck, or stayed at sentencing, this should be mentioned. Other parts of the sentence – such as fines, presentence credits – do not need to be mentioned unless they are relevant to an issue in the brief. Always give the date of the sentencing hearing or the order being appealed from.

The last paragraph explains when the notice of appeal was filed. This establishes the appellate court has jurisdiction.

For orders after judgment, a description of the order being appealed from can be added after describing the sentencing. Many times, the information before the judgement can be consolidated. For example, in an appeal from a petition for resentencing, one can say the defendant was convicted in a certain year by plea or trial of certain offenses and sentenced on a certain date to however long it was. The next paragraph would explain what petition was filed and when. The last paragraph would explain the court's order and when it was made. Then, the date of the notice of appeal is mentioned.

B. Statement of the Facts

A statement of the facts should be as short as possible and yet include all relevant facts. How does one navigate the two contradictory goals?

First, keep in mind that a statement of the facts should be objective. It must include the bad facts. Second, "[i]t is the duty of

counsel to refer to the portion of the record supporting his contentions on appeal." (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) Third, "[o]n appeal, we begin with the presumption that the record contains evidence sufficient to support the judgment. (*Foreman & Clark v. Fallon* (1971) 3 Cal.3d 845, 881.) It is the appellant's burden to demonstrate otherwise. The appellant's brief must set forth all of the material evidence bearing on the issue, not merely the evidence favorable to the appellant, and it must also show how the evidence does not sustain the challenged findings." (*Ibid.*)

When there is an attack on the sufficiency of the evidence, it is vital to mention all bad facts. "A party who challenges the sufficiency of evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient." (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208.)

Nonetheless, the statement of facts should be written to put the appellant in as good as light as possible. For example, if the cause of death is not an issue, it might be possible to paraphrase the long testimony of the coroner. In this sense, the statement of facts can be subtly persuasive.

Some people write the statement of facts as they read the record. While this increases efficiency, I find this to be a bad practice. First, this diminishes the potential persuasive value of the statement of facts. Second, this inevitably results in including facts that are unnecessary to discuss. Third, this often results in a witness-by witness account, which is difficult for the reader to

understand. It is much better to write a narrative. Instead, a statement of facts should be written after one has a good idea what issues will be. Some experienced practitioners do not write the statement of facts at all until the argument portion of the brief is completed. It is also important to attribute each fact to the witness or witnesses who said it with a citation to the record. Do not have a long citation at the end of each paragraph.

If the only issues from a jury trial are sentencing errors, only a brief description of the crime is necessary. If the issues attack only some of the convictions, a description of the remaining convictions can be short. If it is an appeal from an order after judgment, about a paragraph or two about the offense might be sufficient.

Sometimes, the facts are irrelevant to the issues raised on appeal. I think it is good to have some facts to give some life to the case. Unless there are no facts in the record, one should not simply assert the facts are irrelevant.

C. Background information

The procedural history and predicate facts to every claim of error must be in the brief. However, the statement of case does not need to say the court admitted certain evidence, and the statement of facts does not need to describe counsel's objections. This information should instead be at the beginning of each claim of error. It is important to state exactly what counsel's objection was and what the court's ruling was. The Attorney General often argues that an aspect of the claim of error was not within the scope of the objection. A clear statement of the background facts will make it clear whether this is true and would prompt you in the opening brief

to proactively work on the problem by changing the claim of error, adding an argument about how the full claim is cognizable on appeal, or by including a back-up IAC argument.

D. Introductions

I have heard numerous justices state they really like a good introduction. I think introductions are both overrated and underrated.

In short briefs, introductions are often unnecessary. Instead, they make the brief unnecessarily long and create a sense of redundancy because I am reading the same thing several times.

Introductions are more valuable in long briefs. However, they are sometimes long or strident, which can alienate the reader. A good introduction is short, less than a page, sometimes just a paragraph. It goes to the heart of the argument. Because it is the first thing the reader sees, there is often a need to orient the reader to the salient facts of the case. It is also a good vehicle for introducing any theme you might have in the appeal. Nonetheless, it should essentially serve as a summary of the arguments.

