CLEARING PROCEDURAL HURDLES: GETTING YOUR CASE BEFORE THE COURT OF APPEAL

Lori A. Quick
Staff Attorney
Sixth District Appellate Program
95 S. Market Street, Suite 570
San Jose, CA 95113

I. Introduction

Two of the most common and overused responses to appellate arguments are that the claim is forfeited or waived. This is something appellate counsel wants to avoid at all costs since it prevents the court from any consideration of the merits of your case. Of course, this is precisely why it is so frequently invoked. This article will identify some of the more common scenarios in which forfeiture and waiver is raised and ways to respond to that argument.

II. The Difference Between Waiver and Forfeiture

The terms "waiver" and "forfeiture" are often used interchangeably, but there is a significant difference. A forfeiture is the failure to make the timely assertion of a right. (*United States v. Olano* (1993) 507 U.S. 725, 733; accord, *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 389.) A waiver, on the other hand, is the "intentional relinquishment or abandonment of a known right." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; accord, *Olano,* at p. 733.) For example, if trial counsel is unaware of a legal basis for a valid objection, or simply forgets to make the objection, the issue is forfeited on appeal. If trial counsel joins in his or her client's waiver of the right to a jury trial, the right is being intentionally given up or relinquished.

When appellate counsel begins reviewing a record, it is necessary to first determine whether the notice of appeal was timely filed and accurately states the grounds for appeal. The identification of arguable issues during the subsequent review of the transcript requires at the outset a determination whether the issue counsel wishes to raise

was forfeited or waived in the trial court. If that happened, it will be necessary to take steps to avoid or overcome that procedural hurdle. Waivers and forfeitures occur in a variety of contexts, each presenting an obstacle to appellate review.

III. Ways in Which Forfeiture and Waiver Frequently Arise

A. Forfeiture Due to Failure to File a Timely Notice of Appeal and Certificate of Probable Cause

The failure to file a timely notice of appeal and/or request for a certificate of probable cause forfeits the ability to secure appellate review. (See *Samara v. Matar* (2018) 5 Cal.5th 322, 333.) For this reason, it is extremely important to ensure that the notice of appeal was correctly prepared and timely filed.

1. A notice of appeal must be filed within 60 days of the sentencing date. (Cal. Rules of Court, rule 8.308(a).) The same is true for a request for a certificate of probable cause. Appellate counsel should carefully review the notice of appeal to verify the following:

a. The notice was timely filed.

b. The notice clearly indicates the judgment or order being appealed. If the California Judicial Council form CR-120 was used, the date of the order or judgment must be filled in. Counsel should ensure that the correct box or boxes are checked. Section 2.a. of the form provides options for sentencing only appeals; appeals from the denial of a motion to suppress; an appeal that challenges the validity of the plea or admission, which requires a certificate of probable cause; and a generic "other basis for appeal" which also requires a request for a certificate of probable cause. Section 2.b. of the form provides options for appeals from trials (court or jury); contested violations of probation; and "other."

c. Appointed counsel should be sure Section 3 is properly filled out. It should indicate that defendant requests that the court appoint an attorney and whether he or she was represented by appointed counsel in superior court.

2. A certificate of probable cause is necessary whenever the defendant wishes to appeal anything that challenges the validity of the plea. (Pen. Code, sec. 1237.5; Cal. Rules of Court, rule 8.308(b)(1).) "The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.] The objective is to promote judicial economy 'by screening out wholly frivolous guilty [and nolo contendere] plea appeals before time and money is spent preparing the record and the briefs for consideration by the reviewing court.' [Citations.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 75–76.) The request for a certificate must be filed within 60 days of sentencing. A certificate is *not* required when appealing the denial of a motion to suppress evidence (Cal. Rules of Court, rule 8.308(b)(4)(A)) or when the appeal is based on grounds that arose after entry of the plea and do not affect the validity of the plea. (Cal. Rules of Court, rule 8.308(b)(4)(B).)

In cases where there was an application for a certificate of probable cause but it has not yet been granted or denied, counsel should make sure the notice of appeal specifies that the appeal is from *both* the sentence or other matters not affecting the validity of the plea *and* that it challenges the validity of the plea. The reason for this is that if the superior court judge denies the certificate of probable cause and the notice of appeal specifies only that it challenges the validity of the plea or omission, the notice of appeal is inoperative. (Cal. Rules of Court, rule 8.308(b)(3).)

