ADVENTURES IN PRESERVING THE RECORD FOR APPELLATE REVIEW

May 18, 2019

Program Agenda

9:05 - 9:15	•Introduction
9:15 - 9:25	•"Recordness"
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Trainer - Robert S. Dean

A GUIDE TO PRESERVING ISSUES FOR APPEAL

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May 2019

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INTRODUCTION

Providing a comprehensive guide to preservation is virtually impossible, both because there are so many particular issues and rules involved, and because the area is constantly evolving.

This outline seeks to explain why preservation matters, and then provide some basic, general rules with broad application. It goes on to discuss the application of the basic, general rules in some specific contexts.

THE IMPORTANCE OF PRESERVATION

Preservation of an issue can easily make the difference between success and failure on appeal. To understand why, it is important to understand the basics of appellate jurisdiction.

A. Appellate Division Jurisdiction

The Appellate Divisions have two very different kinds of jurisdiction: they can grant relief either (1) based on an error of "law" or (2) in the "interest of justice." (They also have fact-finding jurisdiction.)

1. Errors of Law

If the case presents an error of law, the Appellate Division must consider it and must grant relief unless it finds the error was either cured or harmless. In general, an "error of law" means one that has been preserved by a timely, specific, on-the-record protest. On appeal, the People will routinely argue that an issue is unpreserved. Appellate courts may buy even preservation arguments that seem hypertechnical.

2. Interest of Justice Jurisdiction

While the Appellate Division may consider unpreserved errors in its broad "interest of justice" jurisdiction, it does not have to consider them at all. Even if it does consider an issue in the "interest of justice," it will only reverse if allowing the conviction to stand offends its basic notion of justice and fairness.

If the evidence against your client is even moderately strong, if the crime was unpleasant, or if the client's record is substantial, the Appellate Division may simply decline to use its interest of justice jurisdiction to reverse. For this reason, many issues that would require reversal if preserved as issues of law will not result in reversal if they are unpreserved. Interest of justice reversals are very infrequent.

B. Court of Appeals Jurisdiction

The Court of Appeals does not have interest of justice jurisdiction. It is restricted by the New York Constitution to issues of "law." Therefore (absent an exception to the normal preservation requirement), if an error is not adequately preserved, review of the issue by the Court of Appeals is completely foreclosed.

C. Federal Habeas Corpus Jurisdiction

Increasingly, clients serving substantial sentences go into federal court if they are unsuccessful on their state appeals. Even if they have what would otherwise be a wonderful federal constitutional issue, they may well be thrown out of court if it is either (1) unpreserved, or (2) unpreserved as a federal constitutional issue. Therefore, you should think in terms of preserving the issue as a matter of federal constitutional, as well as New York state, law.

THE PRESERVATION RULE AND ITS EXCEPTIONS

A. The Rule

The preservation requirement is set forth in C.P.L. §470.05(2), which provides:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such

> protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

See also C.P.L. §470.15 for when decisions are "upon the law."

B. The Exceptions

In general, an error of "law" means an error that has been adequately preserved. There are a few exceptions for errors deemed to work a fundamental change in the mode of proceedings required by law, or to deprive the defendant in a very direct way of the right to counsel or the right not to testify at trial. However, what errors are considered so fundamental as to be exempt from normal preservation requirements is often counter-intuitive. The law as to preservation also changes, and rarely for the defendant's benefit. Therefore, you should never rely on the seemingly "fundamental" nature of an error and fail to protest it. You should simply assume that, to have an error of "law" for appeal, you need to preserve it adequately at the trial level.

1. "Mode of Proceedings" Errors

An exception to the general preservation rule exists when there is a lack of jurisdiction, the right to a jury trial has been significantly infringed, or there is some other fundamental, non-waivable procedural defect that "goes to the essential validity of the proceedings." People v. Patterson, 39 N.Y.2d 288, 295-296 (1976), aff'd sub nom. Patterson v. New York, 432 U.S. 197 (1977).

Many things that would seem fundamental (insufficiency of the evidence, the failure to give any presumption of innocence charge) do not fall within this exception. A few examples show why one can never rely on it:

a) Camcemi v. People, 18 N.Y. 128 (1858)(the original "mode of proceedings" case, holding that a verdict from an 11-member jury was such a fundamental error that it required reversal on appeal, even though the defense had not only failed to preserve it, but actually consented to it).

But see People v. Gajadhar, 9 N.Y.3d 438 (2007)(overruling Cancemi almost 150 years later).

b) People v. Lopez, 71 N.Y.2d 662, 666 (1988)(preservation not needed "where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea"; court has duty to inquire further to ensure plea is both "knowing and voluntary").

But see People v. Toxey, 86 N.Y.2d 725 (1995)(case did not fall within Lopez exception when the defendant admitted committing 4 robberies while displaying what appeared to be a weapon, but also said, "I don't carry weapons," since his "utterances overall" did not "engender 'significant doubt'" on the voluntariness of his plea).

