OVERCOMING THE DARKEST, HIDDEN AND MOST MYSTERIOUS CHALLENGES OF FORFEITURE

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A. INTRODUCTION

The classic argument in an Attorney General's brief, like Gaul and the Trinity,[2] consists of three parts: (1) forfeiture (the defendant cannot raise the issue because he waived it by failing to object either entirely or adequately),[3] (2) absence of error (the trial judge ruled or acted correctly), and (3) harmlessness (if error occurred, it made no difference). If the appellate court rules the issue was forfeited, it may decline to consider whether any error occurred. If this happens, the appellate court will simply ignore the product of then hours of insightful research and pages of brilliant briefing. The appellate attorney must take effective steps to make sure a viable issue that requires reversal is not lost on the basis for forfeiture. Fortunately, there is great deal

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[2] History buffs and those who were consigned to study Latin in high school or college will recall Julius Caesar's opening line in *Commentarii de Bello Gallico*: "*Gallia Est Omnis Divisa in Partes Tres"* (all Gaul is divided in three parts, referring then to the parts inhabited by the Belgae, the Aquitanians, the Celts (Gauls)).

[3] *E.g.,* "Time and again in his briefs, he [the State Attorney General] claims that a contention by defendant is procedurally barred." (People v. Gordon (1990) 50 Cal. 3d 1223, 1250.) As noted above, the term should be "forfeited" or "procedurally barred" rather than waiver because a waiver connotes a knowing relinquishment of a right.

of law on the issue of forfeiture that is favorable to defendants and that allows for a review of the substantive issue that the Attorney General argues was "waived."

Just so we start on the proper footing, we need to get our waiver/forfeiture terms clear. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" (United States v. Olano [(1993) 507 U.S. 725, 733.)' (People v. Saunders (1993) 5 Cal.4th 580, 590, fn. 6.)" (Cowan v. Superior Court (1996) 14 Cal.4th 367, 371.) So when in the context of whether an appellate issue is cognizable we use the term "waiver," we undoubtedly mean it in the sense of forfeiture because if the defendant made a knowing and intelligent waiver of a claim, you won't be needing this paper to get around the consequences. Forfeiture invariably means that trial counsel goofed and didn't make an adequate record to preserve the issue. The defendant is uninvolved in that. With waiver, the defendant has explicitly waived the right. We are not talking about that here.[4]

At the outset, let's also lay out a major basis to avoid forfeiture of the claim.

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[4]Nevertheless, courts and attorneys often use the term waiver when they actually mean forfeiture. The reason, like Caesar's Gallic Wars, is historical. Historically, the phenomenon was called waiver. Older case law used this term almost exclusively. And the term will continue to be used, albeit with decreasing frequency (or increasing infrequency), just as alienists are now almost always called psychiatrists..

The courts realize that if prejudicial error in fact occurred at trial, but it is not being addressed because of forfeiture, the defendant can always argue that the forfeiture was due to ineffective assistance of counsel and can obtain relief anyway, either on appeal or on habeas corpus. Rather than drag out the inevitable, appellate courts often will simply address the issue on its merits despite the fact the issue technically was forfeited. Judicial economy may be the driving force here. The court may ask: Should we decide the case twice – once on forfeiture and later on the merits – rather than once? We cite a number of cases below supporting the above.

But another reason for the favorable law on the subject is simply that rules related to forfeiture are complex and subtle, and the appellate courts have broad discretion to address an issue even if a colorable claim of forfeiture can be made. The acceptable practice for the appellate practitioner is to advance the issue despite potential forfeiture. An if the issue in fact is waived, but is nevertheless meritorious, use ineffective assistance of counsel to overcome the forfeiture problem.[5]

It also is helpful to discuss briefly the rationale for the rules involving

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[5] If one is to make this alternate argument, it must be a separately stated issue and not just a footnote statement like "and if counsel did forfeit the issue, s/he was ineffective in doing so." The Rules of Court require separate headings, or sub-headings, for each argument. (*See* California Rules of Court, rule 8.204(a)(1)(B): "State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority.")

forfeiture. The reasons an objection is required are: (1) to give the People the opportunity in the trial court to cure any defect (In re Seaton (2004) 34 Cal.4th 193, 198), (2) to allow the trial court to correct errors (People v. Romero (2008) 44 Cal.4th 386, 411), and (3) to prevent gamesmanship by the defense (*ibid.*), *i.e.,* gambling on an acquittal in the trial court secure in the knowledge the conviction will be reversed on appeal (Seaton at p. 198). If something occurred that gave the People the opportunity to cure any defect and allowed the court to correct the error, the rationale for forfeiture does not apply.