The superior court is supposed to sign and file either a certificate of probable cause as requested, or an order denying the certificate within 20 days of the filing of the request. (Cal. Rules of Court, rule 8.308(b)(2).) If the copy of the notice of appeal in the record on appeal does not indicate whether it was granted or denied, appellate counsel should check with the superior court. Unfortunately, it is not uncommon to discover that no action has been taken. If the certificate is granted or denied after the record on appeal is prepared, the clerk should forward it to the Court of Appeal for inclusion in the record.

(Cal. Rules of Court, rule 8.340(a)(2).) Also unfortunately, that sometimes does not happen. In that case, appellate counsel should file a letter to correct the record pursuant to California Rules of Court, rule 8.340(b).

Surprisingly, determining whether a certificate of probable cause is necessary is not always a simple matter. Some commonly encountered situations in which a certificate must be requested include:

- An appeal from the denial of a motion to withdraw a plea of guilty or no contest, including a claim based on ineffective assistance of counsel. (*People v. Johnson* (2009) 47 Cal.4th 668.)
- A challenge to an agreed-upon maximum possible sentence on the ground that the sentence violates Penal Code section 654. (*People v. Cuevas* (2008) 44 Cal. 4th 374; *People v. Shelton* (2006) 37 Cal. 4th 759.)
- An appeal from the denial of a motion to replace appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 when the motion was made *before* entry of a guilty or no contest plea, for example when the claim is that due to the attorney's actions, the defendant did not intelligently and voluntarily enter into the plea, or that the advice received from counsel was inappropriate resulting in an involuntary plea. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786; *People v. Lovings* (2004) 118 Cal.App.4th 1305; *People v. Armijo* (2017) 10 Cal.App.5th 1171, 1180.)
- A claim that despite a stipulated maximum sentence, the sentence imposed was unconstitutionally cruel and unusual. (*People v. Rushing* (2008) 168 Cal.app.4th 354; *People v. Cole* (2001) 88 Cal.App.4th 850; *People v.Young* (2000) 77 Cal.App.4th 827.)

A certificate of probable cause is generally not required in the following situations:

- Where the appeal is from a sentence where the plea bargain left it to the court's discretion whether to strike certain enhancements. (*Cole, supra,* 88 Cal.App.4th

850.)

- If the plea is based on a plea bargain for a "stipulated lid" of the maximum sentence that may be imposed, no certificate of probable cause is required for a claim of abuse of discretion in imposing the maximum sentence, unless the bargain specifically provides otherwise. (*People v. Buttram* (2003) 30 Cal.4th 773.)
- When a defendant admits a conduct enhancement as part of a guilty or nolo contendere plea, and thereafter seeks to challenge the enhancement on appeal as not lawfully being able to be charged in the case, as opposed to the facts not constituting the enhancement. (*People v. Corban* (2006) 138 Cal.App.4th 1111.)
- A challenge based on a later-enacted statute that retroactively grants a trial court the discretion to waive an enhancement that was mandatory at the time of the sentence. (*People v. Stamps* (2020) 9 Cal.5th 685; *People v. Hurlic* (2018) 25 Cal.App.5th 50.)

Situations frequently arise where it must be determined whether a certificate of probable cause is necessary. Counsel should always make that determination as soon as possible and file the application prior to the 60th day after sentencing. If the 60th day has already passed, it is possible to request relief from default from the Court of Appeal.

B. <u>Situations in Which Waiver Has Occurred</u>

1. <u>Terms of the Sentence</u>

The waiver appellate counsel encounters most commonly in felony cases is the waiver by the defendant of numerous rights when pleading guilty, nolo contendere, or admitting a probation violation. In order to appeal any matter that calls into question the validity of such a plea or admission, two conditions must be met: (1) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings; and (2) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court. (Pen. Code, sec. 1237.5.)

Many appeals following a guilty plea and waiver of rights do not require a certificate of probable cause. An appeal of any component of the sentence does not require a certificate unless it challenges the validity of the plea. (Cal. Rules of Court, rule 8.304(b)(4)(B); *People v. Cuevas* (2008) 44 Cal.4th 374, 379.) However, "[e]ven when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement." (*People v. Johnson* (2009) 47 Cal.4th 668, 678; see, e.g., *Cuevas, supra,* 44 Cal.4th at p. 377 [certificate required for claim that the sentence imposed, which defendant was advised was the maximum possible sentence for the remaining charges after additional charges were dismissed pursuant to a plea agreement, violates the multiple punishment prohibition of Pen. Code, sec. 654]; *People v. Shelton* (2006) 37 Cal.4th 759, 763 [certificate required for claim that the sentence imposed, whose length equaled the agreed-upon "lid," violates the multiple punishment prohibition of Pen. Code, sec. 654]; *People v. Panizzon* (1996) 13 Cal.4th 68, 73 [certificate required for claim that imposition of sentence to which defendant agreed pursuant to plea agreement constituted cruel and unusual punishment].)

