6. Federalize Objections

Note: Variations of this motion have popped up in many trials, but the initial research for this motion appears to trace back to Charles Sevilla. His original pleading and other helpful information may be found on his webpage at www.CharlesSevilla.com.

TO THE COURT AND THE PROSECUTION, PLEASE TAKE NOTICE that Defendant moves the Court for an order permitting shorthand objections to federalize objections instead of lengthy, record-making objections.

The motion is made on the grounds that shorthand objections are necessary to preserve issues for appeal without the burden of long objections.

Date:

_____

Attorney for Defendant

POINTS, AUTHORITIES, AND ARGUMENT

Summary

By this motion, Defendant seeks to promote efficiency and avoid forfeiture of claims during trial by making shortcut objections of the type approved of by the California Supreme Court in *People v. Scott* (2015) 61 Cal. 4th 363), which noted, "the trial court granted defense counsel's pretrial motion to consider all of his trial objections and motions under the Fifth, Sixth, Eighth, and Fourteenth Amendments, these additional constitutional claims are not forfeited on appeal."

Objections Must Be "Federalized" To Preserve Error

To make a proper constitutional objection, the state and federal courts have required precision and specificity by counsel. In other words, simply objecting "hearsay," will not preserve a Sixth Amendment confrontation issue, nor will objecting "352" or "unfair trial" preserve a due process issue.

For example, in *Duncan v. Henry* (1995) 513 U.S. 364, Mr. Henry was tried in a California court for allegedly molesting a five-year-old child. The prosecution was allowed to put on evidence of the parent of another child who testified that twenty years previous, Henry molested that child. Henry's lawyer objected that the evidence should not come in and cited *Evidence Code §352*, arguing the evidence was far more unduly prejudicial than relevant. The parent testified, and Mr. Henry was convicted. On direct appeal, his lawyers argued that the evidence was irrelevant and inflammatory and that the resulting error caused a miscarriage of justice under the California Constitution (the standard for whether an error is harmless under the state constitution). The Court of Appeal found error but ruled it harmless.

Mr. Henry then petitioned in federal district court, arguing that the error was not harmless and denied him federal due process of law. The district court granted the petition, and the Court of Appeal for the Ninth Circuit affirmed the ruling, but the U.S. Supreme Court summarily reversed the grant of relief stating that Mr. Henry never explicitly raised the federal due process issue in state court and thus did not "exhaust" his claim. The court observed that the test for the state law claim was

similar to, but not quite the same as, the federal due process claim. By not intoning the magic words "due process under the federal constitution," the issue was lost, and Mr. Henry's reversal of his felony conviction was lost with it.

As the Supreme Court stated, similarity of claims is not enough to exhaust an issue in state court to permit its being raised in federal court. Justice Steven's dissent placed the impact of this ruling more bluntly: the case "tightens the pleading screws ... to hold that the exhaustion doctrine includes an exact labeling requirement." (*Duncan v. Henry* (1995) 513 U.S. 364, 368.)

In *Idaho v. Wright* (1990) 497 U.S. 805, 812, two codefendants were convicted of child molestation and each appealed. The first, Mr. Giles, appealed only on statutory hearsay grounds. The second, Ms. Wright, raised hearsay and the related constitutional Confrontation issue. The Idaho Supreme Court rejected Mr. Giles's argument and affirmed his conviction, but it agreed with Ms. Wright on her Confrontation claim and reversed her convictions. The ruling as to Ms. Wright was affirmed by the U.S. Supreme Court. Not federalizing his claim cost Mr. Giles a reversal of his conviction.

In *Baldwin v. Reese* (2004) 541 U.S. 27, the court held that the petitioner did not "fairly present" claim of ineffective assistance of appellate counsel to the state courts when his briefs in the state court did not complain that the ineffective assistance violated federal law. Just stating that the claim violates "due process" does not raise a federal claim. (*Shumway v. Payne* (9th Cir. 2000) 223 F. 3rd 982, 987-988 [petitioner "had to alert the state courts to the fact that [she] was asserting a claim under the United States Constitution"].)

