ELUSIVE EXCEPTIONS TO WAIVER & FORFEITURE BARS

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January 2004

Revised May 2009, Sept. 2011 & Oct. 2013
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I. WELL-ESTABLISHED CATEGORIES OF ERRORS COGNIZABLE WITHOUT A SPECIFIC OBJECTION OR REQUEST BELOW.

- Sufficiency of evidence
  - Where a defendant goes to *trial* (jury trial, bench trial, slow plea/submission), sufficiency-of-evidence claim may be raised on appeal, regardless of whether defendant moved for acquittal (Pen. Code § 1118, 1118.1) or otherwise raised sufficiency claim below: E.g., *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.
  - Note that this applies equally to sufficiency of evidence to support a "strike" or other prior conviction enhancement. *People v. Rodriguez* (1998) 17 Cal.4th 253, 262. Contrary to practice of some appellate attorneys, it is not necessary to present such claims in an IAC envelope.
    - But issues re *admissibility* of documents introduced as proof of priors (e.g., outside "record of conviction," hearsay, etc.) still require specific objection below. See *People v. Roberts* (2011) 195 Cal.App.4th 1106.

- Jury instructions (instructions given & sua sponte instructions)
  - Jury instructions given: Pen. Code § 1259 [any instruction given reviewable on appeal if it affected defendant's "substantial rights"]. "Ascertaining whether claimed instructional error affected the substantial rights of the defendant *necessarily requires an examination of the merits of the claim*—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." *People* v. *Andersen* (1994) 26 Cal.App.4th 1241, 1249, emphasis added..
  - Sua sponte duty to instruct on matters openly and closely connected with the case, including elements of the charge, elements of theories of liability, and lesser included offenses and defenses if substantial evidence would support verdict on those theories. E.g., *People v. Flood* (1998) 18 Cal.4th 470, [elements]; *People v. Breverman* (1998) 19 Cal.4th 142, 154-162 [lesser included offenses]; *People* v. *Prettyman* (1996) 14 Cal.4th 248 ["target

offense" for any "natural and probable consequences" theory of liability].

- Even if a subject does not come within a court's sua sponte instructional obligations, **if a court does undertake to instruct on a particular point, it must do so correctly.** Defendant may challenge *incorrect or misleading instructions*, regardless of whether those instructions otherwise would have come within sua sponte duties. *People* v. *Castillo* (1997) 16 Cal.4th 1009, 1015; *People* v. *Prettyman* (1996) 14 Cal.4th 248, 270. "Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." *Castillo*, *supra*, 16 Cal.4th at p. 1015.

- Excess of jurisdiction. Errors "in excess of jurisdiction" may be raised and corrected at any time, even if not preserved at trial. (Indeed, some such "jurisdictional" errors may even be raised on a post-appeal habeas petition, notwithstanding the usual limits barring use of habeas as a second appeal. See *In re Harris* (1993) 5 Cal.4th 813.

  - Unauthorized sentence, *People v. Scott* (1994) 9 Cal.4th 331, 354: "legal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement." Common categories of "unauthorized sentence" claims include § 654 errors, and violations of criteria for legal applicability of enhancement and other rules governing staying or partial staying of terms or enhancements. E.g., *In re Harris* (1989) 49 Cal.3d 131, 134 fn. 2 (claim that two prior "serious felonies" were not "brought and tried separately," as required to support separate enhancements under Pen. Code § 667(a)).

  - Competency to stand trial/Pen. Code § 1368. *People v. Castro* (2000) 78 Cal.App.4th 1402, 1415; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 70-71; *People v. Hale* (1988) 44 Cal.3d 531, 541.