Some people put the introduction first. However, some district courts of appeal prefer to see the statement of appealability before an introduction.

III.

THE SELECTION OF ISSUES IS BEST GOVERNED BY YOUR USE OF FUNDAMENTAL COMMON SENSE.

The question is how counsel should go about selecting issues from the universe of *arguable* claims. I believe that there are a few common sense notions that can be used in performing this task. As

a starting point, appellate lawyers frequently debate the wisdom of raising more than two or three issues in a case. Those who argue for a limited number of issues find powerful support in the traditional view of Justice Jackson that a multitude of issues will cause an appellate justice to conclude that your appeal is weaker than it is. (*Jones v. Barnes* (1983) 463 U.S. 745, 752.) I am not persuaded by this view.

My experience tells me that it is not the number of issues that serves to distract the reader. Rather, it is the unduly lengthy and redundant brief that harms the client's case. If a lawyer is capable of writing clear and succinct arguments, the reader will not become bored. I have perused any number of lengthy briefs that held my attention due to the author's superior analytical and writing skill.

Sometimes, counsel will have the good fortune to have five or six strong issues. In such a case, counsel does a disservice to the client by abandoning an argument that has a plausible chance of success. After all, it is the lawyer's duty to advocate and the court's duty to decide. A lawyer should not change roles and adjudicate an argument in place of the court. If the issue is a good one, the court should be the one to pass judgment.

Experience is the best teacher. I have seen a murder conviction reversed on the basis of the sixth issue raised in the opening brief. Since all six of the issues were perfectly valid, counsel performed ably by allowing the court to consider all six.

In determining whether to advance an issue, the primary criterion is whether a plausible claim of prejudice can be made. As we know, showing error is the easy part. Establishing prejudice is

often difficult. If you cannot show prejudice, there is no point in raising an issue. If you raise an error that truly had no impact on the result, you will only lose credibility with the court.

However, as is almost always true in the practice of law, there is an exception to this rule. Occasionally, there is a tactical benefit to raising an arguable, but ultimately losing, issue. The best example relates to insufficiency of the evidence claims.

A claim of insufficiency of the evidence is difficult to win since the standard of review tilts strongly in favor of the judgment. However, if the People's case was weak in certain respects, a challenge to the sufficiency of the evidence will educate the reader to believe that the trial was far from open and shut. This type of education may well tip the reader towards the conclusion that other arguments require reversal since the case was a close one.

A second consideration in selecting issues is whether you can connect a series of points that support a theme. While the ultimate theme is that the defendant did not receive a fair trial, there are a large universe of case specific themes. An example of a good theme is as follows.

I once had a case where the client was convicted of murdering his 84 year old adoptive mother on the theory that he persuaded her to desist from taking her prescribed medications. The hole in the People's case was that their own medical expert was unable to posit a cause of death. Thus, the lead issue was that there was insufficient evidence to prove that the actus reus (i.e. the client's advice to his mother) was the proximate cause of death. Significantly, I was able to pair this argument with a claim of

ineffective assistance of counsel since the trial attorney had failed to call an expert witness who would have testified that the mother's physical condition was such that she could have died from four or five causes which would not have been prevented by her medications. These two issues tied together in a very neat way and supported the theme that there was a substantial doubt as to whether the client had actually "killed" his mother.

In the usual case, your various issues will not be as closely related as they were in the foregoing example. Nonetheless, you can still have a theme. For example, if the trial court committed five separate evidentiary errors, your theme will be that the trial was a shambles since the People were allowed to introduce a mountain of unreliable and/or prejudicial evidence while the exculpatory evidence was excluded. Or, in a case involving multiple instructional errors, the theme may be that the jury was hopelessly confused.

It is important to note that not every case has a theme. Sometimes, a case will present several good issues which involve entirely separate areas of the law. In such a case, you do not want to lose credibility by manufacturing a less than credible theme.