There is so much case law on forfeiture that no one source can begin to cover it. In the pages that follow we offer some forfeiture cases that are favorable to defendants in the hope they will assist the appellate practitioner.

B. GENERAL GROUNDS TO REVIEW THE ISSUE ON APPEAL

1. Instructional Error

A defendant does not need to object at trial in order to raise on appeal an instructional issue affecting his substantial rights. (Penal Code §1259; People v. Smithey (1999) 20 Cal.4th 936, 976-977 and fn. 7 [finding no forfeiture for the failure to object to an erroneous instruction containing a permissive presumption or inference]; People v. Flood (1998) 18 Cal.4th 470, 482, fn. 7 [finding no forfeiture for the failure to object to an instruction that removed an element of the offense];

People v. Hannon (1977) 19 Cal.3d 588, 600 [no forfeiture due to failure to object to an instruction that was supported by evidence]; People v. Satchell (1971) 6 Cal.3d 28, 33, fn. 10 [finding no forfeiture for the failure to object to an erroneous instruction on felony murder].) *See* People v. Smith (1992) 9 Cal.App.4th 196, 207, fn 20: "The People make their oft-repeated, but only occasionally applicable, contention the issue was waived, or alternatively that any error was invited, because defendants failed to object to, or request modification of, the challenged instruction. As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error. [Citations omitted.] Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty."

2. Question of Law

A theory which presents a question of law based on undisputed facts in the record may be raised for the first time on appeal. (People v. Yeoman (2003) 31 Cal.4th 93, 118; People v. Borland (1996) 50 Cal.App.4th 124, 129; People v. Whitfield (1993) 19 Cal.App.4th 1652, 1657, fn. 6; People v. Carr (1974) 43 Cal.App.3d 441, 444-445.) This includes, for example, the constitutionality of a statute (People v. Hines (1997) 15 Cal.4th 997, 1061; In re Samuel V. (1990) 225 Cal.App.3d 511) and the issue of vagueness or overbreadth (In re Justin S. (2001) 93

Cal.App.4th 811, 814-815.)

3. Lack of Opportunity to Make a More Explicit Objection

There is no forfeiture if the defendant is given no opportunity to make his objection more explicit. (People v. Kitt (1978) 83 Cal.App.3d 834, 848.)

4. Trial Court's Conduct

An issue can be raised when the trial court considered and ruled on the issue as if an objection had been properly made. (People v. Abbott (1956) 47 Cal.2d 362, 372-373.) Also, there is no waiver, even if the objection was not specific, as long as the parties and the court understood the purpose of the objection. (People v. Diaz (1992) 3 Cal.4th 495, 528.)[6] If the court's conduct is such as to preclude a proper objection, then the objection requirement is excused. (Cooper v. Superior Court (1961) 55 Cal.2d 291, 298 ("The power to silence an attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy has been

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[6] Trial counsel must get a court order or risk having the Court of Appeal hold that nothing is preserved because there is no court ruling from which to appeal. (People v. Ramos (1997) 15 Cal.4th 1133, 1171 ("However, the proponent must secure an express ruling from the court"; *but see* Laurel v. Superior Court (1967) 255 Cal.App.2d 292, 296 ("[T]he failure to rule formally is an implied ruling against the objection .... The question of admissibility of such testimony is properly raised on appeal") People v. Flores (1979) 92 Cal.App.3d 461, 466-467 ("Although the defendant did not renew the objection, the court's failure to rule formally, after having reserved the ruling, constituted an implied ruling against the objection and in favor of admissibility.")

afforded").

5. New Issue in California Supreme Court

A party can raise an issue in the California Supreme Court, even if he did not raise it in the Court of Appeal, if there was binding California Supreme Court authority which precluded the Court of Appeal from deciding the issue in the first instance. (People v. Birks (1998) 19 Cal.4th 108, 116, fn. 6.) "[A] criminal defendant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial." (People v. Marshall (1996) 13 Cal.4th 799, 825.) The United States Supreme Court follows a similar rule. (O'Connor v. Ohio (1966) 385 U.S. 92, 93 (the defendant's "failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court.")

6. Discretion of the Appellate Courts

An appellate court has the discretion to excuse a defendant's lack of objection in areas *other than* the admission or exclusion of evidence. (People v. Williams (1998) 17 Cal.4th 148, 161, fn. 6; People v. Ellison (2003) 111 Cal.App.4th 1360, 1369-1370; People v. Abbaszadeh (2003)106 Cal.App.4th 642, 649.) But even evidentiary errors can be excused if they raise due process concerns.

7. Due Process (Fundamental Rights) Issues

Defendant did not waive due process issue by raising it for the first time in his opening brief since the issue was a pure question of law based on undisputed facts and raising a due process issue would have been futile because defendant raised a section 352 issue several times unsuccessfully and the probative vs. prejudicial analysis under section 352 is virtually identical to a due process issue.

In People v. Partida (2005) 37 Cal.4th 428, the court permitted a due process argument to be made on appeal despite the lack of a constitutional objection at the trial court level. It held a due process argument could be made on the same factual grounds as stated by the trial attorney. *See cases* cited in People v. Boyer (2006) 38 Cal.4th 412, 441 fn. 17.

In People v. Allen (1974) 41 Cal.App.3d 196, 201, fn. 1, the appeals court reviewed the merits of defense objections to evidence despite no objection: "Although defendant argues that the hair sample and the expert testimony were admitted over a defense objection, no transcript references were provided and we have found none in the record on appeal. In any event, the constitutional question can properly be raised for the first time on appeal. People v. Norwood (1972) 26 Cal.App.3d 148, 152-153 [103 Cal.Rptr. 7]."

In People v. Sanborn (2005) 133 Cal.App.4th 1462, 1466, the AG argued that

"defendant has waived the right to raise this issue on appeal by failing to object below. [Citation]... Because the alleged error involves fundamental constitutional rights, we will exercise our discretion to consider the matter on the merits."

8. No Need for Repetitive Objections

Once the defendant objects to a line of questions, he is not required to renew it at each recurrence. (People v. Antick (1975) 15 Cal.3d 79, 95; People v. Meacham (1984) 152 Cal.App.3d 142, 155); People v. Zemavasky (1942) 20 Cal. 2d 56, 62 ("In view of the earlier rebuff, it was not thereafter incumbent upon appellant to object repeatedly to such evidence when later sought to be elicited by the prosecution. ... [it] would have been useless and would have served only to emphasize the matter to the jurors."); People v. Diaz (1951) 105 Cal. App. 2d 690, 696 ("Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue"); People v. Calio (1986) 42 Cal.3d 639, 643 ["'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' (Leibman v. Curtis (1955) 138 Cal.App.2d 222, 225)].")

9. Futility

A defendant need not object if it would have been futile to do so. (People v. Abbaszadeh (2003) 106 Cal.App.4th 642, 648; People v. Sandoval (2001) 87 Cal.App.4th 1425, 1433, fn. 1.) This rule applies to the failure to request a clarifying instruction where the court already has rejected the defendant's interpretation of a statute. (People v. O'Connell (1995) 39 Cal.App.4th 1182, 1190.) This rule also applies where the trial court states that evidence is inadmissible for any purpose, so the defendant makes no offer of proof. (People v. Whitsett (1983) 149 Cal.App.3d 213, 219, fn. 1).)[7]

Note the use of the motion for new trial to show futility: "The rule that failure to object bars appellate review applies only if a timely objection or request for admonition would have cured the harm. (Citation.) In the present case the trial judge made clear in his ruling *on the motion to modify the verdict* that he, too, believed the absence of evidence of a mitigating factor rendered that factor aggravating. (See post, pp. 1186-1187.) Thus an objection by defense counsel would almost certainly have been overruled, and consequently would have failed to cure the effect of the prosecutor's argument." (People v. Hamilton (1989) 48 Cal.3d 1142, 1184 fn. 27;

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[7] *See* People v. Birks (1998) 19 Cal.4th 108, 116 n. 6 (State was permitted to raise in Supreme Court for the first time the issue of whether People v. Geiger (1984) 35 Cal.3d 510, should be overruled because only the Supreme Court could overturn Geiger.)

italics added.)[8]

10. To Foreclose an Ineffective Assistance of Counsel Claim

An appellate court will address a waived issue on appeal in order to foreclose an ineffective assistance of counsel claim. (People v. Mattson (1990) 50 Cal.3d 826, 854; People v. Scaffidi (1992) 11 Cal.App.4th 145, 151);[9] People v. Norwood (1972) 26 Cal. App. 3d 148, 153 ("A matter normally not reviewable upon direct appeal, but ... vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal ....") California courts have noted that the State does not always press forfeiture because of the IAC alternative is always present to permit review. *E.g.,* People v. Borba (1980) 110 Cal.App.3d 989, 993-994, the court

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[8] Read the confusing case of People v. Memory (2010) 182 Cal.App.4th 835, 856, stating on the one hand that "Raising an evidentiary issue only belatedly in a motion for a new trial does not preserve the issue for appeal. (People v. Borba (1980) 110 Cal.App.3d 989, 994)," and adding that the AG "concedes the defendants preserved their contention such evidence was irrelevant because they raised that point in a motion for a new trial." Huh?