Of course, the federal rules apply equally to state review: no objection on appropriate grounds, no review on appeal because the issue has not been preserved. (*People v. Clark* (1993) 5 Cal. 4th 950, 988 n. 13 [When a party does not raise an argument at trial, he may not do so on appeal]; see also *In re Robbins* (1998) 18 Cal. 4th 770; *People v. Gordon* (1990) 50 Cal. 3rd 1223, 1254, n. 6 [a hearsay objection does not raise a federal confrontation question and thus the federal constitutional issue was waived by counsel's incompetently made objection]; *People v. Raley* (1992) 2 Cal. 4th 870, 892 [defendant contended on appeal the court erred in admitting evidence and violated his federal constitutional rights, but because defendant objected only on statutory grounds at trial, the constitutional arguments are not cognizable on appeal].)

This is no small point. Precious constitutional rights can be sacrificed for lack of the utterance of a few syllables in stating an objection. (See, e.g., *Peterson v. Lampert* (9th Cir. 2003) 319 F. 3rd 1153 [petitioner did not fairly present his federal claim to state supreme court because on the face of his petition for review he expressly limited his claim to state constitutional law, used the term "inadequate" assistance instead of "ineffective" assistance, and cited only state law cases – federal petition dismissed as a result].) Accord *Hiivala v. Wood* (9th Cir. 1999) 195 F. 3rd 1098, 1106 (holding that, when the petitioner failed to cite federal case law or mention the federal Constitution in his state court briefing, he did not alert the state court to the federal nature of his claims).

If there is an appeal of the instant matter, the state will undoubtedly urge that trial counsel waived raising a constitutional claim and thus the defendant must be deemed procedurally barred from asserting it – "[t]ime 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. 3rd 1223, 1250.)

<u>Proposed Remedies</u>

To save this court's time during this trial, to not frustrate the jury during needless record-making

sidebars for the utterance of lengthy grounds for objections, and to not unduly interrupt opposing counsel's presentation of his or her case, counsel requests permission to use abbreviated terminology in making his constitutional objections. This same simplified technique is commonly used to make standard evidentiary objections under the *Evidence Code*. Thus, it is common to object by saying "*352*" in order to make an objection to evidence which has some relevance but which is outweighed by its prejudicial value. By the same token, the defense requests to make his constitutional objections in the following manner.

Option #1: The simplest alternative would be to make every hearsay, relevance or "352" objection deemed to have been made under the due process clause of the 14th Amendment, and under the confrontation clause of the 6th and 14th Amendments. (This requires agreement by the court on the record.)

Option #2: If option #1 is rejected, then a "by the numbers" alternative is proposed: Any 5th Amendment due process objection would be made by simply by adding "Fifth" to the evidentiary objection. Sixth Amendment confrontation or right to present evidence issues would be made by adding "Sixth" to such claim protected by the 6th Amendment. When objecting to unconstitutional argument by the prosecutor to the jury, counsel would object by saying "prosecution error." This too requires agreement by the court on the record.

The specifics of incorporated meaning of either option #1 or #2 are as follows:

"Fifth" means Fifth Amendment Due Process Clause:

> This objection encompasses the Fifth Amendment of the U.S. Constitution due process guarantee of a fair trial as made available to the States through the 14th Amendment.

"Sixth" means Sixth Amendment Confrontation and Right to Present Evidence in Defense of the Accused:

> This objection states that the defendant's state and federal constitutional rights to confront witnesses against him as guaranteed by the *Sixth and Fourteenth Amendments* to the United States Constitution, and under the similar, but separate and independent California Constitutional protections provided by *article one, sections seven and fifteen* are violated.

"Prosecution Error" means the following:

> This objection includes the statement that the prosecutor's comment is irrelevant, inflammatory, and prejudicial. The objection is grounded in the defendant's state and federal due process rights to a fair trial under the *Fifth and Fourteenth Amendments* to the United States Constitution, as well as defendant's state and federal constitutional right to confront witnesses against him as guaranteed by the *Sixth and Fourteenth* Amendments to the United States Constitution, and under the similar, but separate and independent California Constitutional protections provided by *article one, sections seven and fifteen*.
>
> When this objection is made, Defendant also asks the Court to assign this as misconduct, strike the offending comments, and admonish the jury to disregard it per *People v. Bolton* (1979) 23 Cal. 3rd 208, 215-16, n. 5. Counsel requests the following wording for the admonition:
>
> > Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would

have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks.