

AVOIDING FORFEITURE: ARGUING INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

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I. INTRODUCTION

Often, the great (or not so great) issue you argue on appeal does not mirror what counsel argued in the trial court. If there is any variance between what defense counsel said and what you are saying, or if counsel failed to mention the issue altogether, you should anticipate the Attorney General's first response will be that the issue is forfeited on appeal.

Forfeiture problems generally should be addressed in the opening brief. First, fully describe the specific objection made by counsel in your opening brief. If no objection was made, you must argue the issue is one which can be raised despite the lack of an objection. Second, whether or not an objection was made, consider including a claim counsel provided ineffective assistance by failing to fully preserve the issue you are arguing on appeal.

Do not wait until the reply brief to raise a claim of ineffective assistance of counsel (IAC). Raising an IAC claim in a reply brief in response to the Attorney General's forfeiture argument is hazardous, as appellate courts generally will not consider arguments raised for the first time in the reply brief. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2 [citing *Witkin* for the rule that "points raised in the reply brief for the first time will not be considered"]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055 [refusing to consider IAC claim raised for first time in reply brief in response to Attorney General's forfeiture argument].)

When faced with a forfeiture problem, there are four possible responses:

1. Argue that the objection was sufficiently specific and timely;
2. Argue the issue can be raised on appeal despite the lack of an objection;
3. Argue counsel provided ineffective assistance by failing to raise the issue

argued on appeal; and/or,

4. Raise an IAC claim in a habeas corpus petition filed in conjunction with the appeal.

Which tactic you take depends on the nature of the issue argued on appeal, and what defense counsel did in the trial court. You might pursue one, two, three or all four responses in any given case. Thus, you might argue on direct appeal that the objection made was adequate, that no objection was necessary to raise the issue on appeal, and that if the issue is forfeited, counsel provided ineffective assistance. You might also file a habeas corpus petition supported by a declaration from trial counsel to make clear there was no rational tactical reason for counsel's failure to object.

If you decide to raise an IAC claim on direct appeal, do not put your IAC argument in a footnote. Put the argument in the body of your opening brief, and take the time to argue the merits of the claim. If your IAC claim is perfunctory, the appellate court will give it a perfunctory rejection. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 241; [“he ‘asserts the [IAC] point perfunctorily,’ and ‘[w]e deny it in the same fashion’”].) Indeed, the argument may be deemed forfeited on appeal for lack of proper supporting argument.

II. THE FORFEITURE RULE

As a general rule, an appellate court will not consider matters not raised below. (*People v. Gams* (1997) 52 Cal.App.4th 147, 155.) “An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method.” (*People v. Saunders* (1993) 5 Cal.4th 580, 590-591.) It is “unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.” (*Id.* at p. 591.)

Admission of Evidence. Forfeiture problems most commonly appear when challenging the admission of evidence. An appellate challenge can be made only when defense counsel made an objection in the trial court which is **timely** and **specific** and made

on the **same grounds** raised on appeal. (Evid. Code, § 353.) Evidence Code section 353 “applies equally to any claim on appeal that the evidence was erroneously admitted, other than the stated ground for the objection at trial.” (*People v. Kennedy* (2005) 36 Cal.4th 595, 612.)

Exclusion of Evidence. Forfeiture can also present a problem when arguing the court erroneously excluded evidence offered by the defense. (See Evid. Code, § 354.) “As a condition precedent to challenging the exclusion of proffered testimony, Evidence Code section 354, subdivision (a), requires the proponent make known to the court the ‘substance, purpose, and relevance of the excluded evidence’” (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178.)

Jury Instructions. The general rule is that the appellate court can address challenges to jury instructions given, refused or modified “even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) However, the Attorney General will frequently argue forfeiture when a jury instruction is challenged on appeal, arguing “A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134.)

Prosecutorial Misconduct. “In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.” (*People v. Hawthorne* (2009) 46 Cal.4th 67, 90.)

Sentencing Decisions. Discretionary sentencing choices--those “which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner” (*People v. Scott* (1994) 9 Cal.4th 331, 354) cannot be challenged on appeal unless an objection was made in the trial court.

Invited Error. The invited error doctrine is not based on a failure to object, but like forfeiture it bars appellate challenges. If trial counsel intentionally causes the error, you cannot complain about the error on appeal. (*People v. Marshall* (1990) 50 Cal.3d 907, 931; *People v. Wickersham* (1982) 32 Cal.3d 307, 330.) However, the invited error doctrine should not bar an appellate argument “unless counsel articulated a tactical basis for the choice.” (*Id.* at p. 332.) The Attorney General most often argues invited error when you challenge a jury instruction which was included in defendant’s list of requested instructions.

III. AVOIDING FORFEITURE: ARGUE NO OBJECTION WAS REQUIRED

When faced with a potential forfeiture problem, first consider whether you can argue no specific objection was required to raise the issue on appeal.

A. An Objection Would Have Been Futile

When the record affirmatively shows that an objection would have been futile, a reviewing court should reach the underlying issue despite a failure to object. (See *People v. Welch* (1993) 5 Cal.4th 228, 237; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 and fn. 27; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692.) Sometimes counsel will object once or twice to questions or argument, and the trial court overrules those objections. If the prosecutor continues with related objectionable questions or argument, you should contend further objection was not required to preserve an appellate challenge. Since the court had overruled counsel’s initial meritorious objections, further objection would have been futile.

An objection may also have been futile based on the law in existence at the time of trial. There is no duty to object when the existing state of the law would render an objection futile. (*City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 785, citing *People v. Chavez* (1980) 26 Cal.3d 324, 350, fn. 5.)

If you think you have a valid appellate challenge despite contrary authority which would have required the trial court to overrule any objection, you can raise the issue on appeal despite the lack of an objection below. An objection in the trial court would have

been futile, since the trial court would have necessarily rejected it. Thus, in *People v. Chavez, supra*, the court considered an appellate challenge to the introduction of a witness's prior statements at trial even though no objection was raised below. It found no forfeiture because under controlling precedent at the time of trial the court would have overruled any objection. "The Court of Appeal must follow, and has no authority to overrule, the decisions of [the Supreme] Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because the issue now presented could not have been decided below, it is properly before us in the first instance." (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.) A superior court equally has no authority to overrule the decisions of an appellate court. You can argue for the first time on appeal a prior appellate decision is erroneous, and prejudicial error occurred at trial, even if no objection was made below.

Also, if the law has changed after the trial, you can raise an appellate challenge based on the new law even though no objection was made below. A recent example can be found in appeals following *Cunningham v. California* (2007) 549 U.S. 270. *Cunningham* held the California Supreme Court got it wrong in *People v. Black* (2005) 35 Cal.4th 1238. A challenge to the imposition of an upper term based on *Cunningham* could be raised on appeal even if no objection had been made below if the sentencing preceded the date *Cunningham* was published. Any claim the issue was forfeited "lacks merit because at the time of [] sentencing *Black I* was the 'law of the land' of California and under the rule of *Auto Equity* the trial court had no choice but to follow it. A criminal defendant cannot be deemed to have waived or forfeited a legal argument which was not recognized at the time of his trial." (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1479, fn. omitted.)

B. Jury Instructions

Penal Code section 1259 provides, "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Therefore, the general rule is that no objection is required to challenge jury instructions on appeal.

However, be careful how you frame the issue. You want to argue the instruction contains an incorrect statement of law. Avoid saying the instruction was ambiguous or confusing, misled the jury, or required amplification or explanation. Using those phrases will invite a challenge that the issue is forfeited.

- “In the absence of a request, however, a trial court is under no obligation to amplify or explain an instruction.” (*People v. Beeler* (1995) 9 Cal.4th 953, 983.)
- “A party may not complain on appeal that an instruction *correct in law* and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Hart* (1999) 20 Cal.4th 546, 622, italics added.)

If the Attorney General argues a challenge to a jury instruction is forfeited, cite Penal Code section 1259 in your reply brief, cases finding no forfeiture under section 1259 (e.g. *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7), and make clear your argument is that the instruction is *incorrect in law*, not that it is incomplete or required amplification. Better yet, make this point clearly in your opening brief.

C. Pure Questions of Law

“[A] purely legal issue . . . is not subject to the waiver rule.” (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179.) Reviewing court may consider on appeal “a claim raising a pure question of law on undisputed facts”. (*People v. Yoeman* (2003) 31 Cal.4th 93, 118.) In *Hale v. Morgan* (1978) 22 Cal.3d 388, 394 the Supreme Court said, “our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved.”

This principle has allowed us to challenge probation conditions, particularly gang probation conditions, on the basis they are constitutionally vague and overbroad. (*In re Sheena K.* (2007) 40 Cal.4th 875, 879.)

Similarly, appellate claims the sentencing court violated the plea bargain are not subject to the forfeiture rule, unless the defendant was advised of his right to withdraw his

plea if his sentence exceeds the terms of the plea bargain. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024-1025.)

When arguing there is no forfeiture because the appellate issue raises a pure question of law, be careful to stress it is based on “undisputed facts.” If you argue factual nuances, you risk a forfeiture challenge.

D. Unauthorized Sentences

Unauthorized sentences can always be challenged on appeal even if no objection was made below. (*People v. Dotson* (1997) 16 Cal.4th 547.) If no discretion is involved, and as a matter of law the trial court erred, no objection is required to raise the issue on appeal. “A sentence is said to be unauthorized if it cannot ‘lawfully be imposed under any circumstance in the particular case.’” (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.) Such errors “are so obvious and so easily fixable that correction of these errors in the absence of an objection at sentencing will not unduly burden the courts or the parties.” (*People v. Smith* (2001) 24 Cal.4th 849, 854.)

Examples:

- Violations of Penal Code section 654. (*People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.)
- Miscalculation of credits. (*People v. Aquirre* (1997) 56 Cal.App.4th 1135, 1139.)
- Imposition of punishment under a statute which was not enacted until after the crime was committed. (*People v. Smith* (2001) 24 Cal.4th 849, 854 [imposition of parole revocation fine under Pen. Code § 1204.45 for a crime committed before the law came into effect]; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249 [imposition of \$300 fine when applicable fine was only \$200 when crime was committed].)
- Errors in imposing determinate sentences under Penal Code section 1170.1. (*People v. Thompson* (2009) 177 Cal.App.4th 1424, 1432.)
- Imposition of a sentence where the defendant was not convicted of the underlying crime. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 386.)

There is an exception to this rule in guilty plea cases. “Where the defendants have pleaded guilty in return for a specified sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

E. A Due Process Claim Can Be Raised on Appeal Based On an Evidence Code Section 352 Objection in the Trial Court

In *People v. Partida* (2005) 37 Cal.4th 428 the court held that even in the absence of a federal due process objection at trial, on appeal a defendant still could “argue that the asserted error in overruling [his section 352] trial objection had the legal consequence of violating due process.” (*Id.* at 431.) “[W]hether that error violated due process is a question of law for the reviewing court[.]” (*Id.* at 437.)

The reasoning of *Partida* should equally apply to an argument the erroneous exclusion of evidence had the legal consequence of violating a defendant’s due process right to present a defense. No court has so held, but the logic of *Partida* supports this argument.

F. Assertion of Fundamental Rights

“Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.” (*People v. Vera* (1997) 15 Cal.4th 269, 276.) However, this exception to the forfeiture rule is very limited. It has only been applied to appellate claims alleging a violation of a defendant’s constitutional right to jury trial (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444), or double jeopardy. (See *People v. Saunders* (1993) 5 Cal.4th 580, 592 .)

G. Courts Have the Discretion to Address Issues Despite the Lack of Objection, Except Where the Issue Involves Admission or Exclusion of Evidence.

In *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6, the Supreme Court held an appellate court *may* choose to address an issue, despite the lack of an objection. “An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party.” (*Ibid.*) However, if the issue on appeal involves the admission or exclusion of evidence, the appellate court is barred from considering a forfeited issue on appeal due to the express provisions of Evidence Code sections 353 and 354.

H. Issues Raised in Limine May Be Preserved Despite the Lack of an Objection During the Presentation of Evidence

Defense counsel may raise an issue during in limine motions and the court makes an adverse ruling. Sometimes this is sufficient to preserve the issue for appeal even if counsel does not again object during the presentation of evidence. An in limine motion is sufficient to preserve an appellate issue if: “(1) a specific legal ground for exclusion was advanced through an in limine motion and subsequently raised on appeal; (2) the in limine motion was directed to a particular, identifiable body of evidence; and (3) the in limine motion was made at a time, either before or during trial, when the trial judge could determine the evidentiary question in its appropriate context.” (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 210.)

However, an in limine ruling satisfies the requirement of an objection only “if the court's ruling were sufficiently clear and express.” (*People v. Brown (Andrew)* (2003) 31 Cal.4th 518, 550.) If there is any ambiguity in the court’s ruling, or if it states the issue could be revisited at the time the evidence is admitted, an in limine ruling will not preserve the issue for appeal. (*Ibid.*)

I. Invited Error

Invited error is different from forfeiture, but the result is the same. If the court finds an error was invited, it will not consider the merits of the issue. The Attorney General raises the doctrine of invited error most frequently in the context of jury instructions where the challenged instruction was one requested by the defense, even in a general list. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 88 [“Because the [aiding and abetting] instruction was

requested by defendant's trial counsel, as well as by the prosecution, the Attorney General contends that any claimed defects in it were [invited]”.) Unless counsel stated on the record he or she had an express tactical reason for requesting the instruction as worded, you can argue the invited error doctrine does not apply. An appellate challenge is barred by the invited error doctrine only if counsel requested the instruction “for a deliberate tactical purpose.” (*Ibid.*) If the court had the sua sponte duty to give the challenged instruction (which is true of most standard instructions), the invited error doctrine does not apply ““unless counsel articulated a tactical basis for [his] choice” of the instruction subsequently attacked.”” (*People v. Marshall* (1990) 50 Cal.3d 907, 931-932, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 332.)

IV. ANTICIPATE A POSSIBLE FINDING OF FORFEITURE BY ARGUING IAC ON DIRECT APPEAL

Any time you anticipate a possible forfeiture problem, you should, as a rule, include an IAC claim in your opening brief. The only exception is when you believe there is an apparent reasonable tactical justification for counsel’s failure to act.

You generally have nothing to lose by including an IAC claim in the opening brief if there is a possible forfeiture problem. An IAC claim will sometimes induce the court to consider the merits of the issue argued, and will provide the client with a potential constitutional claim to pursue in federal court. If you make an IAC claim in response to a possible forfeiture problem, be sure to fully develop the argument. Don’t put it in a footnote. put your IAC argument under a separate heading or subheading, as required by the California Rules of Court, Rule 8.204 (a)(1)(B).

The elements of an IAC claim are well known. A defendant bears the burden of demonstrating he received ineffective assistance from his attorney; he must first show counsel's performance was “deficient” because his “representation fell below an objective standard of reasonableness ... under prevailing professional norms.” (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Second, he must also show prejudice by

establishing a reasonable probability the outcome would have been different if his attorney had not committed the claimed unprofessional error. (*Id.* at 691-694.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at 694.)

Third, on direct appeal defendant must also convince the court “there simply could be no satisfactory explanation” for counsel's failure to act.” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) This is a frequent basis for rejecting a claim of IAC on direct appeal. The first prong is straightforward. A reasonably competent attorney will preserve arguably meritorious issues for appellate review. (See *People v. Jackson* (1986) 187 Cal.App.3d 499, 506; *In re Christina P.* (1985) 175 Cal.App.3d 115, 129-130.) If your argument is a winner, a reasonably competent attorney should have done what was necessary to preserve it. The second prong is a familiar one, as virtually all appellate issues require a showing of prejudice.

The third prong is unique to an IAC claim, and requires special attention. Appellate courts give great deference to decision made by trial counsel. An IAC finding will not be made on direct appeal unless there is no conceivable reason for counsel’s failure to preserve the issue. However, “deference is not abdication.” (*People v. McDonald* (1984) 37 Cal.3d 351, 377.) “[W]here the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel.” *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Arguing There Was No Possible Reason for Failing to Object

- **Counsel objects, but not on the basis argued on appeal.** This is a frequent occurrence. You raise an issue on appeal, and while counsel did address the issue she or he did not cite the same basis argued on appeal. Counsel makes a relevance objection, but fails to cite Evidence Code section 352. Counsel makes a section 352 objection, but fails to cite Evidence Code section 1101 where the evidence involves another crime committed by the defendant. Counsel makes a hearsay objection, but

fails to object on confrontation grounds. Where counsel objected but for the wrong reason, you can argue IAC on direct appeal. Since counsel objected, there can be no tactical reason for failing to raise every meritorious objection to the evidence. As the court stated in *People v. Asbury* (1985) 173 Cal.App.3d 362, 366 “If counsel objected on the grounds of insufficient evidence, there is no reason why he should not have done so on the grounds of collateral estoppel--except for failing to realize that such an objection was available.” Thus, if counsel did object, but failed to make the meritorious objection you argue on appeal, you have a good IAC claim. There is no conceivable tactical reason for objecting, but failing to object on a meritorious basis.

- **Counsel objects, but it is not timely.** If counsel raised an objection during in limine motions which the court provisionally denied, but failed to renew the motion at the time the evidence was admitted, *People v. Asbury* provides a basis to argue there could be no rational tactical reason for failing to renew a meritorious objection. Similarly, if counsel makes an objection too late, after evidence was already admitted, there could have been no rational tactical reason for failing to make a timely objection.
- **A meritorious motion to suppress.** “When a defendant claims ineffective assistance of counsel based on his counsel's failure to bring a motion to suppress evidence on Fourth Amendment grounds, the defendant is required to show that the Fourth Amendment claim had merit.” (*People v. Frye* (1998) 18 Cal.4th 894 , 989.) There is little deference given counsel’s choices under these circumstances. If there was a *meritorious* basis to seek the suppression of evidence pretrial, it is difficult to conceive of a tactical reason for foregoing a meritorious motion, unless the evidence in questions supports something the defense wants to prove. (See *People v. Rosales* (1984) 153 Cal.App.3d 353; *People v. Farley* (1979) 90 Cal.App.3d 851, 868. NB: In *Rosales*, trial counsel admitted on the record at trial he had failed to pursue a meritorious suppression motion out of ignorance.)

- **Highly inflammatory evidence.** If counsel fails to object to highly inflammatory evidence which the prosecutor exploits in closing argument, IAC should be found on direct appeal. In *People v. Guizar* (1986) 180 Cal.App.3d 487, a murder trial, counsel failed to seek the redaction of Guizar's statement to the police where he admitted committing other murders. The prosecutor referred to this in his closing argument as a "sledge hammer." (*Id.*, at p. 491.) The appellate court had no difficulty finding IAC on direct appeal. The court rejected the suggestion that the failure to edit the tape could have been a conscious tactical decision. "It is inconceivable to us that a defense attorney would make a tactical decision to admit evidence that a defendant, on trial for murder, had committed other murders in the past. We can imagine no sound tactical reason why trial counsel would have done this, and the record does not support an assumption that admission of the evidence was a tactical decision." (*Id.*, at p. 492, fn. 3.) (See also *People v. Stratton* (1980) 205 Cal.App.3d 87 [IAC where counsel failed to seek exclusion of evidence defendant was carrying a knife and a hand grenade when arrested by police].)
- **The objection could have been made outside the jury's presence.** Frequently, courts find defense counsel may have refrained from objecting to avoid highlighting prejudicial evidence in front of the jury. If the opportunity to object was outside the jury's presence (e.g. at sentencing, or at a pretrial hearing) it is easier to argue there was no possible tactical reason for not making a meritorious objection. "Since an objection . . . would have been adjudicated outside the presence of the jury, there could be no satisfactory tactical reason for not making a potentially meritorious objection." (*In re Hall* (1981) 30 Cal.3d 408.)
- **Counsel failed to seek the proper application of sentencing alternatives.** In *People v. Scott* (1994) 9 Cal.4th 331, 351 the Supreme Court held a defense attorney who fails to promote proper application of sentencing alternatives "may be found incompetent."

- **Counsel’s failure to object to prosecutor’s misstatement of law.** In *People v. Anzalone* (2006) 141 Cal.App.4th 380,395-396, the court reversed attempted murder convictions because trial counsel failed to object to prosecutor’s misstatement of the law of concurrent intent.
- **Examples (but not exhaustive list) of IAC on direct appeal .**
 - *People v. Moreno* (1987) 188 Cal.App.3d 1179, 1190-1191. In DUI case IAC where defense counsel failed to object to hearsay which provided only independent evidence defendant was driving the truck.
 - *People v. Jones* (1983) 145 Cal.App.3d 751, 760. Defendant denied adequate assistance of trial counsel because his attorney failed to make a *Hitch* motion, based on *People v. Murtishaw* (1981) 29 Cal.3d 733, 752-755, to suppress defendant’s confession on the ground the police officer's handwritten notes of the interview during which the confession was obtained had been lost or destroyed.
 - *People v. Zimmerman* (1980) 102 Cal.App.3d 647, 657-659. Where defendant was tried for robbery, IAC found where counsel failed to seek exclusion of prior robbery conviction since other priors were available to impeach and to prove ex-felon status. “No plausible tactical explanation can be conceived which would justify foregoing two opportunities to remove from the jury's consideration the only robbery conviction suffered by a defendant who was about to be tried for robbery.” (*Id.* at p. 657-658.) NB: this case was decided pre-Proposition 8, when *People v. Beagle* (1972) 6 Cal.3d 441 was controlling. The point is still valid. If you can find controlling precedent which would have given counsel the means to exclude prejudicial evidence, IAC may be found on direct appeal.
 - *People v. Ellers* (1980) 108 Cal.App.3d 943, 951-952. Failure to assert meritorious grounds to have evidence suppressed was IAC.

- *People v. Jackson (Kaseen)* (2005) 129 Cal.App.4th 129. Counsel's performance fell below standard of reasonableness where he failed to seek suppression of statements obtained in violation of laws governing wiretaps (however, court decided there was no prejudice).
- *People v. Farley* (1979) 90 Cal.App.3d 851, 868. "The failure of defendant's trial counsel to make the appropriate suppression-of-evidence motions and raise these issues constitutes a denial to defendant of his constitutional right to effective assistance of counsel. The violation of defendant's constitutional right to the effective assistance of counsel compels a reversal of the judgment of conviction so that defendant can be tried after crucial issues of the admissibility of evidence have properly been determined."

V. PREPARE COMPANION HABEAS PETITION IF COUNSEL ADMITS SHE OR HE HAD NO TACTICAL REASON FOR OMISSION

When you become aware of a forfeiture problem on direct appeal, you should discuss the matter with trial counsel and consider the viability of filing a companion habeas petition in conjunction with the appeal. Sometimes counsel will admit having no tactical reason for failing to properly raise the issue you are arguing on appeal. If so, you should obtain a declaration from trial counsel and prepare a habeas petition so that the appellate court cannot avoid the merits of your issue by fantasizing about possible tactical reasons for counsel's omission.

In some cases you may have a difficult time arguing there was no possible tactical reason for failing to raise an issue. In such cases, it is probably pointless to argue the issue on appeal. Ask counsel about the issue, and file a habeas if counsel admits he or she had no tactical reason for the omission, or the claimed justification is arguably unreasonable.

For example, despite evidence of intoxication, counsel may have foregone intoxication instructions, even though the charged crime involves specific intent. There may be valid reasons for counsel not seeking that instruction. An intoxication defense could be

inconsistent with the defense raised at trial, such as identification, third party culpability, or self-defense. Counsel might have wanted the jury to focus on those issues rather than intoxication, which is rarely a successful defense.

VI. SUMMARY

- The Attorney General will always argue forfeiture if there is any basis to do so, and often when there is no basis to do so. Anticipate possible nonfrivolous forfeiture issues and address them in your opening brief.
- If counsel never raised the issue you are arguing on appeal, consider whether you have a basis to argue the issue can be addressed on appeal even though not raised below.
- If counsel did raise the issue you are arguing on appeal, but did not use the same rationale you are arguing on appeal, be particularly alert to forfeiture problems. If at all possible, argue counsel's objection or motion was sufficient to preserve the issue raised on appeal. However, you should always add a claim of ineffective assistance of counsel as a back-up, citing *People v. Asbury, supra*, 173 Cal.App.3d at p. 366 [if counsel objected, no possible tactical reason for not making other meritorious objections].)
- If you are arguing an issue on direct appeal and there is any possible forfeiture problem, you have nothing to lose by adding an IAC argument as a backup.
- Ask trial counsel why they did not raise the issue you are arguing on appeal. If there was no sound tactical reason for the omission, prepare a habeas petition to file in conjunction with the appeal.