When handling an appeal in cases in which there was a guilty plea, counsel should very carefully read the reporter's transcript of the entry of the plea, and also the written waiver of rights if there is one. If at all possible, argue that the terms of the plea agreement did not cover the particular issue being raised on appeal.

2. Admission of Prior Felony and Prison Prior Enhancements

Recent changes to the law permit courts to exercise their discretion to dismiss prior conviction allegations imposed pursuant to Penal Code section 667, subdivision (a). In addition, courts may no longer impose consecutive terms for prison priors pursuant to Penal Code section 667.5, subdivision (b) unless the prior prison term was for a sexually violent offense as defined in Welfare & Institutions Code section 6600. (Pen. Code, sec. 667.5, subd. (b).) These changes led to questions about whether a certificate of probable

cause was required to appeal non-final judgments that arose from plea bargains on the ground that the trial court did not exercise its discretion at to section 667, subdivision (a), or that the term for a prison prior should be dismissed even though its imposition was agreed to as part of the plea bargain.

The California Supreme Court recently answered those questions. In *People v. Stamps* (2020) 9 Cal.5th 685, the appellant sought the benefit of the change in the law permitting trial courts discretion to dismiss Penal Code section 667, subdivision (a) allegations. The Court acknowledged that issues going to the validity of a plea require a certificate of probable cause. (*Stamps, supra,* 9 Cal.5th at p. 694.) Nevertheless, it held that where an appellant seeks relief because the law subsequently changed to his potential benefit, the appeal does not attack the plea itself and does not require a certificate of probable cause. (*Id*., at p. 698.) Unfortunately, the Court did not stop there. It also held that where the trial court withdraws its approval of the plea bargain by dismissing an enhancement, it "cannot 'proceed to apply and enforce certain parts of the plea bargain, while ignoring' others. [Citation.] Instead, the court must restore the parties to the status quo ante. [Citations.] Thus, while there may be cases in which the trial court will elect to strike the serious felony conviction enhancement, it is not without consequence to the plea bargain." [Citation.]" (*Id.*, at pp. 706-707.) Because the appellant may lose the benefit of his plea bargain, "it is ultimately defendant's choice whether he wishes to seek relief . . ." (*Id*., at p. 708.)

Stamps did not address prison priors imposed pursuant to Penal Code section 667.5, subdivision (b). Prison priors present a different situation in that, as long as they do not qualify as sexually violent offenses, they may not be imposed at all. Therefore, on remand, the court has no discretion to impose them - they must be struck. Nevertheless, there is no reason to believe the same rationale would not apply in that situation if imposition of the terms for the prison priors was part of the plea bargain. In either case, counsel should very carefully explain to the client that requesting a dismissal of either a

five-year prior or a prison prior following a plea bargain could result in a loss of the plea bargain. The client must be advised of all the possible outcomes so that he or she may make an informed decision.

3. Firearm Enhancements

Effective January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate Bill No. 620) amended Penal Code section 12022.53, giving trial courts discretion to strike or dismiss firearm enhancements in the interest of justice pursuant to Penal Code section 1385. (See Pen. Code, sec. 12022.53, subd. (h).) In *People v. Hurlic* (2018) 25 Cal.App.5th 50, Division Two of the Second Appellate District held that where a new law does not take effect until after the plea agreement was negotiated and executed, an appellant may take advantage of new laws ameliorating criminal sentences without first obtaining a certificate of probable cause. (*Hurlic, supra,* 25 Cal.App.5th at pp. 58-59.) The Sixth District has agreed, stating that "[i]f the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements. It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1079.)

There is no reason to believe the rationale of *Stamps* would not apply to cases in which the imposition of a firearm enhancement was part of a plea bargain occurring before the change in the law. Therefore, appellant counsel should advise clients who admitted firearm enhancements and whose judgments were not final when the law took effect that although the issue may be raised on appeal, there is a risk of losing the plea bargain if the superior court dismissed the enhancement.

4. Health & Safety Code section 11370.2 Enhancements

Senate Bill No. 180 was approved by former Governor Edmund G. Brown on October 11, 2017 and went into effect on January 1, 2018. (Assembly Bill No. 1618 (2019–2020 Reg. Sess.) The bill amended Health & Safety Code section 11370.2 by eliminating the consecutive three year terms previously imposed on most drug offenses. After the amendment, the enhancement can only be applied when the defendant is convicted of a violation of, or a conspiracy to violate Health & Safety Code section 11378.5, 11379.5, 11379.6 or 11383 (Health & Saf. Code, sec. 11370.2, subd. (b)); or is convicted of a violation of, or of a conspiracy to violate Health & Safety Code section 11378 or 11379 if the substance in question is amphetamine or methamphetamine. (Health & Saf. Code, sec. 11370.2, subd. (c).)