How difficult it is to draw the line between statements that cast the plea's voluntariness into significant doubt and those that do not is well illustrated by the cases involving display of a weapon. In People v. Powell, 278 A.D.2d 848 (4th Dept. 2000)(where the defendant admitted using a "fake gun"), and People v. Costanza, 244 A.D.2d 988 (4th Dept. 1997)(when the prosecutor conceded the recovered gun was unloaded), the Fourth Department reversed as a matter of law without requiring preservation of the issue. The First Department took the position that the preservation rule applies in People v. Pariante, 283 A.D.2d 345 (1st Dept. 2001)(reversing in interest of justice when defendant said he simulated gun with rolled-up newspaper), and People v. Wallace, 247 A.D.2d 257 (1st Dept. 1998)(preservation required when admission was of possessing imitation gun). In People v. Martin, 7 A.D.3d 640 (2d Dept. 2004), the Second Department distinguished between the defendant's statement that he had an unloaded gun in one incident, which it held required preservation, and his statement that he was unarmed in another incident, which did not because it negated an essential element of the crime.

c) People v. Louree, 8 N.Y.3d 541 (2007)(unlike a defendant who is promised one specific prison term when he pleads guilty and then given another, a defendant who is not told about post-release supervision at the plea but has it imposed at sentencing need not preserve as an issue that the error rendered the plea less than a voluntary and intelligent choice among available alternatives).

d) People v. Samms, 95 N.Y.2d 52 (2000)(challenge to adjudication as a predicate felony offender does not require preservation if it is based on the timing of the prior felony conviction(s), but does if it is based on an out-of-state predicate not being the equivalent of a New York felony).

2. Denial of a Defendant's Fundamental Rights.

This exception, which has been eroded significantly in recent decades, retains viability only in extremely limited circumstances involving the right to counsel or the privilege against self-incrimination. Again, a few cases illustrate why you should never rely on it:

a) People v. Narayan, 54 N.Y.2d 106 (1981)(although denial of counsel generally does not require preservation, preservation is required when the court, in counsel's presence, directs counsel and the defendant not to confer during an adjournment).

b) People v. McLucas, 15 N.Y.2d 167 (1965)(court's instruction to jury that defendant's denial of guilt to police officers who testified about it did not "take the place of sworn testimony from this witness chair" did not require preservation).

But see People v. Autry, 75 N.Y.2d 836 (1990)(preservation exception is limited to instruction that "expressly or at least unambiguously conveys to the jury that the defendant should have testified"; it did not apply to an overly expansive charge about his right not to testify).

BASIC REQUIREMENTS FOR PRESERVATION

The normal rule is that, in order to present an issue of law, a claimed error must be timely and adequately protested. In other words, the defense must lodge an objection, make a motion, present an argument, request an instruction, except to a jury charge, etc. in order to preserve the issue. There are four basic requirements for preserving an issue.

A. The protest must be timely

To preserve an issue as one of law, a protest must be timely. Under the statute that means it must be made either (1) "at the time of" the ruling or instruction being protested or (2) "at any subsequent time when the court had an opportunity of effectively changing the same."

Some issues have particular time-frame requirements, which reflect an assessment that protesting them later may prejudice the other side or preclude "an opportunity of effectively" curing the problem. For example:

> A repugnant verdict issue must be raised before the jurors are discharged, when they are still available to reconsider the verdict and correct the repugnancy. People v. Alfaro, 66 N.Y.2d 985 (1985).
>
> A request for a missing witness charge must generally be made before the close of the People's case, when they can still present evidence that, for example, the witness is unavailable. People v. Fields, 161 A.D.3d 897 (2d Dept. 2018).

In general, objections must be "contemporaneous" -- when the People try to introduce the evidence (or beforehand, if you know about it beforehand), when the witness blurts out the prejudicial information, when the prosecutor makes an improper summation comment, etc. An error of timing may be forgiven, however, if the court itself prompted it. See People v. Castellano, 41 A.D.3d 184 (1st Dept. 2007)(sufficiency issue preserved because counsel "complied with the trial court's directive as to the timing of his sufficiency arguments").

If no particular rule applies, and you did not make a contemporaneous objection, try to lodge a protest before it is too late to cure the error. If you are concerned that you thought of something too late, make your protest, or state the additional basis for your protest, anyway. Better late than never. If you made a timely protest but you are not sure it was on the record, restate it on the record at the earliest opportunity, making clear

that you raised it earlier, at a point when it could still have been cured.

If new information develops that affects the issue, be sure to renew your protest. For example, if the defense case could conceivably have added something to the People's proof on an issue, you must renew your motion to dismiss at the end of the evidence as a whole. Or if new evidence at trial places a suppression issue in a more favorable light, you must move to reopen the suppression hearing (evidence elicited only at trial cannot be used in support of a suppression issue on appeal).

B. The protest must be by you, not a co-defendant

Never rely on an objection, motion, or request made only by a co-defendant's attorney. It will not preserve an issue for your client, unless you specifically join in it, on the record. See C.P.L. §470.05(2); People v. DeRosario, 81 N.Y.2d 801 (1993)(issue sufficiently preserved when "trial counsel for appellant joined in an objection made by counsel for a codefendant").