As a corollary to your search for a theme, it is good practice to select issues that are compatible. If there is a claim that there is insufficient evidence regarding an element of the offense, it is very useful to pair the issue with a claim of instructional error regarding the element. Or, if the trial court overruled the defense objections to several types of prejudicial evidence (i.e. gang evidence, evidence of the defendant's drug use or prior acts of violence), a multi-part argument can be mounted that the defendant was denied a fair trial

due to the cumulative weight of the inadmissible evidence.

As the foregoing techniques reveal, one's personal experience will inform the choice of issues. After handling a number of appeals, a lawyer will have a good idea of what "sells" to a court. If the court has a history of not purchasing certain issues, a lawyer is not doing a good job for the client by raising arguments that are either non-starters or have outlived their utility by being ritualistically raised and rejected. However, this is not to say that there are not issues which must necessarily be raised until they succeed.

A criminal appellate lawyer has an ethical duty to argue for change in the law if reasonable argument can be made in support of the change. (*People v. Feggans* (1967) 67 Cal.2d 444, 447.) If you strongly believe that a higher court will eventually accept your view of what the law should be, the issue should be raised. If we fail to proceed in this manner, the law can never change for the better.

IV.

THE PRIMA FACIE CASE FOR RELIEF.

The elements of the prima facie case are: (A) a proper argument heading; (B) the material facts and procedural history underlying the claim; (C) the objection or offer of proof (or assertion that no objection or offer of proof was required) and ruling on the claim; (D) a precise statement of the legal basis for your claim; (E) the standard of review; (F) an exposition of the law establishing that error occurred; (G) a showing of prejudice; and (H) a statement of the remedy requested. Careful attention is required as to each of these elements.

A. Headings

Although it may seem too obvious to state, the initial component of the prima facie case is the heading for your argument. Pursuant to California Rules of Court, rule 8.204(a)(1)(B), it is incumbent upon counsel to state "each point under a separate heading or subheading summarizing the point...." If you fail to properly state your contention in a heading, the court may deem the claim to be forfeited. (*People v. Scott* (2009) 179 Cal.App.4th 920, 924 [argument forfeited where it was not developed under a heading].)

As a matter of good practice, counsel should assert any and all federal constitutional bases for the contention in the argument heading. This practice serves two purposes. First, if you have a federal claim, you will want to raise and exhaust it in state court so that your client can fight another day on federal habeas. In order to get to federal court, the client's federal claim must have been expressly raised in both the Court of Appeal and the California Supreme Court. (*Duncan v. Henry* (1995) 513 U.S. 364, 365-366 [federal relief unavailable where the Fourteenth Amendment was not mentioned in the defendant's state court pleadings].) Second, the practice of always including your federal claim in the argument heading will serve as a check against your inadvertent failure to preserve the client's federal claim. If you always federalize in the argument hearing, you will never fail to remember to federalize.

B. Background Facts

The recitation of the material facts and procedural history is the second component of the prima facie case. Facts are the lifeblood of any legal argument. An issue of law does not exist in an abstract vacuum. Rather, a legal issue can only be rationally analyzed in the context of the facts which gave rise to the issue. For this reason, counsel has a duty to fully and carefully recite the facts and procedural history which form the basis for the claim of error.

In stating the relevant facts and procedural history, counsel should not forget the guiding principle of brevity. The reader already has a global recitation of the evidence from the Statement of Facts section of the brief. The facts depicted at the beginning of a legal argument should be limited to those which bear on the issue at hand.

Of course, the nature and length of your factual and procedural recitation will vary depending upon the specific legal issue being advanced. A few examples follow.

Typically, Fourth Amendment claims are fact intensive. Stops and searches usually occur on the street and involve a chain of events. In order that the court may fully appreciate the various legal nuances attendant to our complicated Fourth Amendment jurisprudence, it is critical that a detailed factual account be given. This is necessarily so since the analysis usually involves discrete, sequential issues involving detentions, pat searches and the existence or non-existence of probable cause to justify a search or arrest. The court needs to know all of the facts in order to decide these various issues.

By comparison, some evidentiary issues require very little factual recitation. For example, the prosecutor will often produce evidence that the defendant possessed a weapon other than the one used in the commission of the crime. In setting up the claim that the court erred by allowing admission of the evidence, the factual recital need only be a two sentence summation showing that a police officer went to the defendant's house and found a .45 magnum, or a knife or whatever.

Similarly, many instructional claims require very little reference to the record. In a homicide case, the issue might be that the trial court erred by failing to give an instruction on antecedent threats made to the defendant. (See CALCRIM No. 3470.) The relevant factual basis for the claim can be efficiently stated: on a prior occasion, the alleged victim threatened to kill the defendant. Nothing more is required.

As with all components of an opening brief, the guiding principle is that the recitation of the facts should be both authoritative and concise. Counsel should provide all of the necessary facts that support the claim of error. In so doing, redundancy should be avoided and collateral facts should be excised. Precision in the statement of the evidence will earn both the admiration and attention of the court.

C. Cognizability

The third component of the prima facie case is a reference to the place in the record where defense counsel raised the legal issue at hand. You should state the exact nature of the objection or request. A page citation to the record is required in every instance.

The failure to cite to the record will highly aggravate the personnel at the Court of Appeal.

Special attention is required with regard to evidentiary issues. By statute, a claim of error relating to the admission of evidence is barred on appeal absent a contemporaneous objection. (Evid. Code, § 353.) Similarly, a claim involving the exclusion of evidence requires an offer of proof unless the evidence was offered during cross-examination. (Evid. Code, § 354.) Most importantly, the Supreme Court has said that an appellate court has no authority to excuse defaults under sections 353 and 354. (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.) It is therefore incumbent upon counsel to carefully establish that a sufficient objection or offer of proof was made.

For the most part, a legal claim must first be advanced in the trial court in order to be cognizable on appeal. This is true of the oft raised claims of prosecutorial misconduct and sentencing error. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Scott* (1994) 9 Cal.4th 331, 336.) As is the case with evidentiary error, care must be taken to carefully state the exact objection or argument made in the trial court.

Of course, some issues can be raised on appeal without prior objection. Most instructional claims fall within this category. (Pen. Code, § 1259.) Claims of jurisdictional error involving the statute of limitations or "unauthorized" sentences can also be raised for the first time on appeal. (*People v. Williams* (1999) 21 Cal.4th 335, 337-338; *People v. Scott*, supra, 9 Cal.4th 331, 354.) If you have an issue that falls within one of these categories, you will need to expressly

cite the authority that establishes that an objection was not required to preserve the issue.

It is foolish to fudge about the sufficiency of the objection or offer of proof. Obfuscation will not work. The Attorney General is trained to dissect the sufficiency of the objection or offer of proof. If there is any doubt as to whether an adequate record was made below, you will need to add a backup claim of ineffective assistance of counsel. The claim has to be made under a separate heading or subheading and the prejudice test of *Strickland v. Washington* (1984) 466 U.S. 668 must be applied. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be stated "under a separate heading or subheading summarizing the point. . . ."]; *People v. Bryant* (2013) 222 Cal.App.4th 1196, 1206, fn. 11, ptn. for rv. pending [claim of ineffective assistance of counsel deemed forfeited where it was raised in a "single sentence . . . ."].)

D. Thesis Sentence

The fourth component of the prima facie case is the statement of the legal basis for the claim. The legal basis must be stated with precision and accuracy in order to guarantee that the Court of Appeal will understand the claim and actually address it. As has been discussed above, it is particularly important that any federal constitutional issue be expressly raised by reference to the supporting constitutional provision. For example, if the issue involves the trial court's curtailment of the cross-examination of a government witness, you should state your legal basis as "the trial court erred under the Confrontation Clause of the Sixth Amendment when it precluded proper cross-examination of witness X."

A viable legal argument can arise under a myriad of legal principles. The legal basis of an argument can be anything from the state or federal Constitutions to state statutes to arithmetical errors in the calculation of the length of the sentence or presentence credits. Regardless of what the legal basis may be, your duty is to state it clearly.

E. Standard of Review

The fifth component of the prima facie case is the standard of review. This component is often the determinative factor in an appeal. The standard of review is the court's guidepost for deciding the case. If you fail to cite the standard, your credibility with the court will be shot. As with the objection requirement, you cannot fudge the standard of review. If the standard is unfavorable (e.g. abuse of discretion), you have to acknowledge the standard and do your best to show that it is satisfied.

Oftentimes, an appellate advocate will suffer a moment of despair or loss of faith upon realizing that the standard is unfavorable. However, there are some helpful nuances in the law even though a standard of review is seemingly adverse to the defendant.

The real world meaning of the abuse of discretion standard is that the appellant loses unless the trial court did something really crazy. This is the standard for most sentencing claims. Stated in legal terms, it is appellant's burden to establish that the court's ruling was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) Occasionally, a court's action will fit the bill.

For example, a court has discretion in making an award of

victim restitution. (*People v. Garcia* (2011) 194 Cal.App.4th 612, 617.) But, the court "must employ a rational method" for calculating the amount of restitution. (*Ibid*.) When the method is faulty, a remedy can be obtained. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 995-996 [court erred by awarding 13 months of lost value for rental of cement mixer since the victim acted unreasonably by waiting that long to replace the mixer].)

As the example reveals, the trick is to find a foothold in the case law where a specific circumstance has been found to be irrational or arbitrary. While such nuggets are rare with respect to routine sentencing issues such as the length of the term, careful research can sometimes yield helpful results.

A different take on the abuse of discretion standard can be found in the area of evidentiary error. The courts have said that a trial court's evidentiary rulings are subject to review for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) However, for the most part, this assertion is lip service since most evidentiary issues actually present pure questions of logic (i.e. issues of law). An example can be found in the precedent involving Evidence Code section 403.

Pursuant to section 403, the trial court acts as the gatekeeper in determining whether evidence has a sufficient foundation to go to the jury. Although the Supreme Court has said that a court is vested with discretion under section 403, trial judges are admonished to exclude evidence "only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.' [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) By

definition, the court will abuse its discretion under this test if it excludes evidence that has any plausible foundation. Presumably, appellants will frequently prevail on this issue regardless of the supposed abuse of discretion standard.

F. The Merits of the Claim of Error

The sixth component of the prima facie case is the exposition of the law establishing that error occurred. In advancing the merits of an issue, it is important to first set forth the thesis of your argument. Once the thesis is stated, you can then discuss the relevant legal principles which support your position. In so doing, you should not forget our guiding principle: present your argument with brevity and precision.

A common belief of young attorneys is that it is necessary to discuss each case precedent in detail with respect to both its facts and reasoning. This is simply untrue. The appellate court is interested in the bottom line. The resolution of your case will turn on whether the *holdings* in prior cases support your position. Unless there is a case specific reason to do so, you should cite cases solely for their holdings and those details that are relevant to your case.

The best technique for efficiently citing case law is to summarize the holding in a single sentence. For example, if the issue before the court involves the proper scope of a statute, you can synopsize a holding in the following manner: "(*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1102, fn. 5 [Penal Code section 1237.1 requires the defendant to "raise the issue at sentencing, or, upon later discovery of miscalculation, by motion for correction of the record in the trial court. [Citation]."].) As the example shows, the

reader has been quickly given the relevant principle stated in the case.

In preparing your legal analysis, you will be confronted with the tactical decision as to whether you should address the counter-arguments that might be made in opposition to your position. Although this decision has to be made on a case-by-case basis, there are two applicable rules of thumb.

First, if you have no doubt that the counter-arguments will be advanced by the People, they should be addressed. By raising the issues in the first instance, you will demonstrate to the court that you are a thorough, thoughtful and fair minded advocate. By fostering this reputation, you will help the present client and your future clients.

Second, counsel should be wary of the problem of arguing "uphill." If you are bright and well informed, you can always imagine more arguments against your position than will ever be presented by the People. In my experience, the Attorney General typically raises only the most obvious arguments and does not worry about more esoteric points. As a result, you should do the same. If a possible counter-argument is not obvious, you should not bring it to the Attorney General's attention.

In addition, you must be sensitive to the appearance that there are simply too many obstacles in front of you. I have read opening briefs where counsel addressed numerous possible counter-arguments. This type of briefing has usually left me with the feeling that we are going to lose since the road to victory is blocked by too many hurdles.

G. Prejudice

The most important portion of your prima facie case is the showing of prejudice. The drafting of this section of the brief requires careful attention.

While I have argued that brevity is a virtue, the discussion of prejudice is the one exception to the rule. We have all had the experience of reading an opening brief where thirty pages were devoted to the exposition of error and one page was given to the prejudice analysis. Unless the error is reversible per se, this single page has virtually no chance to persuade the reader.

In formulating your prejudice discussion, you must first set forth the applicable test. Most issues can be framed as federal constitutional error which implicates the standard of *Chapman v. California* (1967) 386 U.S. 18. If it is questionable that the *Chapman* test applies, you should also argue the state test of *People v. Watson* (1956) 46 Cal.2d 818. Since the tests are different in nature, it is vital that you separately apply them. This attention to detail will impress the reader.

In arguing the *Chapman* test, counsel should emphasize that it is the People's burden to establish that the error was harmless beyond a reasonable doubt. (*Chapman*, supra, 386 U.S. at p. 24.) It should be affirmatively argued that the appellate court should not usurp the province of the jury by itself determining the guilt or innocence of the defendant. (*People v. Jackson* (2014) 58 Cal.4th 724, 790 (conc. and dis. opn. of Liu, J.).) Rather, reversal is compelled under *Chapman* unless the People can "show that the error *did not* have adverse effects." (*Id.* at p. 793.)

It is critical to note that case law has developed hybrid versions of the *Chapman* standard which are more favorable than *Chapman* itself. Primary examples of these hybrids include: (1) error in instructing on a mandatory presumption (*Yates v. Evatt* (1991) 500 U.S. 391, 404 [error is prejudicial unless the record shows that the jury's verdict "actually rested" on evidence unrelated to the presumption]; (2) error in precluding the jury from seeing a testifying witness (*Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022 [witness' testimony must be disregarded]); (3) error in failing to instruct on an element of the offense (*Neder v. United States* (1999) 527 U.S. 1, 19 [error must be deemed prejudicial if "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . . ."].) In a proper case, counsel should consider whether either case law or logic allows for similarly stringent applications of *Chapman*.

Notwithstanding the official standards for prejudice, there is a "real world" test that is employed by the courts. Instead of applying the objective tests found in the case law, judges often prefer a subjective standard which I call: "The He's Good For It" test. Under this standard, a judge will only reverse the judgment based on the conclusion that there is a substantial possibility that the defendant is either not guilty or is guilty of less than what the jury found to be the case. Given this de facto test, it behooves counsel to skillfully advance a factual showing of either innocence or mitigated liability. This can be done by showing the factual weaknesses in the People's case such as suspect witnesses of poor character or evidentiary inconsistencies. Failing that, it is useful to

carefully marshall facts demonstrating that the supposed victim was an evil individual for whom the judges should lack sympathy.

Aside from a focus on the helpful facts in the record, there are a variety of tried and true methods for establishing prejudice. The record should be scoured to see if any of the following circumstances apply: (1) lengthy jury deliberations (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberation is evidence of a close case].); (2) a prior hung jury (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188, disapproved on other grounds in *People v. Mendoza* (2011) 52 Cal.4th 1056, 1086); (3) acquittals on some counts (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1398; *People v. Epps* (1981) 122 Cal.App.3d 691, 698; *People v. Washington* (1958) 163 Cal.App.2d 833, 846); (4) jury requests for additional instructions or readback of testimony (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40); (5) the prosecutor's comments to the court with regard to evidentiary issues (*Singh v. Prunty* (9th Cir. 1998) 142 F.3d 1157, 1163 [court reversed based on prosecutor's "candid concession" of importance of excluded evidence since "the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case."].); (6) prosecutorial exploitation of the error during closing argument (*LeMons v. Regents of University of California* (1978) 21 Cal.2d 869, 876 [reliance on erroneous instruction]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [preponderant emphasis on inadmissible evidence]; *Chambers v. McDaniel* (9th

Cir. 2008) 549 F.3d 1191, 1200 [prejudice found where prosecutor "emphasized" erroneous instruction during closing argument].); (7) error which disproportionately impacted on the defense case (i.e. key defense witness was erroneously impeached (*People v. Rucker* (1980) 26 Cal.3d 368, 391; *People v. Wagner* (1975) 13 Cal.3d 612, 621); (8) error that precluded the defense from presenting its theory of the case (*People v. Spearman* (1979) 25 Cal.3d 107, 119; *People v. Filson*, supra, 22 Cal.App.4th 1841, 1852; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741); (9) error which disproportionally helped the People's case (i.e. exclusion of impeaching evidence regarding the key government witness) (*People v. Randle* (1982) 130 Cal.App.3d 286, 293); (10) error that went to the central issue in the case (*People v. Vargas* (1973) 9 Cal.3d 470, 481 [*Griffin* error is prejudicial if it touches a "'live nerve'" in the defense].); and (11) anything else that might show prejudice.

In making your case specific argument for prejudice, it should not be overlooked that some errors are better than others. Errors in the admission of the defendant's confession or evidence that the defendant was a gang member or a drug addict are highly prejudicial regardless of the strength of the government's case. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296 ["'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him'"]; *People v. Cardenas,* supra, 31 Cal.3d 897, 904-907 [admission of gang evidence leads to " 'a substantial danger of undue prejudice;' " admission of evidence of narcotics addiction is "`catastrophic.'"].) Appellate counsel should strive to find those case authorities which depict a particular error

as being one which necessarily involves a high degree of prejudice.

In a proper case, a claim of cumulative prejudice should be made as the final argument. Even though each individual error might not amount to much on its own, a pattern of error can be used to depict a trial that skidded off the rails. (*People v. Hill*, supra, 17 Cal.4th 800, 845 ["sheer number of instances of prosecutorial misconduct and other legal errors" deprived the defendant of a fair trial].)

The goal of a cumulative prejudice argument is to show that the errors were interrelated and thereby caused the foundation of a fair trial to crumble. A useful model for showing cumulative prejudice is to compare the trial that actually occurred with the one that would have occurred absent the errors. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 834 [in assessing prejudice, the court should "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently."].)

In employing the comparative model, you should demonstrate that the People's case was artificially strengthened and the defendant's case was unfairly diminished. By showing that the entire balance of the trial was skewed, you can persuade the court that a new (and fair) trial is required.

G. Remedy

The final piece of the prima facie case is the statement of the requested remedy. In this section, you should concisely and precisely describe the relief that should be afforded. You should be sure to ask for the maximum relief possible. Generally speaking, the court will

not give a greater remedy than the one sought. However, the court will often given a lesser form of relief.

If a range of remedies is possible, each potential resolution should be carefully described. In many cases, the court will only be willing to partially reduce a conviction. Thus, the suggested remedy might be to reverse a murder conviction with directions to allow the prosecutor an opportunity to accept a reduction to voluntary manslaughter. In a similar vein, the improper denial of a motion for new trial might lead to either a complete reversal or a reversal with directions to reconsider the motion. Although you will want to seek the broadest remedy possible, some remedy is usually better than no remedy.

It should not be forgotten that an appellate court has broad remedial authority. (Pen. Code, § 1260.) In the last section of your prima facie case, you should not be afraid to request an innovative or unusual remedy which will be in your client's best interests.

CONCLUSION

The practice of appellate law is governed by a fairly strict set of norms. As genetic individualists, appellate lawyers often chafe against those norms and desire to express themselves in new and different ways. My experience has taught me that an effective appellate lawyer is one who has the discipline to conform to the prima facie structure that the courts expect. Since the highest calling of a lawyer is to serve the client with zeal, skill and knowledge, we should all conform to the norms that will best help the client.