  - Imposition of enhancement not pleaded.? Not clear; it all depends...
    - *People v. Mancebo* (2002) 27 Cal.4th 735, 749 fn. 7. Unauthorized sentence and due process violation. Prosecution pleaded gun use for purposes of "one strike" law (§ 667.61) in way that effectively limited its use to calculation of "one strike" sentence. But, at sentencing, prosecution dismissed the "one strike" allegation of "gun use) (contrary to 667.61) in order to "free up" the gun use for imposition of a separate § 12022.53 enhancement.
    - Contrast *People v. Houston* (2012) 54 Cal.4th 1186, 1225-1229. Waiver found where clear opportunity to object. Contrary to § 664(a),

indictment failed to allege that attempted murders were premeditated. But, during instruction conference at trial, court announced its intent to instruct on premeditation and to provide for separate jury finding and offered opportunity to raise objections to any proposed instructions. Defense had notice of intended submission of premeditation. Failure to object to instructions and verdict forms waived the indictment's failure to alleged premeditation. (If defense had objected at time, prosecution could have moved to amend the indictment.)

- Statute of limitations, where untimeliness is evident *on the face of the accusatory pleading*. *People v. Williams* (1999) 21 Cal.4th 335, 339-340.
  - This exception to forfeiture applies only "when the charging document indicates on its face that the action is time-barred." *Williams* at 341. However, the general forfeiture principle will still apply where the accusatory pleading appears timely on its face. Where the pleading appears "facially sufficient" and the limitations issue turns on factual or other evidentiary matters (such as where the pleading alleges facts which would toll the statute), the limitations claim must be litigated at trial, and a failure to assert it will result in forfeiture. *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1287-1289.

- Facial unconstitutionality of probation condition. *In re Sheena K.* (2007) 40 Cal.4th 875. A claim that a probation condition is "facially vague and overbroad" or otherwise unconstitutional *on its face* presents a pure question of law . Because such a claim does not turn on the specific facts and does not require development of the record before the trial court, it does not implicate the policies underlying waiver/forfeiture rules.
  - This does *not* mean that all constitutional challenges to probation terms are exempt from waiver/forfeiture. Constitutional sentencing claims which are more dependent upon specific circumstances of case and sentencing record may still be forfeited if not raised at sentencing. *Sheena K.* at 888-889.

II. GENERAL RULE: MOST ERRORS REQUIRE AN OBJECTION IN TRIAL COURT IN ORDER TO RAISE CLAIM ON APPEAL.

- General principle: "The forfeiture doctrine is a 'well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been--but were not--raised in the trial court.' [Citations.] Strong policy reasons support this rule: 'It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been

easily corrected or avoided.' [Citations.]" *People v. Stowell* (2003) 31 Cal.4th 1107, 1114.

- Most common categories presenting waiver problems:

- Errors in admission or exclusion of evidence (Evid. Code §§ 353, 354).

- Sentencing error related to adequacy of court's reasons (or failure to state reasons) for a discretionary sentence choice. *People v. Scott* (1994) 9 Cal.4th 331 [reasons for upper term or consecutive sentences]; *People v. Stowell* (2003) 31 Cal.4th 1107 [failure to make express findings for HIV testing of sex offender].
  - Failure to provide a "tentative decision" before pronouncing sentence does not excuse *Scott* duty to object to any defects in sentencing reasons. *People v. Gonzalez* (2003) 31 Cal.4th 745.
  - See also *People v. Welch* (1993) 5 Cal.4th 228 [necessity of objection to preserve challenge to probation conditions].

- Prosecutorial misconduct. *People v. Green* (1980) 27 Cal.3d 1, 27; e.g., *People v. Brown* (2003) 31 Cal.4th 518, 553-554; *People v. Sapp* (2003) 31 Cal.4th 240, 279.

- Pinpoint instructions (i.e., failure to give instructions deemed outside a court's sua sponte instructional duties). E.g., *People v. Saille* (1991) 54 Cal.3d 1103, 1120; *People v. Middleton* (1997) 52 Cal.App.4th 19. Instructions relating categories of evidence (e.g., eyewitness testimony, intoxication) to elements of offense or defense theory or "clarifying or amplifying" a point covered by correct general instructions must be requested. *People v. Guiuan* (1998) 18 Cal.4th 558, 570.

- Most errors during jury selection.

- Most other "courtroom errors." E.g., shackling, misconduct of court personnel or spectators, etc.