C. The protest must be on the record

You need to place your objection, argument, motion, etc. on the record if you want it to count for anything on appeal. As an appellate rule of thumb, if it happened off the record, it did not happen. You can give the most brilliant and specific argument, but if you give it at an unrecorded side bar you might as well not have bothered.

Records often reveal that counsel made a contemporaneous objection and asked to approach the bench, and then there was a side-bar conference. The word "objection" will be on the record, but the record will not reveal the basis for it. Since only a contemporaneous and specific objection, once overruled, preserves an issue for appeal, you have not preserved the issue.

One solution to this common problem is to ask that the bench conference be recorded. If there is a practical impediment to this, you can obviate the problem by putting something like the following on the record at a later time (ideally, the next available opportunity outside the hearing of the jury):

> Judge, for the record, during Doe's direct, the D.A. asked him to provide the description he gave to the police and at the sidebar I argued that this was hearsay and not covered under Huertas, since it wasn't the complainant's description. You overruled me.

D. The protest must be sufficiently specific

In general, a protest must be sufficiently specific to alert the trial court to the nature of the problem being protested. It must make the defendant's position "known to the court," or be "specifically directed" at the error. People v. Gray, 86 N.Y,.2d 10, 19 (1995). That means, for example, that:

> A request for a missing witness charge is insufficient if it does not make clear as to which witness the charge is sought. People v. Walls, 91 N.Y.2d 987 (1998).
>
> Saying "I object" to a summation comment will not preserve an issue of law unless the attorney went on to identify the basis of the objection, even if the basis may appear obvious. People v. Dien, 77 N.Y.2d 885 (1991)(racial remark).
>
> A general objection to evidence is insufficient to preserve an issue that it constituted improper bolstering. People v. West, 56 N.Y.2d 662 (1982).

There are, at least in theory, two exceptions to this rule, but neither should be relied upon.

1. The Vidal Exception.

In People v. Vidal, 26 N.Y.2d 249, 254 (1970), the Court spelled out the general rule:

> A general objection, in the usual course, is to no avail when overruled if not followed by a specific objection directing the court, and the adversary, to the particular infirmity of the evidence [].

But it noted an exception when:

> it appear[s] from the record that the offending material is inadmissible and that nothing could cure the inadmissibility.

See also Judge Smith's concurring opinion in People v. Williams, 5 N.Y.3d 732 (2005).

2. The Exception for Expressly Decided Issues

As C.P.L. §470.05(2) provides, a protest is sufficient to preserve an issue "if in response to a protest by a party, the court expressly decided the question raised on appeal." See:

a) People v. Prado, 4 N.Y.3d 725 (2004)(at non-jury trial, whether requisite corroboration for defendant's confession could be provided by child complainant's prompt outcry, although not subject of specific protest, was preserved by a general sufficiency objection "coupled with the trial court's specific findings as to corroboration" in delivering its verdict).

But see People v. Colon, 46 A.D.3d 260, 262-264 (1st Dept. 2007)(even after Prado, finding lack of requisite nexus between protest and court's decision on issue, which was in direct response to prosecutor's statement and then jury's question).

b) People v. Edwards, 95 N.Y.2d 486, 491 n2 (2000)(probable cause issue preserved because court's written decision denying suppression motion "expressly decided" the question in response to a "protest by a party").

c) People v. Berry, 49 A.D.3d 888 (2d Dept. 2008)(although argument that elicitation of testimony violated defendant's right to confrontation was not "plainly present[ed]" by the defense, court's ruling on the objection "demonstrate[d]" that it "specifically confronted and resolved" the issue, rendering it preserved).

FOUR GOLDEN RULES OF PRESERVATION

You will do pretty well if you keep in mind the following four "golden rules" of preservation:

1. **Always give the reason (in other words, be specific).**
2. **Don't quit until a request you make is denied.**
3. **Come to trial prepared to preserve your issues.**
4. **Make sure the record is clear.**

GOLDEN RULE #1: ALWAYS GIVE THE REASON

The word "objection" alone does nothing. It does not matter how obvious the reason for the objection may be. The issue will not be preserved unless you give a reason for the objection. You can say "objection" 25 times during the prosecutor's summation and nothing will be preserved unless you accompanied the word "objection" with a reason.

The same is true of a request. Give a reason why you are entitled to what you are asking for. Why is the evidence admissible (for example, under precisely what hearsay exception[s] does it fall)? Why are you entitled to the requested charge (for example, how would it be reasonable for the jury to find the defendant guilty of only the lesser included offense you are asking for, and not the greater)?

A motion for a trial order of dismissal needs to be specific: why should the case or count be dismissed? In other words, what element of the crime did the People fail to prove, or what defense did they fail to disprove? A general claim that the evidence was "not sufficient as to each and every element of the crimes charged" is worthless. Instead, say, for example:

> The evidence was insufficient to prove the defendant's identity as the robber (rapist, thief, etc.).
>
> ★ ★ ★
>
> The evidence was insufficient to disprove the defendant's justification (or alibi) defense beyond a reasonable doubt.
>
> ★ ★ ★
>
> The evidence was insufficient to make out the element of force (value, physical injury, intent, operability, forcible compulsion, etc.).

GOLDEN RULE #2: DON'T QUIT UNTIL A REQUEST YOU MAKE IS DENIED

If you object and the court sustains the objection, nothing is preserved. It doesn't matter how timely and specific your objection was. You must ask for some further relief and have the

request denied to preserve an issue for appeal. Otherwise, the defense got what it wanted and has no preserved issue that it should have gotten more.

For example, if the defense registers a timely and specific objection to a summation comment by the prosecutor:

> If the defense objection is overruled, the error will be preserved for appeal. The defense need do nothing more.
>
> If the defense objection is sustained and no further relief is requested, there will be no preserved issue. The defense got all it asked for.
>
> If the defense objection is sustained and the defense goes on to ask for a curative charge and one is denied, there will be a preserved issue that the defense was entitled to the charge it requested. It need not move for a mistrial or do anything more to preserve that issue.
>
> If the defense asks for a curative charge and one is granted, and the defense registers no further protest or request, there will be no preserved issue. Again, the defense got everything it sought.
>
> If the objection was sustained and the defense made a mistrial motion at the conclusion of the summation based on the improper comment and that motion is denied, there will be a preserved issue. The defense need not also request a curative instruction (essentially, it is taking the position that the error could not be cured and that the only sufficient relief was a mistrial).

The key question is always whether the defense asked for something the court did not give it. If you requested a hearing of some sort (for example, regarding closing of the courtroom during an undercover officer's testimony), and got it, you have no preserved issue. If the court's ruling after the hearing did not completely go your way, you must object to that ruling. See also People v. Lee, 92 N.Y.2d 987 (1998)(when juror reported remark she heard during trial, and defense asked only for a cautionary instruction, which it received, issue that court should have removed juror was unpreserved).

If you properly preserved an issue at the end of a suppression hearing, that issue can be raised on appeal, based on the hearing record, regardless of what happened at the later trial. But new evidence adduced at the trial cannot be used to further that argument unless the defense asked to reopen the suppression hearing and had that request denied. Then there would be a preserved issue as to whether, in light of the new evidence, the denial of the suppression motion was proper. If the court grants the request for

a reopened hearing, you must advance your suppression argument again at the reopened hearing's conclusion.

The same is true for rulings during trial. Since the court is being asked to rule on the basis of the facts and evidence before it, if new evidence makes the issue better for the defense, it cannot argue that the ruling should have been more favorable based on the subsequent events unless it asked for a new ruling.

If the court seems to agree with your request for something, but then does not follow through to your satisfaction, you must renew the request or make a further objection, and be denied or there is no preserved issue. For example, if the defense requests a particular jury charge and the court agrees to give it but then simply forgets, the defense must bring it to the court's attention again. The assumption in that situation is that, had the court simply been reminded, it would have done as it had agreed to do. See People v. Wilson, 156 A.D.2d 1002 (4th Dept. 1989). The same is true if the court agrees to give a charge in its own language; if there is no further protest, the assumption will be that the defense was satisfied with the charge it got and did not want anything further.

GOLDEN RULE #3: COME TO TRIAL PREPARED TO PRESERVE YOUR ISSUES

Lots of issues go unpreserved because, in the heat of battle, the attorney simply can't think fast enough to articulate the correct objection or argument. A little advance preparation can make it a lot easier to make the appropriate protest.

In particular, it is helpful to think out your case ahead of time and bring along whatever helpful lists, charts, or other materials you can prepare in advance. For example:

A. Make a list of the counts, broken down into elements

You have the indictment. Break down each count into its elements, and make a chart. Check the definitions or case law, if necessary, so you know what proof will satisfy each element of the crime. Bring the chart to court with you. You can use it in several helpful ways. For example:

1. Framing motions to dismiss

Having the chart with you when you make your motion to dismiss at the end of the People's case can help make certain that you address your motion to the specific elements at issue. Remember, a motion that does not target and address a specific element is useless. (Of course, don't forget that you may want to target non-elements in your motion as well, depending on the facts of your case: justification, identity, credibility of the People's witnesses, etc.)

2. Requesting submission of lessers

Many defendants are needlessly deprived of a preserved appellate issue as to a lesser included offense because their attorney either (1) asked for the wrong lesser, (2) failed to realize a particular crime was a lesser, or (3) requested the right lesser but failed to specify the applicable subdivision of that lesser.

Getting requests for lessers right takes some thought ahead of time, comparing the elements of the charged crime with the elements of the potential lessers. For example, some subdivisions of second degree assault may be lesser included offenses of a particular count of first degree assault, while others are not; you need to know exactly what subdivision you want to request.

Using your chart of elements can be very helpful in sorting out the potential lesser included offenses in your case. It may be helpful to make a further list of what crimes are (and are not) lessers, so you have a handy reference when lessers are discussed during the trial.