Like the serious felony prior conviction and firearm enhancements discussed above, this amendment applies retroactively to any case in which the judgment is not yet final. (*People v. Barton* (Aug. 4, 2020, No. F076599) ___Cal.App.5th___ [2020 Cal. App. LEXIS 726 at pp. *7-*8].) In *Barton*, the Fifth District Court of Appeal applied *Stamps, supra,* 9 Cal.5th 685, 706-707 and stated that where the sentence was the product of a plea bargain, but is now unauthorized, the plea agreement is unenforceable. The Court stated further "[w]hether by withdrawal of its prior approval or the granting of a withdrawal/rescission request by one or both of the parties, the trial court must restore the parties to the status quo ante. [Citations]. The parties may then enter into a new plea agreement, which will be subject to the trial court's approval, or they may proceed to trial on the reinstated charges." (*Barton, supra,* at pp. 21-22.) So just as in the situations discussed above, appellate counsel must carefully assess whether a reversal of the enhancements will lead to the loss of a favorable plea bargain and advise the client accordingly.

C. Situations in Which Forfeiture has Occurred

Forfeiture occurs more frequently than waiver, mainly because forfeiture may result from the inadvertent failure to object or take some other action, whereas waiver requires an affirmative act. Very often, it is necessary to attack a forfeiture by arguing ineffective assistance of counsel. However, there are ways to try to avoid making that argument.

1. Presentence Custody Credits Appeals

If appellate counsel discovers an error in the calculation of presentence custody credits and it is the only issue on appeal, he or she must first make a motion for correction in the trial court. (Pen. Code, sec. 1237.1.) The motion may be in letter form, and the superior court retains jurisdiction to correct any error even after a notice of appeal has been filed. (Pen. Code, sec. 1237.1.) If this sole issue is raised on appeal without first requesting relief in the trial court, the Court of Appeal will deem the issue forfeited. Normally, the Court will dismiss the case without prejudice to seeking relief in the superior court.

The requirement of first raising the issue in the trial court does not apply if the claim is something other than simple miscalculation of credits. For example, it can be argued as the sole issue on appeal that credits were calculated pursuant to the wrong version of an applicable statute. (See *People v. Delgado* (2012) 210 Cal.App.4th 761.) A challenge to the constitutionality of a credits statute may be raised as the sole issue on appeal without first raising it in the superior court. (See *People v. Verba* (2012) 210 Cal.App.4th 991.)

2. Appeals on Grounds of Erroneous Imposition or Calculation of Fines, Penalty Assessments, Surcharges, Fees, or Costs

Just as with the calculation of presentence credits, if an appeal regarding the erroneous imposition of fines or fees is the sole issue on appeal, it may not be raised without first seeking relief in the superior court. (Pen. Code, sec. 1237.2.) In this case

too, the motion may be made informally, and the superior court retains jurisdiction despite an active appeal. (*Ibid.*) As with presentence credits appeals, a failure to first raise the issue in the superior court will result in dismissal. (See *People v. Alexander* (2016) 6 Cal.App.5th 798.)

The issues of whether the superior court may impose certain fines and fees without first holding a hearing regarding the defendant's ability to pay them and which party has to make that showing, first raised by Division Seven of the Second District in *People v. Duenas* (2019) 30 Cal.App.5th 1157, are currently pending before the California Supreme Court. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, rev. gr. Nov. 13, 2019, S257844.) Until it is resolved, the issue should be raised in every case possible.

3. Lack of an Objection or an Insufficient Objection

Forfeiture frequently occurs when trial counsel fails to object or the objection made was insufficient to preserve the issue for appeal. "A party who does not object to a ruling generally forfeits the right to complain of that ruling on appeal. [Citation.]" (See *People v. Seijas* (2005) 36 Cal.4th 291, 301.) Although no particular form of objection is required, the objection must fairly inform the trial court, as well as the opposing party, of the specific reason or reasons for the objection so that the opponent can respond appropriately and the court can make a fully informed ruling. (See *People v. Valdez* (2012) 55 Cal.4th 82, 130; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 366; *In re I.A.* (2020) 48 Cal.App.5th 767, 776.) The lack of an objection to the admission of evidence is often fatal to issues on appeal. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . ." (Evid. Code, sec. 353; *People v. Stevens* (2015) 62 Cal.4th 325, 333, superseded by statute on another ground.)

Given the necessity of timely and specific objections, it is sometimes necessary for appellate counsel to characterize the claim as one where the objection was unnecessary or the objection made was sufficient.

a. An Objection was Unnecessary

When trial counsel did not object at trial, it may be possible to raise the contention by arguing that no objection was necessary to preserve the issue. This is a viable way of avoiding the problem of a lack of objection in a variety of situations.

1. Motions in Limine

If trial counsel raised an issue in a written motion in limine, for example a motion for exclusion of certain evidence, and the motion was denied, it might be argued that an contemporaneous objection at the time the prosecution introduces the evidence is not necessary. This argument is only viable if the trial court actually ruled on the issue in limine. If counsel did not seek a ruling, the issue is forfeited. (See *People v. Lewis* (2008) 43 Cal.4th 415, 481 ["Failure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance"], disapproved on another ground by *People v. Black* (2014) 58 Cal.4th 912, 919-920; see also *People v. Morris* (1991) 53 Cal.3d 152, 195 [defendant forfeited appellate challenge to admission of testimony by failing "to press for" a ruling "until he obtained one"], overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Appellate counsel must carefully read the reporter's transcript of the motions in limine to ensure that the court actually ruled. If the court deferred the ruling and counsel did not revisit the issue and press for a ruling, forfeiture has occurred.

2. Probation Conditions

The failure to object does not forfeit an argument that a probation condition is unconstitutionally vague or overbroad as long as the issue involves pure questions of law that can be resolved without reference to the underlying facts. (*In re Sheena K.* (2007) 40

Cal.4th 875, 887; accord, *People v. Moran* (2016) 1 Cal.5th 398, 403; *People v. Connors* (2016) 3 Cal.App.5th 729, 736-737.) "Under the void for vagueness constitutional limitation, '[a]n order must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.' [Citations.] In addition, the overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. [Citations.]" (*In re Luis F.* (2009) 177 Cal.App.4th 176, 192; accord, *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

A condition of probation that is facially unconstitutional due to vagueness or overbreadth is, of course, one that requires no reference to the facts developed in the trial court to make that determination. If in order to demonstrate either, it is necessary to refer to the specifics of the crime, appellant's criminal history, or the probation department's policies, then the condition cannot be challenged as facially vague, but rather it is unconstitutional *as applied* to the appellant. (See *People v. Kendrick* (2014) 226 Cal.App.4th 769, 778.) In such a situation, the issue is forfeited absent an objection.

If there was no objection in the trial court, appellate counsel should try to frame the condition as facially unconstitutional if at all possible. The argument should be that the condition would be vague or overbroad under any circumstances without reference to any facts developed in the trial court. This argument can be made even absent an objection in the trial court.

3. Unauthorized Sentences

An unauthorized sentence is one that could not be lawfully imposed under any circumstance in a particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Such a sentence is correctable at any time even without an objection. (*Ibid.*; see also *People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Lee* (2018) 244 Cal.App.5th 50, 54, fn. 2.) "Appellate courts are willing to intervene in the first instance because such error is 'clear

and correctable' independent of any factual issues presented by the record at sentencing." (*Ibid*.) Errors involving an exercise of lawful authority in a questionable manner, on the other hand, are not unauthorized sentences, and will require the defendant to object below to preserve the issue for appeal. (*People v. Welch* (1993) 5 Cal. 4th 228, 237-238.)

There are several instances where a sentence is clearly unauthorized and can be raised as an issue on appeal without an objection below. The imposition of multiple punishments in violation of Penal Code section 654 after trial, or the erroneous stay of a sentence under that section, is an unauthorized sentence that can be challenged for the first time on appeal. (*People v. Le* (2006) 136 Cal.App.4th 925, 931; accord, *People v. Soto* (2016) 245 Cal.App.4th 1219, 1234.) A sentence is unauthorized "where the court violates mandatory provisions governing the length of confinement." (*Scott, supra*, 9 Cal.4th at p. 354, fn. omitted.) This might occur for example where the court imposes concurrent terms when the statute requires consecutive terms. (See, e.g. *People v. Lawrence* (2000) 24 Cal.4th 219, 233; *People v. Deloza* (1998) 18 Cal.4th 585, 599.) The failure to strike or impose an enhancement may constitute an unauthorized sentence. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.) Imposition of an AIDS testing requirement is unauthorized where the appellant was not convicted of violating one of the statutes enumerated in Penal Code section 1202.1, subdivision (e). (*People v. Guardado* (1995) 40 Cal.App.4th 757, 763.) There are of course numerous situations in which unauthorized sentences may arise.

Appellate counsel should always be cognizant of the fact that court sometimes imposes unauthorized sentences that benefit the client. Such a sentence is subject to correction by an appellate court even if the correction creates the possibility of a more severe punishment. (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 432.) Consequently, in such a situation, the appellant should be advised of the risks of proceeding with the appeal and given the opportunity to abandon it.

4. Futility

In an appropriate case, it is possible to argue that an objection was not necessary to preserve the issue because any objection would have been futile. (See *People v. Wilson* (2008) 44 Cal.4th 758, 793.) Counsel is not required to make futile objections to preserve a claim of error. (*People v. Penunuri* (2018) 5 Cal.5th 126, 166; accord, *People v. Young* (2019) 7 Cal.5th 905, 951, fn. 5.) For example, while it is generally necessary to make a timely objection and ask for an admonition to preserve a claim of prosecutorial misconduct, it is not required if such an objection would have been futile and a request for admonition ineffective. (*People v. Hill* (1998) 17 Cal.4th 800, 820; accord, *People v. Flores* (2020) 9 Cal.5th 371, 403.) Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have wholly unsupported by substantive law then in existence. (*People v. Brooks* (2017) 3 Cal.5th 1, 92; accord, *People v. Perez* (2020) 9 Cal.5th 1, 7-8.) Where a court has already ruled against the defense on a particular issue, such as the interpretation of a statute, counsel is excused from again objecting when the same issue arises in a slightly different context, such as in the fashioning of jury instructions. (See *People v. O'Connell* (1995) 39 Cal.App.4th 1182, 1190.) Similarly, counsel is excused from making repeated objections where the court has already overruled it either in the presence of the jury or outside of it. (*People v. Padilla* (1995) 11 Cal.4th 891, 937 [counsel not ineffective for failing to make futile objection where hearsay testimony was discussed at length outside the presence of the jury and the court ruled it was admissible], overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Venegas* (1994) 25 Cal.App.4th 1731, 1741-1742 [counsel not ineffective for failing to object to evidence where objection was overruled when the prosecution initially offered the evidence].)

Clearly, this argument cannot be made where counsel failed to make an objection simply because he or she knew or believed it would be overruled. (See *People v. Dowl* (2013) 57 Cal.4th 1079, 1095.)

5. No Objection on Federal Constitutional Grounds Necessary if State Law Error Violated Federal Due Process

If trial counsel made a timely and specific objection on state law grounds, for example hearsay or Evidence Code section 352, but failed to object on federal constitutional grounds, the constitutional claim is normally forfeited. However, it can be argued that the objection was sufficient to preserve a federal due process claim when the error of overruling an objection made on state grounds "had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435; accord, *People v. Gomez* (2018) 6 Cal.5th 243, 287.) As long as "the trial objection fairly informs the court of the analysis it is asked to undertake," the objecting party need not "inform the court that it believes error in overruling the actual objection would violate due process." (*Partida, supra,* at p. 437.) Appellate counsel should always try to federalize state error in this way if possible in order to avoid forfeiture of the federal constitutional issue. Appellate counsel must be sure that the issue being raised on appeal is truly that the due process violation is an additional consequence of the state error. A different theory for exclusion than was raised in the trial court will not be cognizable and the federal constitutional issue will be deemed forfeited. (*Id.,* at pp. 435, 438-439.)

6. The Court Can Exercise Discretion to Decide the Issue Even Absent an Objection

"An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; accord, *People v. Grimes* (2015) 60 Cal.4th 729, 758; *People v. Scott* (2012) 203 Cal.App.4th 1303, 1311.) Appellate counsel should use this argument as a back-up to an argument that no objection was necessary. However, this is *not* the case when the issue is the exclusion or admission of evidence, in which case an objection is necessary. (*Williams, ibid.*; accord, *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 520.)

b. The Objection Made was Sufficient

As stated above, preservation of an issue for appeal typically requires a timely and specific objection. (Evid. Code, sec. 353.) A portion of the previous section dealt with situations where trial counsel objected to the admission or exclusion of evidence during motions in limine. On appeal, it is often possible for appellate counsel to argue that such an objection was sufficient even absent a contemporaneous objection at the relevant time during trial.

In limine motions to exclude evidence normally must be renewed when the evidence is introduced at trial in order to preserve the issue for appeal. (*People v. Morris* (1991) 53 Cal.3d 152, 189, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; accord, *People v. Thompson* (2016) 1 Cal.5th 1043, 1108-1109.) "[A] motion in limine to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal. (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*Ibid*.) If trial counsel raised an objection in motions in limine but did not contemporaneously object at the appropriate time during trial, check to make sure all three of the requirements are met before arguing that the objection was sufficient.