III. OVERCOMING WAIVER CLAIMS – ADEQUACY OF OBJECTION BELOW TO PRESERVE ISSUE.

- Timing/in limine motion. Where defendant raises evidentiary issue in an in limine motion and court rules on it, defendant generally does not need to renew that objection during trial to preserve issue. *People v. Morris* (1991) 53 Cal.3d 152, 189; accord *People v. Crittenden* (1994) 9 Cal.4th 83, 127; *People v. Rowland* (1992) 4 Cal.4th 238, 264 fn. 3; *People v. Felix* (1999) 70 Cal.App.4th 426, 430-431.

- General principles in assessing sufficiency of objection:
  - "An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented.. [Citations.]" *People v. Scott* (1978) 21 Cal.3d 284, 290 [objections to relevance, intrusiveness, and "demeaning" nature of medical test on defendant sought by prosecution deemed sufficient to preserve search-and-seizure, self-incrimination, and privacy claims].
  - "While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility. [Citations.] [¶] .... The circumstances in which an objection is made should be considered in determining its sufficiency. [Citations.]" *People v. Williams* (1988) 44 Cal.3d 883, 906-907 [where prosecutor's statements had already informed court of nature of "other crimes" evidence, defense counsel's "relevance" objection deemed sufficient to put court on notice to determine admissibility under Evid. Code § 1101 & § 352 standards for other offenses]; see also *People v. Clark* (1992) 3 Cal.4th 41, 123-124 [under totality of circumstances, counsel's relevance and Evid. Code § 352 objections deemed sufficient to raise Evid. Code § 1101 objection].

IV. FORFEITURE AND FEDERALIZATION

- One of the most frequently recurring forfeiture/waiver questions is *whether trial counsel's objection on a state law ground is sufficient to obtain appellate review of a related federal constitutional claim*. Especially in the evidentiary area, numerous California decisions have deemed various federal claims (e.g., due process, confrontation, right to counsel, etc) forfeited where trial counsel framed the objection only in traditional state law terms (e.g., relevance, hearsay, etc.). See, e.g., *People* v. *Barnett* (1998) 17 Cal.4th 1044, 1119 fn. 54; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116 fn. 20; *People v. Ashmus* (1991) 54 Cal.3d 932, 972 fn. 10. However, two recent California Supreme Court decisions have partially relaxed those limitations.

- *Yeoman:* Objection on parallel state law ground. An objection on a state law grounds is sufficient to preserve a parallel federal constitutional claim *governed by the same standard*:

- "[N]o useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [*Wheeler* motion sufficient to preserve *Batson* claim as well].

- The same rationale should apply in other situations of parallel state and federal doctrines (e.g., *Aranda-Bruton*).)

- *Partida*: Federal claim reviewable where it only represents "consequences" of erroneous ruling on state law objection. The California Supreme Court expanded upon the *Yeoman* rationale in *People v. Partida* (2005) 37 Cal.4th 428. At trial, the defense had objected to gang evidence on Evid. Code § 352 grounds. On appeal, Partida argued that the asserted § 352 error (i.e., admission of evidence substantially more prejudicial than probative) also amounted to a federal due process violation. The Supreme Court reiterated that a defendant "may not argue that the court should have excluded the evidence for a reason different from his trial objection." But the Court continued, "however, ... defendant may make a very narrow due process argument on appeal. He may argue that the asserted error in admitting the evidence over his Evidence Code section 352 objection had *the additional legal consequence of violating due process*." *Id.* at 435, emphasis added.

  - *Partida* emphasized that the "narrow due process argument" did not alter the grounds for exclusion urged below or the analysis governing the trial court's ruling on the admissibility of the evidence. Instead, the due process claim concerned only the "legal consequences" of the trial court's error in overruling the § 352 objection – which was a question for the reviewing court, rather than the trial court. The Court distinguished its earlier cases finding state law objections insufficient to preserve federal claims as only barring arguments "that the constitutional provisions required the trial court to exclude the evidence for a reason not included in the actual trial objection." *Partida* at 437-438. But a defendant may still "argue [that] an additional legal consequence of the asserted error in overruling" his state law objection was a federal due process violation.

  - *Partida* effectively allows appellate review of the federal constitutional

implications of a ruling on a state law objection *where the federal claim does not alter the analysis of whether the trial court erred*, but only concerns the reviewing court's analysis of the effect – the "legal consequence" – of that error.

- Subsequent cases have adhered to that distinction. E.g., *People v. Lewis* (2006) 39 Cal.4th 970, 990 fn. 5 (allowing review of federal arguments that "merely assert that the trial court's act or omission, insofar as each was wrong on grounds actually presented to that court, had the additional legal consequence of violating the Constitution"). As later cases have phrased the *Partida* rule, there is no forfeiture where the federal claim simply adds a "constitutional 'gloss'" to the same claim posed to the trial judge through the state law objection. *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.

- **A federal claim (or, for that matter, a different state law claim) will still be deemed forfeited if the error component of the claim requires a different analysis than the state law objection raised below**. For instance, because "a *Crawford* [confrontation clause] analysis is distinctly different than that of a generalized hearsay problem," a hearsay objection below is not sufficient to obtain appellate review of a confrontation claim. *People v. Chaney* (2007) 148 Cal.App.4th 772, 777-780. The same goes for attempts to argue a different federal claim, subject to different substantive standards, than the one urged below. E.g., *People v. Lewis* (2008) 43 Cal.4th 415, 444-445 (5th Amen. *Miranda* objection below did not allow review of 4th Amen. *McLaughlin* claim that statements were obtained through excessive delay in judicial determination of probable cause); see also *People v. Zamudio* (2008) 43 Cal.4th 327, 354 ("objection did not fairly inform the trial court or the prosecution that defendant was objecting on work product grounds").

- ***New!*** <u>Questionable efficacy of "mantra motions" federalizing objections</u>. In recent years, many trial attorneys have attempted to forestall waiver problems by filing so-called "mantra motions" purporting to federalize all trial objections in advance. Such a motion asks that all objections be deemed made on federal constitutional, as well as state law grounds (and typically includes a list of constitutional provisions which could potentially be implicated during trial, including due process, confrontation, etc.). Though the "mantra" tactic is certainly an understandable one, recent California Supreme Court cases

indicate that **trial and appellate counsel should not count on a blanket pre-trial request such as this to preserve a federal claim** which is governed by a different standard than the explicitly-asserted state law objection.

- In at least two recent capital cases, the Supreme Court has found certain federal claims forfeited, despite trial counsel's filing of a pretrial pleading asserting that all objections and motions were also made under assorted federal constitutional provisions. *People v. Ervine* (2009) 47 Cal.4th 745, 783; *People v. Redd* (2010) 48 Cal.4th 691, 730 fn. 19. Like most "mantra" motions, the *Ervine* and *Redd* pretrial requests included a litany of potential federal grounds (e.g., "4th, 5th, 6th, 8th, and 14th Amendment[s]" (*Ervine*)). But the Supreme Court found that such a preemptive motion does not satisfy the purpose of the rule. "This standard of specificity is not satisfied by offering a generic laundry list of potentially applicable constitutional provisions untethered to any particular piece of evidence." *Ervine* at 783. *Ervine* and *Redd* indicate that **a "mantra" motion will likely <u>not</u> preserve a constitutional claim outside the *Partida* situation of a congruence of state/federal standards**.
  - For example, *Redd* found a confrontation claim forfeited because it invoked different standards than the hearsay objection asserted at trial. "Therefore, defendant's new objection on appeal is not merely a constitutional "gloss" upon an objection raised below ...." *Redd*, 48 Cal.4th at 730 fn. 19.

- At best, such a bid for federalization of all claims will only be effective in cases where the trial judge agrees to the request, and, even there, it is questionable how much the tactic can accomplish. In two recent cases, the Supreme Court found certain constitutional claims preserved where the trial court had explicitly granted motions that "all defense counsel's objections at trial be deemed objections under the Constitutions of both the State of California and the United States." *People v. Vines* (2011) 51 Cal.4th 830, 865 & fn. 15; accord *People v. McKinnon* (2011) 52 Cal.4th 610, 629 fn. 14. But, at least in *McKinnon*, "defense counsel did not urge that different legal standards governed the constitutional and nonconstitutional aspects of his objections." Because a federal constitutional claim invoking the identical standard as the state law objection would have been cognizable anyway under *Partida*, it is not clear that the "mantra motion" actually preserved any issues which would otherwise have

been deemed forfeited.