3. Requesting that counts be charged in the alternative

You can use the chart to compare elements and decide whether to ask that various counts be charged in the alternative.

4. Preserving repugnant verdict issues

Once you know what counts are being submitted to the jury, use the elements in your chart to determine in advance what verdict might be repugnant. Remember, a repugnant verdict is not preserved unless protested immediately, before the jury is discharged. "Reserving" motions until sentencing will not work. Therefore, you cannot afford to wait until the jury comes in to start figuring out whether a particular verdict is repugnant or not.

B. Use a jury charge checklist

Use a jury charge checklist like the one attached to this outline and, before the charge, adapt it to the counts, defenses, and particular issues in your case. Then use it as you listen to the charge to check off charges correctly given and make a quick note of portions of the charge you want to object to. You can also use the charge checklist ahead of time, as a handy reminder of charges you may want to request.

C. Other helpful charts or lists

If you think out ahead of time what other charts or lists might come in handy, make them and take them along. Many will be reusable. You may want to copy them onto colored paper, so they are easy to locate, or even laminate them, so you can carry them forward from case to case.

A prosecution summation checklist like the one attached to this outline can readily give you a word or phrase to identify the reason a summation comment is objectionable.

If you know there is likely to be a hearsay issue as to some evidence you will want admitted, make a list of the standard exceptions to the hearsay rule and bring it with you to trial. Many hearsay issues have gone unpreserved because the attorney could not, in the heat of the fray, name the correct hearsay exception. Asking to have evidence admitted as a dying declaration will not preserve an issue that it should have come in as an excited utterance. If you are uncertain as to what exception applies, argue as many hearsay exceptions from your list as you think could conceivably apply.

D. Investigate and bring along potentially relevant statutes

If you suspect that a particular situation that is addressed by a statute may arise during the trial, investigate that possibility ahead of time and/or bring a copy of the statute along. For example, if your client has confessed or the People will be relying primarily on an accomplice's testimony, think about whether there is any possibility the People will not come up with sufficient corroboration, and bring along a copy of C.P.L. §60.50 or §60.22. If a prosecution witness seems like he or she may be reluctant, come to court armed with a copy of C.P.L. §60.35 and some basic research, so you can prevent the People from improperly impeaching a witness who ends up giving only neutral testimony. In general, it is a good idea to run through C.P.L. Article 60 before trial and

think out what evidentiary issues may arise that are addressed in that article.

GOLDEN RULE #4: MAKE SURE THE RECORD IS CLEAR

Many potential appellate issues are lost because the factual record is insufficient or ambiguous. Indeed, an issue may be "preserved" in the sense that a specific protest was registered on the record, but nevertheless not "reviewable" because the facts on which a decision would turn are not clear from the record, either because significant facts are missing or because the record is ambiguous.

It is the defendant's burden to provide an adequate record for appeal, so any factual gap or ambiguity will work against your client. You can take several easy, "no down-side" steps to create a better appellate record.

A. Be sure the key facts are recorded

Make sure the entire voir dire is recorded. You are entitled to this under Judiciary Law §295. Otherwise, when there is a later challenge to a juror, there may be an unresolvable disagreement as to what that juror actually said. In particular, if the judge recalls the juror saying he or she could be fair, your recollection to the contrary will do you no good. As a practical matter, unless there is a transcript of the actual questions and answers, whatever the judge recalls will be accepted by the appellate court. The defense will be faulted for failing to supply an adequate appellate record on the issue.

Make sure the record reflects whether or not the defendant is present at sidebar or in the robing room. A defendant's non-presence at a sidebar or robing room conference may constitute a failure to have him/her present at all material stages of the trial, in which case a reversal on appeal, without any preservation or specific showing of prejudice, is a real possibility. However, to win on appeal, the defense must provide a record that demonstrates, without ambiguity, that the defendant was in fact not present at the sidebar or robing room conference in question. A court reporter's standard notation -- "(whereupon, there was a sidebar conference between the attorneys and the court)" -- is not sufficient to establish that the defendant was absent.

If there is a Brady or Rosario issue, there may be a lot of back and forth discussion on various dates, some of it off the

record. If you end up making a motion because of the non-production or delayed production of the material, be sure to lay out, chapter and verse, what happened when.

B. Be sure the key facts are clear

Remember that the printed record will not reflect what you see at trial, only what you (and the other participants) say.

For example, litigating for-cause challenges or Batson issues on appeal often requires identifying a particular juror's response to questions posed to that juror during voir dire. This can be difficult or impossible if the record does not identify the juror being questioned. Therefore, at least when you are zeroing in on a particular prospective juror as one who might be challenged for cause or involved in a Batson issue, try to address that juror by name during the voir dire. If the key questions were asked by the court or prosecutor, restate, as best you can, during your argument of the resulting issue exactly what the juror said, so the appeals attorney can identify the relevant parts of the transcript.

Similarly, if a witness describes directions, locations, etc., by pointing, describe them for the record. A colloquy like the following leaves the appeals attorney at a loss:

> DEFENSE COUNSEL: Officer, referring to the map previously marked as People's Exhibit 3, you say you were posted here (indicating) and ran this way (indicating) when you saw the person you believed to be the defendant?
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: And then when you got to this corner (pointing) you turned and ran that way (indicating)?
>
> WITNESS: Yes. And then I went that way (indicating).

The same colloquy, as constructed by an attorney who is thinking about the creation of an appellate record, might read as follows:

> DEFENSE COUNSEL: Officer, referring to the map previously marked as People's Exhibit 3, you say you were posted here, at West 48th and Rockefeller Plaza, and ran this way, north on Rockefeller Plaza, when you saw the person you believed to be the defendant?

WITNESS: Yes.

DEFENSE COUNSEL: And then when you got to this corner, West 49th and Rockefeller Plaza, you turned and ran that way, eastbound on 49th?

WITNESS: Yes. And then I went that way (indicating).

DEFENSE COUNSEL: Northbound on 5th Avenue?

WITNESS: Yes.

C. If a document is in issue, get it marked for identification and make sure to preserve it

Whenever a document is important, make sure it is part of the record for appeal by getting it marked for identification. Otherwise, the document will probably not be part of the record on appeal and may be useless to the appellate attorney.

For example, if you wanted to use a police report to contradict a witness and were not permitted to do so, have the report marked for identification. Then the appeals attorney can argue that, because of what the report said, you should have been allowed to use it.

Similarly, if some document comes into your hands during the trial, and you argue it should have been turned over earlier under Rosario, Brady or some other prosecutorial duty, have it marked. Otherwise, the appeals attorney cannot refer to the contents of the document to argue, for example, that it does relate to the subject matter of the witness's testimony.

The same principle is true for any document or exhibit -- e.g., videotapes, photos -- that you want the court to examine or allow into evidence. The court may refuse to examine it or to enter it into evidence, but if it is marked for identification, it becomes part of the record on appeal. The court's ruling will then become subject to appellate review.

You must also make sure the document or object involved is not lost between the trial and the appeal. You can ask the court to place a copy in the Supreme Court file. If it will not do so, retain it yourself and make sure to get it to the appeals attorney.

PRESERVING SUFFICIENCY OF THE EVIDENCE ISSUES

A. The General Rule.

A motion to dismiss for insufficiency of the evidence will preserve an issue of law only if it makes clear what element of the crime has not been proven. People v. Gray, 86 N.Y.2d 10 (1995)(the defendant's knowledge of the weight of drugs he possessed). A general claim -- for example, that the evidence was "not sufficient as to each and every element of the crimes charged" -- is insufficient. People v. Bynum, 70 N.Y.2d 858, 859 (1987); People v. Stahl, 53 N.Y.2d 1048, 1050 (1981). Thus, a motion to dismiss must specify the element of the crime not proven (intent, physical injury, etc.), or the defense not disproven (justification, for example), or the other salient issue (lack of required corroboration, identity, incredibility of a witness, etc.).

Specifying the element may not be good enough, however, if the proof of that element could be insufficient on more than one theory. Then, you should be certain to make clear the theory under which you are claiming that the element was not proven.

This is a particular problem in depraved indifference cases, since the evidence may fail to establish a defendant's guilt of, for example, depraved indifference murder for either of two distinct reasons: (1) because the defendant's conduct was manifestly intentional, and therefore lacking in the recklessness required for depraved indifference; or (2) because the defendant's conduct, while reckless, did not have the added element of depravity.

A few years ago, the Court of Appeals seemed to accept an argument that the People had failed to prove the element of "depraved indifference" as adequate to preserve either issue. See People v. Payne, 3 N.Y.3d 266 (2004)(issue that shooting was manifestly intentional was preserved based on defense motion to dismiss depraved indifference murder count on ground that "one shot from a shotgun is not depraved indifference action as . . . contemplated by the legislature and enunciated by the courts in their decisions throughout the years"). But in People v. Hawkins, 11 N.Y.3d 484 (2008), it held that a motion that identified only a failure to "prove that Mr. Hawkins acted with Depraved Indifference Murder in that matter" was insufficient to preserve a claim that his acts could only have been intentional, not reckless.

An analogous problem is presented when a crime requires two separate but similar elements. For example, burglary requires two distinct intents: trespassory intent and intent to commit a crime

inside the building upon the unlawful entry or remaining. Conceivably, even if the context should make it clear which intent is in issue, a protest only that the proof was insufficient as to "intent" could be found insufficient because it failed to specify which intent you were assailing.

B. The Need to Renew a Motion to Dismiss

In general, a motion to dismiss, made at the end of the People's case, is sufficient to preserve an issue that the evidence was insufficient to establish the defendant's guilt, provided it specifies the unproven element or issue. Some confusion exists as to whether and when the motion must be renewed at the close of the evidence as a whole.

If the defense presents a case that may add in any way to the People's evidence on the contested issue, the motion must be renewed. Whether there is otherwise any need to renew the motion was cast into some doubt, however, by the decision of the Court of Appeals in People v. Hines, 97 N.Y.2d 56 (2001). It appears to have been clarified later in People v. Payne, 3 N.Y.3d 266 (2004), and People v. Feingold, 7 N.Y.3d 288, 290 (2006).