Whenever an objection is made during trial, appellate counsel must first determine whether it was sufficient to preserve the issue for appeal. The following are some examples of situations where objections were deemed insufficient:

- Objections on relevance, lack of foundation, that the prosecutor was asking leading questions, and that evidence was "improper, calling for a conclusion" were insufficient to preserve an argument that the evidence was inadmissible under Evidence Code section 352. (*People v. Valdez* (2012) 55 Cal.4th 82.) "Although

[defense] counsel's lack of express reference to Evidence Code section 352 is not itself fatal to defendant's claim, the stated bas[e]s of the objection[s] [were] insufficient to alert the trial court that this provision was being invoked." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014–1015.)

- An objection based solely on state grounds will not preserve issues of federal constitutional error. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Gutierrez* (2009) 45 Cal.4th 789, 809; accord, *People v. Riccardi* (2012) 54 Cal.4th 758, 801-802; but see *People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1217 [trial counsel not required to object on *Crawford* grounds in a case tried before *Crawford* was decided].)
- Where the prosecutor makes improper comments during closing arguments, the issue of prosecutorial misconduct is not preserved unless defense counsel also asked the court to admonish the jury to disregard them. (*People v. Price* (1991) 1 Cal.4th 324, 447; accord, *People v. Bennett* (2009) 45 Cal.4th 577, 595.)
- Defendant's objection at a pretrial hearing to any testimony about possession of a particular gun was not sufficient to preserve an objection to the actual testimony about two *different* guns. (*People v Carpenter* (1999) 21 Cal.4th 1016, 1047.)
- An objection that a probation condition is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 does not preserve the issue of whether the condition is unconstitutionally vague or overbroad. (See *People v. Smith* (2017) 8 Cal.App.5th 977, 987.)

The following are some examples of situations where objections were deemed sufficient or even unnecessary:

- Appellant could contest the admission of highly prejudicial evidence in violation of the Eighth and Fourteenth Amendments even without objection on the grounds below by arguing that the error in overruling an Evidence Code section 352 objection was so serious that it violated due process. (*People v. Partida, supra,* 37

Cal.4th at pp. 436-438; accord, *People v. Moore* (2011) 51 Cal.4th 386, 407, fn. 6.)

- A general hearsay objection was sufficient to preserve the issue of whether the trial court could judicially notice the truth of hearsay statements contained within an opinion used to prove the existence of a conviction. (*People v. Woodell* (1998) 17 Cal.4th 448, 457-458.)
- An objection during jury voir dire to the court's explicit decision not to ask followup racial bias questions "both on federal and state constitutional grounds" without specifying precise state and federal constitutional grounds was sufficient to preserve the issue. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1043, fn. 6; *Partida, supra,* 37 Cal.4th at pp. 436-437.)

IV. <u>Ineffective Assistance of Counsel Due to Forfeiture or Waiver</u>

Whenever it appears that an issue has been forfeited or waived by trial counsel, appellate counsel should always first try to frame the issue as one where no objection was needed or the objection made, if there was one, was sufficient. However, this argument should always be followed up with a claim that trial counsel was ineffective for failing to make the appropriate objection.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates, prejudice, i.e., that ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Camino* (2010) 188

Cal.App.4th 1359, 1377.)

A judgment or decision may not be reversed on the basis of the erroneous admission of evidence unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, sec. 353, subd. (a).)

As stated above, where counsel made no objection whatsoever, it will be necessary to argue on appeal if possible that an objection was not necessary or the Court of Appeal should entertain the issue anyway. In addition, it is necessary to argue ineffective assistance because "[c]ounsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts. 'Generally, the Sixth Amendment and article I, section 15 require counsel's "diligence and active participation in the full and effective preparation of his client's case." [Citation.] Criminal defense attorneys have a "'duty to investigate carefully all defenses of fact and of law that may be available to the defendant … .'" [Citation.] … That counsel … may be compelled to yield to his client's right to insist on the presentation of a defense of his own choosing [citation] does not excuse him from his duty to investigate and research other defenses so as to make an informed recommendation to his client [citation]." (*People v. Ledesma* (1987) 43 Cal.3d 171, 222; accord, *In re Edward S.* (2009) 173 Cal.App.4th 387, 416.)

Where counsel objected, but the objection was not timely and specific, or trial counsel objected on incorrect or incomplete grounds, it should be argued that there is no satisfactory explanation for such an error. For example, it may be argued that counsel obviously had no tactical reason for failing to make the appropriate objection since it is clear from the record that he or she was seeking to exclude the evidence altogether. (*People v. Asbury* (1985) 173 Cal.App.3d 362, 366 [ineffective assistance found where trial counsel objected to felony murder instruction on invalid ground of insufficient evidence, but failed to object on meritorious basis of collateral estoppel]; accord, *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131.) This failure resulted in ineffective

assistance of counsel.