- Additional caveat – necessity of explicit federalization at appellate level. The *Yeoman* and *Partida* rationales apply only to whether a state law objection in the trial court is nonetheless sufficient to allow review *on direct appeal* of a federal constitutional claim arising out of the same error. The partial relaxation of the forfeiture rule in this context **should not be confused with "exhaustion" of the federal bases of a claim for purposes of future federal habeas review.** In other words, even if *Yeoman* and *Partida* may sometimes excuse a failure to explicitly "federalize" a claim at the trial court level, **appellate counsel must still explicitly state the federal constitutional basis for a claim in his or her briefs in the Court of Appeal and in any petition for review to the California Supreme Court**. See *Reese v. Baldwin* (2004) 541 U.S. 27 (petition to Oregon Supreme Court deemed insufficient to exhaust 6th Amen./*Strickland* ineffective assistance claim, where the petition cited only Oregon cases on "inadequate counsel"). To avoid any doubt on the subject, **appellate briefs and petitions should explicitly cite federal constitutional provisions and/or U.S. Supreme Court or other federal cases, as to each claim with a potential federal constitutional dimension**.

V. OVERCOMING WAIVER CLAIMS – MISCELLANEOUS GROUNDS FOR URGING COURT TO EXCUSE OR OVERLOOK LACK OF OBJECTION.

- General thoughts: The various grounds listed below are the "elusive" waiver-busters of the title of these materials. These grounds are much less commonly invoked than the various rules noted in the preceding sections. But, as reflected in the handful of recent citations, these grounds have not entirely disappeared from the case law. However, the published case law shows little consistency in appellate courts' willingness to overlook apparent defects in objections on these grounds. When a court is interested in getting to the merits of an issue, it will frequently invoke several of these overlapping grounds (e.g., "pure question of law," "constitutional" issue, and appellate court's discretion).

- Change in the law. Courts will generally not find a forfeiture rule "'when the pertinent law changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.' [Citations.]" *People v. Black* (2007) 41 Cal.4th 799, 810-812 ("*Black II*"). In *Black II*, the California Supreme Court applied that exception to forfeiture to the failure to raise a Sixth Amendment challenge to the trial court's finding of aggravating factors in a pre-*Blakely* sentencing hearing. "Prior to *Blakely*, it was widely assumed" in California that the Sixth Amendment/*Apprendi*

jury trial right applied only to adjudication of enhancements, but not to a judge's findings of aggravating factors for an upper term. Consequently, defense trial counsel's failure to anticipate *Blakely* did not forfeit appellate review of the claim. See also, e.g., *People v. Turner* (1990) 50 Cal.3d 668, 703.

- This rationale applies even more strongly when appellate case law at time of trial would have required trial court to reject the claim. Because that case law would have been binding on the trial judge, any attempt to assert the claim in the trial court would have been a futile exercise (implicating the "futility exception" discussed below). *People v. Sandoval* (2007) 41 Cal.4th 825, 837 fn. 4 (*Blakely* claim not forfeited where sentencing occurred during interval between *Black I* and *Cunningham*; *Blakely* objection would have been futile since then-extant *Black I* opinion would have required trial court to reject it).

- "Fundamental constitutional rights." Lack of objection does not forfeit right to appeal deprivation of "certain fundamental constitutional rights," such as right to jury trial and double jeopardy (even though it may bar right to raise related claims of violations of state statutory or other procedural rules): "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]" *People v. Vera* (1997) 15 Cal.4th 269, 276 -277; accord, *People v. Saunders* (1993) 5 Cal.4th 580, 592, 589 fn. 5; *People v. Valladoli* (1996) 13 Cal.4th 590, 606.

  - "Constitutional" issues. Some older cases speak more generally of an appellate court's authority to review "constitutional" claims not raised below, including constitutionality of statute. *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.

  - However, *courts invoke that maxim only sparingly*. The general rule is that *most constitutional claims are still subject to waiver/forfeiture rules.* (However, as discused below, the constitutional character of a claim may provide a reason for an appellate court to exercise its discretion to overlook forfeiture in some instances.

- Pure question of law cognizable on appeal despite inadequate objection. In *Yeoman* (the case deeming a state "*Wheeler* motion" sufficient to preserve federal *Batson* claim), the Supreme Court also noted "the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. [Citations.]" *People v. Yeoman* (2003) 31 Cal.4th 93, 118; see also, e.g., *People v.*

Gutierrez (2003) 112 Cal.App.4th 1463, 1471 fn. 5.

- Appellate court's inherent discretion to consider a claim not adequately preserved below (except evidentiary claims):

  - **The *"Williams* footnote":** "Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent[]' or 'correct[]' the claimed error in the trial court [citation] does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. *An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party.* ([Citation]; see, e.g., *People* v. *Berryman* (1993) 6 Cal.4th 1048, 1072-1076 [] [*passing on a claim of prosecutorial misconduct that was not preserved for review*]; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 975-976 [] [*same*].) Indeed, it has the authority to do so. [Citation] .... Therefore, it is free to act in the matter. [Citation] *Whether or not it should do so is entrusted to its discretion.* [Citation]" *People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6; emphasis added.

  - In *Williams*, the Supreme Court upheld an appellate court's discretionary authority to review the soundness of a trial court's reasons for dismissing a "strike," even though *the prosecutor had failed to object* to those reasons. But (as reflected by *Williams'* citation to cases reaching prosecutorial misconduct claims), the principle applies equally to review of inadequately preserved *defense* objections. See, e.g., *People v. Ellison* (2003) 111 Cal.App.4th 1360, 1370-1371 (jurisdiction of judge to pass sentence where sentencing proceedings had begun before different judge); *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642 (judge's voir dire comments inviting jurors to make up some other reason for excusal rather than admit to racial prejudice against defendant).

  - But, per the *Williams* footnote, *there is no such discretion with respect to evidentiary claims*. Evid. Code §§ 353 and 354 specifically prohibit review of evidentiary objections not raised below. *People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6.

  - Of all the waiver exceptions discussed here, the "inherent discretion" principle recognized in the *Williams* footnote potentially has the most far-reaching implications. There are no clearly-defined standards governing how and when an appellate court should exercise its discretion to overlook a waiver, and no

consistent pattern emerges out of the relatively few cases (published and unpublished) referring to that discretion. Some cases (both pre- and post-*Williams*) simply note the "importance" of constitutional claims and "issues of public policy" as grounds for exercising discretion to reach the merits. Cf. *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.

- More recently, the Supreme Court commented that appellate courts most frequently invoke this discretion to overlook a forfeiture "where a forfeited claim involves an important issue of constitutional law or a substantial right [citations]" or "where the applicability of the forfeiture rule is uncertain or the defendant did not have a meaningful opportunity to object at trial [citations]." *In re Sheena K.* (2007) 40 Cal.4th 875, 887 fn. 7.

- Prejudice not curable by admonition. Prosecutorial or judicial misconduct is reviewable without objection where the prejudice is so great that it couldn't have been cured by an admonition. *People v. Green* (1980 27 Cal.3d 1, 27; see e.g., *People v. Johnson* (1981) 121 Cal.App.3d 94, 103-104 (prejudicial prosecutorial misconduct); *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567 (prejudicial judicial misconduct).

- Futility (e.g., where court has already overruled similar objections). E.g., *People v. Hill* (1998) 17 Cal.4th 800, 820 (prosecutorial misconduct); *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 (judicial misconduct). (As noted earlier, an objection is also deemed "futile" where then-extant case law would have required the trial court to reject it under *stare decisis* rules. *People v. Sandoval* (2007) 41 Cal.4th 825, 837 fn. 4.)

- Closely balanced case and misconduct material to the verdict. "'.... "Misconduct of the prosecuting attorney may not be assigned as error on appeal if it has not been assigned at the trial unless, *the case being closely balanced and presenting grave doubt of the defendant's guilt, the misconduct contributed materially to the verdict* or unless the harmful results of the misconduct could not have been obviated by a timely admonition to the jury....."' [Citation.]" *People v. Bryden* (1998) 63 Cal.App.4th 159, 182, emphasis added.

- Prosecutor's duty. Prosecutor has equal duty to ensure that law is obeyed. *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649.

- Lack of opportunity to object. E.g., *In re Khonsavahn S.* (1998) 67 Cal.App.4th 532,

536-537 ("it appears counsel here was utterly surprised by the court's ruling [requiring AIDS testing] and had little opportunity to react").

- But cf. *People v. Gonzalez* (2003) 31 Cal.4th 745 (failure to give "tentative" sentencing decision ordinarily doesn't excuse objection requirement).

- Discretion to consider merits of constitutional issue to forestall habeas petition on same issue. "A matter normally not reviewable upon direct appeal, but which is shown by the appeal record to be vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal. [Citations.]" *People v. Norwood* (1972) 26 Cal.App.3d 148, 153; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173.

  - Similar principle. "*To forestall any later charge of ineffective assistance,*" reviewing court may consider merits of claim not preserved below. E.g., *People v. Cox* (1991) 53 Cal.3d 618, 682.

- Final thought (when nothing else quite fits): "**An appellate court may note errors not raised by the parties if justice requires it.** [Citations.]" *People v. Norwood* (1972) 26 Cal.App.3d 148, 152.

VI. STRATEGIC REASONS FOR INVOKING THESE WAIVER-AVOIDANCE GROUNDS.

- To win in state court. If you've managed to persuade the justices on the substantive issue – i.e., that there's been an injustice in this case – *give them a way to rule in your favor on the apparent procedural bar*.

  - Additionally, preserving the right to argue the federal constitutional consequences of a ruling (e.g., under *People v. Partida* (2005) 37 Cal.4th 428 (see Part IV, *ante*)) allows you to argue prejudice under a much more favorable standard. Thus, if framed only in state law terms (hearsay, Evid. Code § 352, etc.), an erroneous ruling on admission of certain evidence or alleged instances of prosecutorial misconduct will be subject to the state *Watson* standard, requiring the defense to show a "reasonable probability" of a more favorable verdict, but for the error. But, if that same evidence or prosecutorial error is deemed a federal constitutional violation, the *Chapman* standard will apply, requiring the state to prove that the error was "harmless beyond a reasonable doubt."

- To win in federal court.

- If the state appellate court decides the claim on the merits and does not invoke "waiver," "forfeiture," or any other state "procedural default," the defendant will be free to pursue his claim on federal habeas corpus.

- Conversely, even if the state appellate court does declare a claim forfeited, marshaling all the potential arguments against forfeiture in the state appeal may still assist in setting up the claim for federal habeas corpus review. Some aspects of California's waiver/forfeiture rules *may* not stand up as "adequate and independent" state procedural defaults, because the state appellate courts apply the waiver rules and their exceptions inconsistently or arbitrarily. Note, however, that the Ninth Circuit has "held that California consistently applies its contemporaneous objection rule when a party fails to object to the admission of evidence. [Citation.]" *Fairbank v. Ayers* (9th Cir. 2011) 650 F.3d1243, 1256.

- The "*Williams* footnote" recognizing an appellate court's inherent discretion to reach an inadequately-preserved *non-evidentiary* issue (*People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6, discussed above) arguably could still be vulnerable to such an "adequate and independent" argument. The California case law does not appear to identify any clear *standards* for when and how an appellate court should exercise that discretion. However, the U.S. Supreme Court recently upheld the "adequacy" of California's habeas timeliness rules against a similar challenge. "Indeterminate language is typical of discretionary rules. Application of those rules in particular circumstances, however, can supply the requisite clarity." *Walker v. Martin* (2011) __ U.S. __, 131 S.Ct. 1120, 1128. The Court also found the habeas timeliness rules "regularly followed," despite some instances of merits consideration of long-delayed petitions. "A discretionary rule ought not be disregarded automatically upon a showing of seeming inconsistencies. [Fn.] Discretion enables a court to home in on case-specific considerations and to avoid the harsh results that sometimes attend consistent application of an unyielding rule." *Walker* at 1130.