Thus, a series of Appellate Division, Second Department, cases appears to correctly explain the rule:

> People v. Soto, 8 A.D.3d 683 (2d Dept. 2004)(renewal required when "the defendant thereafter presents witnesses whose additional testimony supplies additional evidence of guilt." "Hines clearly did not intend to announce sweeping changes in the rules of preservation applicable to legal sufficiency challenges generally." Reiterating adherence to rule that motion at close of People's case, asserting specific grounds, is sufficient).
>
> People v. Mendez, 34 A.D.3d 697 (2d Dept. 2006)(issue preserved despite failure to renew motion after defense case since the defense witnesses "did not supply any additional evidence of guilt").

Nevertheless, it would be wise to renew the motion routinely, at least whenever the defense has presented any case at all.

C. Can an Objection to the Charge Preserve a Sufficiency Issue?

Some cases suggest that an objection to the jury charge, or a request to charge, that targets a specific element of the crime can suffice to preserve a sufficiency issue. People v. Cona, 49 N.Y.2d

26 (1979), involved issues as to whether accomplice testimony was sufficiently corroborated. As to some defendants, the court noted that only a general motion to dismiss was made, which was "not specifically directed at the failure to require corroboration" for a particular witness's testimony, and found the issue as to them unpreserved because no objection was registered to the corroboration charge regarding that witness. As to other defendants, however, there was a timely request for a corroboration charge as to a different witness, which the court denied. The Court of Appeals held that, "[b]y timely requesting such a charge, these defendants created a question of law" for appellate review. See also People v. Rosenblatt, 277 A.D.2d 61 (1st Dept. 2000)(insufficiency of evidence issue preserved by objections to pertinent portion of court's charge).

You should never rely on an objection to the charge to preserve a sufficiency issue. But this rule may help you if you realize belatedly that you failed to raise the issue in a sufficiently timely or specific motion to dismiss.

PRESERVING PROSECUTION SUMMATION ERRORS

A. Listen to the prosecution summation carefully for errors

This is difficult because you may feel a natural need to relax after giving your own summation. It is useful to keep a checklist, like the one attached to this outline, as a handy guide. However, no such list can be extensive enough to cover every summation error. If you are in doubt as to the propriety of an argument, object.

If you are tempted not to object in order to avoid appearing obstructionist to the jury or the judge, keep in mind that you will inexorably bind your client at the appellate level. Unless you have the rare case in which holding back may make the difference between conviction and acquittal, or impact strongly on your client's sentence, you should make all valid objections. Appellate courts rarely forgive the failure to preserve summation errors.

B. Make an objection specific

The word "objection" alone is **not** sufficient. **You must be specific enough for the record to show that you alerted the court to the reason the argument is error.** If a judge restricts you to

saying only "objection," make a record by, **on the record**: (a) citing People v. Nuccie, 57 N.Y.2d 818 (1982), for the proposition that you must do more and (b) arguing that the restriction deprives the defendant of the effective assistance of counsel and the right to a meaningful appeal. An appeals lawyer can then argue that, because you could do no more, your general objections should be deemed sufficient.

C. Make your objection contemporaneous

An objection must be made contemporaneously with the erroneous summation comment. An objection interposed after the prosecutor has moved to another summation topic, after the summation is over, or after the verdict will not be considered "contemporaneous." On the other hand, if an objection (or another reason a comment is objectionable) occurs to you belatedly, object at that point, since that will be better than nothing.

D. Make a mistrial motion

This is especially crucial if some of your objections were sustained. Remember that a sustained objection is not enough to preserve an issue for appeal. If your objection was sustained and you requested no further relief (either a curative instruction or a mistrial) and had that request denied, you will **not** have preserved the issue for appeal. Similarly, if the court, rather than sustaining or overruling an objection, issues a minor curative instruction such as, "The jury's recollection will control," you must request something additional -- a further curative instruction or a mistrial -- in order to preserve the issue.

The best course is to make a mistrial motion at the end of the DA's summation if you objected during it at all. You may not recall every error you objected to. Again, using a checklist may help. However, in your mistrial motion, try to mention at least the general areas in which you believe the most important summation errors occurred. (If the court has not permitted you to make specific objections during the charge, a mistrial motion also gives you an opportunity to provide some on-the-record explanation of why the errors were errors.)

PRESERVING JURY CHARGE ERRORS

A. Think about potential jury charge issues ahead of time

Long before the charge is actually given, you should start thinking about what charges would benefit or harm your client. If you make tentative decisions early on, you can refine them as the case progresses. Thinking ahead is especially important for three reasons:

1. What is an acceptable charge cannot be judged by your gut instincts. The charge that makes its way to the Court of Appeals is almost invariably a questionable one; if the Court finds such a charge not to be error, it may effectively become the new model charge, given repeatedly, even though it is far from ideal. Therefore, a charge that sounds awful to you may have received the Court's seal of approval. On the other hand, a charge that sounds logically correct may have been condemned repeatedly (for example, that "even scales" mean jurors must acquit). To know what charge is proper or improper may require research.