V. FORFEITURE AND WAIVER IN JURY SELECTION

If there is any indication in the appellate record that there may have been a biased jury, such as the denial of a defense challenge for cause or any discussion between the parties and the court about a potentially biased juror, appellant counsel should move to augment the record with the reporter's transcript of the jury voir dire.

Generally, the failure to exhaust peremptory challenges or to express dissatisfaction with the jury as constituted forfeits any issues regarding whether the defendant did not receive a fair trial due to a biased or otherwise unqualified juror. (*People v. Bell* (2019) 7 Cal.5th 70, 94, citing *People v. Davis* (2009) 46 Cal.4th 539, 582.) While a court has the discretion to excuse a biased juror *sua sponte*, the failure to do so does not excuse trial counsel's failure to preserve the issue. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487.) Thus, to preserve the issue for appeal, the defense must challenge the juror for cause, exercise a peremptory challenge, exhaust the available peremptory challenges, and express dissatisfaction with the jury ultimately selected. (*People v. Clark* (2016) 63 Cal.4th 522, 565, citing *People v. Taylor* (2009) 47 Cal.4th 850, 884.)

A claim of ineffective assistance of counsel may be made where a juror was demonstrably biased or unfit for duty, but trial counsel did not challenge for cause, exercise a peremptory, and express dissatisfaction with the sworn jury. This is a difficult argument to make since it must be shown that the challenged act or omission was a mistake beyond the range of reasonable competence. (*People v. Pope* (1979) 23 Cal.3d 412, 426-427.) "Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process." (*People v. Montiel* (1993) 5 Cal.4th 877, 911, overruled on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686.)

When there is reason to believe that a biased juror remained on the jury, appellate counsel should carefully determine whether trial counsel went through the necessary steps to preserve the issue. If he or she did not, appellate counsel will need to do a careful analysis of whether an argument can be made that a different outcome is reasonably probable had counsel made the appropriate objections and challenges.

VI. FORFEITURE AND WAIVER OF PROSECUTORIAL MISCONDUCT

"To preserve a claim of prosecutorial misconduct on appeal, a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. The failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm." (*People v. Fayed* (2020) 9 Cal.5th 147, 204, internal citations and quotations omitted; *People v. Clark* (2011) 52 Cal.4th 856, 960; see *People v. Collins* (2010) 49 Cal.4th 175, 226.) Ordinarily, *both* the objection and the request for an admonition must be made. (*People v. Gonzalez* (2012) 54 Cal.4th 1234, 1275; accord, *People v. O'Malley* (2016) 62 Cal.4th 944, 1009.) However, "the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 821.) In *Hill,* for example, defense counsel's prosecutorial misconduct objection was not only erroneously overruled, but the court then chastised defense counsel in front of the jury. When counsel objected to the prosecutor's misstatement of the evidence, the court again erroneously overruled the objection and in front of the jury told defense counsel that his "interpretation may be not necessarily accurate . . ." (*Id*., at p. 822.) The Court of Appeal found that any further objections would have been futile as defense counsel could have reasonably inferred that further objections would simply risk additional critical comments from the bench. (*Ibid.*) Defense counsel has no obligation to continually object when he or she is subjected to a "constant barrage" of unethical conduct by the prosecutor

and the court "not only failed to rein in the excesses but sometimes contributed to it." (*People v. Spencer* (2018) 5 Cal.5th 642.)

Obviously, if it is not possible to make the argument that an objection and request for an admonition would have been futile, it will be necessary to raise the issue under the rubric of ineffective assistance of counsel. This is also a difficult argument to make since "a prosecutor is given wide latitude to vigorously argue his or her case [citation] and may make assurances regarding the apparent honesty or reliability of a witness based on the facts of [the] record and the inferences reasonably drawn therefrom." (*People v. Redd* (2010) 48 Cal.4th 691, 740, internal quotations omitted; accord, *People v. Rodriguez* (2020) 9 Cal.5th 474, 480.) This latitude makes it even more difficult to demonstrate that it is reasonably probable the result would have been different had counsel made the appropriate objection and request for an admonition.

CONCLUSION

Raising issues that were not properly preserved in the trial court can be challenging. Nevertheless, there are many creative ways in which to frame the issue in order to get the client's case before the Court of Appeal. While this article did not cover petitions for writs of habeas corpus, that is also an avenue that should be explored when a meritorious issue was not adequately preserved.