[9] Former Justice Otto Kaus labeled the IAC predicate to reviewing non-objected to issues as the "Morton's Fork" of appellate advocacy. This involves raising the substantive claim, and in the face of a claim of trial counsel's default in preserving the issue, the courts entertain the other prong of the "fork" – ineffectiveness for failure to raise the substantive issue by objection. *See* People v. Edwards (1970) 12 Cal.App.3d 87, 91 ("There was no error in the admission of the evidence, since defendant never objected to any of it..... Realizing that the lack of an objection to the evidence under attack may be fatal to defendant's first contention, counsel falls back on what has become the Morton's Fork of criminal appellate advocacy: he claims that trial counsel's failure to object brings the case under the umbrella of the rule of [ineffectiveness in] People v. Ibarra, 60 Cal.2d 460, 464-466 [34 Cal.Rptr. 863, 386 P.2d 487].")

reversed a conviction despite a lack of a trial objection to the constitutionality of statements taken from the defendant, noting that the State "does not press the `failure to object' point, obviously because, if the point were well taken, the People would be out of the Pettingill [then a California variant on Miranda v. Arizona, 384 U.S. 436 (1966)] frying pan an into the incompetence-of-counsel fire." *See also* People v. Crittenden (1994) 9 Cal.4th 83, 146 (defense counsel waived issues of prosecution misconduct for failure of trial counsel to object, but court reviewed the issue: "Nonetheless, in view of the potential claim that counsel's failure to object on the specific grounds urged on appeal denied him his rights under the state and federal Constitutions to the effective assistance of counsel, we review these claims on the merits;" People v. Rivera (2003) 107 Cal.App.4th 1374, 1379 ("Because appellant contends that any waiver [of the issue of impeachment with an misdemeanor] would constitute ineffective assistance of counsel, we will consider appellant's contention.") *See also* People v. Chaney, 148 Cal.App.4th 772, 780 ("we choose to address the issue on its merits even though it was waived by failure to specifically object.")[10]

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[10] In federal court, matters affecting substantial rights may be raised as plain error. *See* U.S. v. Rosenberg, 195 F.2d 583, 611fn. 9 (2d Cir. 1952) "True, we may, of our own motion, notice egregious errors to which there were no objections below, if they 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.' Johnson v. United States, 313 U.S. 189, 200-201, 63 S.Ct. 549, 555, 87 L.Ed. 704; Criminal Rule 52(b). That exception might conceivably govern here if we believed the failure to object to this testimony (continued...)

11. Raising "Morton's Fork:" The IAC Alternative to Preserve Review

If an IAC claim is to be raised as an alternative way to address the merits of an issue, it has to be raised as an independent issue with a separate heading. However, this is a last resort alternative because the review standard under Strickland v. Washington (1984) 466 U.S. 668, is worse than the standard if the issue is review on the merits. (*See* People v. Howard (1987) 190 Cal.App.3d 41, 46-47 (noting that IAC errors for failure to raise a suppression motion under the Fourth Amendment must be assessed under Strickland's prejudice analysis, not the more rigorous Chapman standard, observing that the courts are "willing to tolerate a greater likelihood of error in the outcome where the mistake is defense counsel's rather than that of the trial judge.")

12. Defendant Attacks Damaging Evidence on Its Merits

If the defendant's objection to evidence is overruled, and he attacks the evidence on its merits, this is acceptable trial tactics and is not waiver. (People v. Venegas (1998) 18 Cal.4th 47, 94; People v. Sam (1969) 71 Cal.2d 194, 207.)

13. Act in Excess of Court's Jurisdiction

The failure to object to an act which is in excess of the court's jurisdiction is

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[10](...continued)
resulted from the incompetence of defendants' counsel."

not waiver. (In re Mark L. (1983) 34 Cal.3d 171, 176.)

14. Law Is Unsettled

When the law is so unsettled that reasonable minds could differ as to the appropriateness of an objection, the failure to object is excused. (In re Gladys R. (1970) 1 Cal.3d 855, 861.) The same is true where the application of settled law to new facts is unclear. (People v. Haston (1968) 69 Cal.2d 233, 256, fn. 28.) Also, a party should not be penalized for not appreciating a point which was unsettled at the time of trial. (People v. Ruiz (1990) 222 Cal.App.3d 1241, 1246.)

15. Issue Raised During Argument

An issue is not waived if it was raised in argument on a motion, even if it was not mentioned in moving papers. (People v. Manning (1973) 33 Cal.App.3d 586, 601; People v. Kelley (1968) 264 Cal.App.2d 212, 214 ("Apparently the trial court had permitted counsel to raise that issue for the first time in their arguments, which were not reported. Inasmuch as the trial court did consider and rule upon the issue, this court will also consider it.")

16. Court Cuts Off Defense Counsel

An objection is preserved on implicit grounds when the court cuts off defense counsel when s/he attempts to state them. (People v. Leffel (1987) 196 Cal.App.3d 1310, 1317-1318); People v. Hail (1914) 25 Cal.App. 342, 356 (When the court

refuses to heed defendant's objection, the court has made an error which could properly be made the basis of a motion for a new trial; therefore the matter is reserved for appeal.)

17. Forfeiture Issue is Close

When the issue of forfeiture is a close and difficult one, the appellate court will assume defendant has preserved the issue and will address it on its merits. (People v. Champion (1995) 9 Cal.3d 879, 908, fn. 6; People v. Wattier (1996) 51 Cal.App.4th 948, 953.)

18. Reviewing it "Just Because We Want To."

People v. Malone (1988) 47 Cal.3d 1, 38 (Supreme Court "assumed" no procedural default and reviewed the merits of the evidentiary issue despite lack of *any* defense objection to prosecution cross-examination of the defendant about whether he had stated to others he had killed someone earlier that day.)

19. Good 'Nuff: Trial Attorney Made a Nice Enough Try.

People v. Scott (1978) 21 Cal.3d 284, 290 ("Preliminarily, we dispose of the People's contention that defendant waived his objections, first, by failing to raise them with sufficient specificity before the trial court, and second, by declining to renew them after the test results were known. We cannot accept the contention. ¶ ....

¶An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide."); People v. Briggs (1962) 58 Cal.2d 385, 410 (issue preserved for appeal "[e]ven if, ... the objection was not properly phrased, and even if it was not stated in the most precise terms...."); People v. Bob (1946) 29 Cal.2d 321, 325 (counsel's statement that he objected to any statement made by the witness deemed sufficient, "the mere fact that the objection could have been made in better form will not justify a refusal to consider it, where the intention of the defendant could not be misunderstood."); People v. Green (1963) 215 Cal.App.2d 169, 171-172 ("[T]he motion to strike, ... was amply specific to afford court and prosecutor full opportunity to correct their respective errors").

20. Issue Is Understood by the Parties or Judge

If the issue is understood by the parties or the judge, there is no need for a more specific objection. (People v. Gibson (1976) 56 Cal.App.3d 119, 137; People v. Dowdy (1975) 50 Cal.App.3d 180, 187.)

21. Prosecution Put the Issue "on the Table"

There is no forfeiture if the defendant did not expressly object in the trial court but the prosecution put the "issue on the table in its pretrial motion." (People v. Brenn (2007) 152 Cal.App.4th 166, 174.)

22. Lack of Additional Briefing

When a court denies a motion but invites further briefing, there is no forfeiture if the defendant fails to file additional briefing. (Lozoya v. Superior Court (1987) 189 Cal.App.3d 1332, 1340, fn. 5.)

23. Court's Assurance that the Defendant Can Raise an Issue on Appeal

If the court assures the defendant that he can raise an issue on appeal, the defendant can raise that issue even if the court committed judicial error when it gave the defendant this assurance. (People v. Calio (1986) 42 Cal.3d 639, 642-644.)

24. Mischaracterization of Issue

Counsel's mischaracterization of the issue does not preclude appellate review of the error. (People v. Phillips (1985) 169 Cal.App.3d 632, 638 ["Yet his mischaracterization of the issue does not preclude us from recognizing his complaint that the court erred"].)

25. Prosecutor's Distorting Basis for Admitting Evidence

"Defendant did not object to the evidence of the attack on Deputy Legg or to the prosecutor's argument. But his failure to do so was excusable, in light of the prosecutor's inaccurate representation to the trial court that defendant had been convicted of the assault. Thus, the Attorney General does not contend that defendant has forfeited the claim by lack of objection, and we need not consider defendant's

alternative claim that counsel was incompetent for not objecting." (People v. Hernandez (2003) 30 Cal.4th 835, 871.)

26. Raising an Issue Not Recognized at the Time of Trial

The rule requiring a specific objection in the trial court on the ground later urged an appeal does not apply when the objection would have been without support in the law as it stood at the time of trial. (People v. De Santiago (1969) 71 Cal.2d 18, 22-23 [and cases cited].)

27. The Objection Can Be Stretched to Cover Non-included Evidence

People v. Livaditis (1992), 2 Cal.4th 759, 775 n.3 (finding that defendant satisfied the contemporaneous objection rule by making general objections that were overruled; the defense objected to "other crimes" evidence at trial, but not to a cocaine-related other crimes. "Although defendant did not specifically object to the evidence regarding the cocaine, we believe that defendant's general objections on the grounds argued on appeal to all of this evidence, which were overruled, were sufficient to satisfy the contemporaneous objection rule. (Evid. Code, § 353.)"

28. A Ruling Made without Prejudice to the Defendant Renewing a Motion

There is no forfeiture if a court makes a final ruling without prejudice to the defendant renewing his motion and the defendant does not renew the motion. (People v. Washington (1989) 211 Cal.App.3d 207, 211.)

29. Forfeiture Forfeited

If the Attorney General does not assert forfeiture in the Court of Appeal, he cannot assert is in the California Supreme Court. (People v. Tillis (1998) 18 Cal.4th 284, 292, fn. 4.)

30. Twice Is Enough

There is no forfeiture if the defendant objects and moves for a mistrial when the error first occurs, fails to object at later instances of the same error, and then again moves for a mistrial. (People v. Hardy (1992) 2 Cal.4th 86, 156-157.)[11]

31. Thanks but no Thanks

The fact that defense counsel thanked the trial court for admonishing the jury is not a forfeiture of the error that the court sought to cure by the admonition because it cannot be determined why counsel thanked the court. (People v. Vance (2006) 141 Cal.App.4th 1104, 1113.)

32. Counsel Was Slow on the Uptake

There is no forfeiture if defense counsel does not object when the prosecutor first began asking questions on an improper topic when objected eight times to the line of inquiry once he caught the prosecutor's drift. (People v. Carrillo (2004) 119

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[11] Note that a tentative ruling on a motion in limine will require a renewed objection to get a final order. (People v. Holloway (2004) 33 Cal.4th 96, 133.)

Cal.App.4th 94, 101.)

33. The Attorney General Hoisted on His Own Petard

The People cannot rely on a new theory when it was not supported by the record made at the hearing and would have required the taking of considerably more evidence, or when the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition. (People v. Brown (2004) 33 Cal.4th 892, 901.)

34. Defense Counsel Revokes His Agreement

Defense counsel's mere agreement that an instruction was not relevant does not preclude the defendant from raising the issue on appeal, as a trial court should give this instruction sua sponte where the circumstances so dictate. (People v. Carrera (1989) 49 Cal.3d 291, 311, fn. 8.)

35. Better Late Than Never

Issue addressed on merits where counsel made a motion to strike testimony the day after the witness testified. (People v. Riel (2000) 22 Cal.4th 1153, 1192.)

36. Trial Court Ruled On an Issue the Defendant Did Not Raise

If the defendant does not mention a ground for objecting to evidence (here, hearsay), but the court rules the statements are not hearsay, the defendant has not forfeited the hearsay objection and an objection on that ground would have been

superfluous. (People v. Morgan (2005) 125 Cal.App.4th 935, 940.)

C. SPECIFIC EXAMPLES

1. Batson Argument

If the defendant raises in the trial court the issue of discriminatory use of peremptory challenges under People v. Wheeler, he can argue on appeal that there also was error under Batson v. Kentucky. (People v. Yeoman (2003) 31 Cal.4th 93, 117-118.)

2. Relevance

If a defendant objects on hearsay grounds, he can argue on appeal that the evidence is irrelevant. (People v. Arcega (1982) 32 Cal.3d 504, 528; People v. Johnson (1980) 26 Cal.3d 557, 579; People v. Scalzi (1981) 126 Cal.App.3d 901, 907.)

3. Insufficiency of Evidence

Generally, issues of insufficiency of the evidence are never waived, even when, on appeal, the defendant makes a different insufficiency argument than he made at trial. (People v. Rodriguez (2004) 122 Cal.App.4th 121, 129.) Also, if an enhancement is improper, the defendant does not need to challenge it at trial in order to challenge it on appeal. (People v. Levell (1988) 201 Cal.App.3d 749, 751.)

4. Hearsay Objection as a Confrontation Claim

In People v. Sakarias(2000) 22 Cal.4th 596, 630: the defendant made only a

hearsay objection to the testimony of an agent about statements to him from the victim. On appeal, he argued the evidence violated his Sixth Amendment right to confront witnesses. The Supreme Court reviewed the constitutional issue by assuming the "defendant did not waive the constitutional objection by his failure to cite constitutional authority in the trial court" (Id. at 630.)

5. Blakely Come Lately

"Although we understand the well-established notion of waiver of a claim of error, we find there is no waiver or forfeiture of Blakely error in this case because a criminal defendant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial. (Blakely, *supra*, 542 U.S at p. 310.)" (People v. Esquibel (2008) 166 Cal.App.4th 539, 556.)

6. Double Jeopardy Claim

If a plea of former jeopardy had merit and trial counsel's failure to raise the plea resulted in the withdrawal of a crucial defense, then the defendant would have been denied the effective assistance of counsel. (People v. Belcher (1974) 11 Cal.3d 91, 96 [acknowledging general rule of forfeiture, but addressing double jeopardy issue on appeal and concluding trial counsel's failure to timely raise plea of former jeopardy constituted IAC].)

7. Evidence Code §352

Court will consider a section 352 issue on appeal if the defendant objected on various grounds but did not object on section 352 grounds. (People v. Roscoe (1985) 168 Cal.App.3d 1093, 1100.)

8. Evidence Code §353

Usually, failures to object to evidence are not reviewable on appeal. The California Assembly Comment to this section of the Evidence Code states: "Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. (People v. Matteson, 61 Cal.2d 466, 39 Cal.Rptr. 1, 393 P.2d 161 (1964)." The latter case involved a failure to object to an officer's testimony about a defendant's incriminating statement, but the issue was reviewed on appeal on constitutional grounds based upon a belatedly made motion to strike. (See also People v. Mills (1978) 81 Cal.App.3d 171, 176.)

9. Evidence Code § 1101

An objection under Evidence Code §352 and on the ground evidence showed the defendant was a criminal and a bad person held sufficient to raise the issue that the evidence constituted inadmissible character evidence under Evidence Code §1101 even though the defendant did not object on 1101 grounds. (People v. Carpenter

(1999) 21 Cal.4th 1016, 1052.)

10. Pattern of Prosecution Misconduct.

A pattern of prosecution misconduct may warrant review even when there are insufficient objections. (People v. Estrada (1998) 63 Cal.App.4th 1090, 1098.)

11. Involuntary Confession

A defendant need not object to raise the issue on involuntary confession, if the record shows involuntariness as a matter of law. (In re Cameron (1968) 68 Cal.2d 487, 503.)

12. Removal of a Juror

People v. Barber (2002) 102 Cal.App.4th 145 (Barber did not object while the prosecutor questioned Juror No. 5, but the trial court had the "duty to conduct a reasonable inquiry into juror misconduct consistent with defendant's right to a fair trial. (People v. Engelman (2002) 28 Cal.4th 436, 442.) Such constitutional issues may be reviewed on appeal even where the defendant did not raise them below."

13. Unauthorized Sentence

A defendant can argue that his sentence is unauthorized by law (*e.g.,* it violates Penal Code §654) even though he did not object in the trial court. (People v. Scott (1994) 9 Cal.4th 331, 354.) *See also* People v. Urbano (2005) 128 Cal.App.4th 396 [reviewing courts have discretion to consider on the merits issues a party has not

preserved for review, citing People v. Smith (2003) 31 Cal.4th 1207, 1215.) Since sentencing issues involved neither the admission nor the exclusion of evidence, court exercises discretion to consider them on direct appeal. (*See also* People v. Williams (1998) 17 Cal.4th 148, 161-162 & fn. 6)].)

Even if the issue involves evidence at sentencing, an inadequate objection may be good enough:

> The People argue, as a threshold matter, that defendant's due process claim has not been preserved for appeal. We disagree. Before the sentencing hearing, defendant filed a statement in mitigation. The statement objects to the same inconsistencies between the sentencing documents and the trial evidence that defendant relies on now. Defendant repeated this objection at the sentencing hearing. Defendant did not use the words "due process" in the memorandum or at the hearing, but we do not think that was required to preserve the issue. The cases the People rely on ...state the rule that an objection to a sentencing or probation decision is waived if not raised in the trial court, but they do not require the objection to be made with more specificity than appears in the record here. We proceed to consider the merits of the issue.

(People v. Eckley (2004) 123 Cal.App.4th 1072, 1077-1078.)

A reviewing court may even forgive a failure to object where the error goes to the fundamental fairness of sentencing: (People v. Surplice (1962) 203 Cal.App.2d 784, 792 ["although it appears that defendants attempted to waive the defect in the probation and sentence proceeding by agreeing that the judge impose sentence in accordance with the trial judge's notations, we do not consider that this constituted

a waiver in fact because the defect was one which goes to the fundamental fairness of the proceeding"].)

14. No Kelly objection at trial means it is forfeit on appeal.

Objection to scientific evidence regarding a Kelly foundation is waived unless raised in the trial court (People v. Clark (1993) 5 Cal.4th 950, 1018), and a court has no sua sponte duty to consider it. (People v. Kaurish (1990) 52 Cal.3d 648, 688.)

D. WHAT'S NOT GOING TO ESCAPE FORFEITURE'S JAWS

We don't want the reader to believe that virtually any forfeiture can be handled on appeal by implementing the suggestions we make. We all know that the courts of appeal in California often pounce on forfeitures and escape review on the merits (or review it only after saying it has been forfeited). The Supreme Court has reviewed a few novel means by trial counsel of trying to escape forfeiture, and rejected them. Thus, trial counsel's fashioning a pre-final argument list of common prosecution errors in argument to take the place of contemporaneous objections was rejected in People v. Ervine (2009) 47 Cal.4th 745, 807. The same case rejected counsel's pre-trial motion that attempted to preserve constitutional arguments by asking the trial court to consider that "every motion that is being made in this court by the defense" is objected to on constitutional grounds "in order to protect the defendant's Federal 4th, 5th, 6th, 8th, and 14th Amendment, constitutional rights, State Constitution,

Article One, Sections One, Seven, 13, 15, 16, 17, and 27, constitutional rights, and all statutory rights he may have." (People v. Ervine, *supra* at 783-784.) Nope. "This standard of specificity [of objection] is not satisfied by offering a generic laundry list of potentially applicable constitutional provisions untethered to any particular piece of evidence." (Ibid.)

E. LAST RESORT: GOING TO FEDERAL COURT

If the state courts of appeal invoke forfeiture (procedural default) and do not review the issue on the merits, all is not lost. The federal courts will entertain the merits of an allegedly defaulted constitutional claim where the state courts do not evenly apply their default rules. A state procedural rule constitutes an adequate bar to federal court review only if it was "firmly established and regularly followed" at the time it was applied by the state court. (Ford v. Georgia (1991) 498 U.S. 411, 424; *see* Hathorn v. Lovorn (1982) 457 U.S. 255.) The "state rule [for waiver] must be clear, consistently applied, and well-established at the time of the petitioner's purported default." (Calderon v. U.S. Dist. Ct. (9th Cir. 1996) 96 F.3d 1126, 1129.)

In Bennett v. Mueller (9th Cir. 2002) 296 F.3d 752, 763, the court held it is the State's burden to show an even application of the state's contemporaneous objection rule. While a state's discretionary forfeiture standard can be deemed "adequate," it will be so only if the standards are known, understood, and have reasonable operating

limits. (Id. at 760.)

California's standards are so amorphous as to foreclose an argument of an independent and adequate ground (default) to bar federal review. People v. Partida (2005) 37 Cal.4th 428 and People v. Boyer (2006) 38 Cal.4th 412, 441 fn. 17, permit a due process argument to be made on appeal despite the lack of a constitutional objection at the trial court level. That is a major basis to argue in federal court that the California Courts explicitly permit arguing on appeal issues imperfectly objected to at trial on non-constitutional grounds.

Prior to Partida, the rules allowed for the exercise of discretion to review forfeited issues, but there were no standards. One obtained review depending on what district or division one found oneself in the state appellate courts.

There will be much irony and satisfaction in getting a state conviction reversed on a constitutional ground never addressed by the state court due to its invocation of a procedural bar (*i.e.,* no objection at trial) which is found inadequate to prevent review of the issue in federal court.

CONCLUSION

There is nothing more frustrating than to have the state appellate court refuse to review a decent issue simply because trial counsel didn't mumble a few syllables to make a proper objection. As can be seen, all is not lost. Not even close. There

are numerous bases to convince the appeals court to review the issue on the merits despite the imperfectly made (or omitted) objection.

OVERCOMING THE DARKEST, HIDDEN AND MOST MYSTERIOUS CHALLENGES OF ISSUE WAIVER

by George Schraer and Charles Sevilla

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