2. You may need authority to convince the court that a particular charge should or should not be given. Be prepared to combat any undesirable charges the People may request, as well as to support the charges you want.

3. Becoming familiar with the appropriate charges ahead of time, and making a charge checklist (like the one at the end of this outline), can help focus your attention as you listen to the charge.

B. Do not assume that the CJI charge is necessarily the right charge for your case

It is important to become familiar with the CJI pattern jury charges that apply to the crimes and other issues in your case, since most judges take their charges directly from the CJI. However, it is important to think critically about the CJI or any other "pattern" jury charges. Keep two important caveats in mind:

1. Do not assume that any particular CJI or other pattern charge is correct. The law changes and there are periods when particular CJI charges have not yet been revised to reflect the current state of the law. A particular CJI charge may be too favorable to the People.

For example, for years, the CJI contained a charge on self-defense that had been rewritten after People v. Goetz, 68 N.Y.2d 96 (1986), but before People v. Wesley, 76 N.Y.2d 555 (1990). It was less favorable than the charge to which a defendant was entitled under Wesley, but was given in case after case without a protest that preserved the issue for appeal.

2. Do not assume that the CJI charge fits your particular case. The CJI charges are designed to fit the standard, typical case, with the assumption that judges will adapt them as necessary to meet the needs of non-standard cases. This is an important proposition for judges to understand, since many are reluctant to leave what they see as the safer course of sticking with precisely the language of the CJI.

For example, there is usually no question of whether a structure constitutes a "dwelling" under the burglary statute. Therefore, the CJI charge on burglary, although including a definition of "dwelling," lists elements of the crime as if there is no issue as to whether the structure constitutes a "dwelling." Thus, the jurors are simply told they must find "That . . . the defendant unlawfully entered in a dwelling located at . . . ." If you have an issue as to whether the structure involved meets the definition of a dwelling, you should object to the CJI charge on the ground that, in essence, it directs a verdict as to this issue, by conveying the assumption that the structure at the location specified is a dwelling. You might ask the court to charge as two separate elements: (1) "that the defendant unlawfully entered a structure located at . . . " and (2) "that the structure located at . . . was a dwelling," thus making clear to the jury that they have to decide this specific factual issue.

C. Make timely requests

Some charge requests have particular timeliness requirements. For example, a missing witness charge must generally be requested before the end of the People's case. If you can possibly make a timely request, do so.

If a request suddenly occurs to you, however, do not assume it is too late. Make your request at the earliest opportunity. If you can, give a plausible reason, on the record, for your failure to do it sooner (for example, the People had led you to believe the missing witness would be called, or a comment in the prosecutor's summation makes a particular charge necessary).

D. Make sufficiently specific requests

You do not need to make charge requests in writing. Nor, as a general rule, do you need to request any specific language. However, you must make your request sufficiently clear that there can be no confusion about what you want.

For example, if you request a missing witness charge, you do not have to propose specific wording, but you do need to make clear on the record which witness you are talking about (even if you think there could be no possible confusion).

If you decide to request specific language, be very careful. Keep in mind:

1. The language you request must be language you are entitled to have charged. You should be prepared to back up your request with specific statutory or case law to convince the judge your requested language is correct.

2. If your request for specific language is denied, it is crucial that you make a fall-back request, on the record. Otherwise, the only issue you will have preserved for appeal is that you were entitled to precisely the requested language -- meaning (1) it was absolutely correct, and (2) it was so crucial that no other language would do. That is an extremely hard argument to win.

An appropriate request might be (1) for specific language, but if that is denied, then (2) for the CJI language, and if that is also denied, then (3) for whatever generic charge the court might be willing to give ("if you won't charge as I requested, would you please, at the very least, give some charge as to _____").

E. Listen to the charge very carefully

It is crucial to listen to the charge itself very carefully. There have been cases with no presumption of innocence charge whatsoever, and no objection, because of the natural human tendency to think we must have heard what we expected to hear. If possible, use a checklist (like the one at the end of this outline) to make sure that no crucial portion of the charge is omitted and to note any objections or requests you wish to make at its conclusion.

A good basic charge checklist would include a column listing items the charge should include, followed by a column for a check mark when that item is charged adequately and correctly, and then a space for jotting down key words to remind you of any objection or further request you want to make regarding that item. It should have a section for the various standard charges (presumption of

innocence, credibility, etc.), and then a section listing the various charges, defenses, and other items specific to the case at hand (robbery 1, robbery 2, acting-in-concert, identification, alibi, use of prior crimes to impeach defendant, etc.).

F. After the charge, be sure to register objections and renew any requests that were not outright denied on the record

Obviously, after the charge, you need to make any appropriate objections or further requests. Again, these need to be sufficiently specific so that there can be no question what you are complaining about or asking for.

If you are asked to supply specific wording and you are at a loss, ask that the court charge "the wording of the statute" if there is a statute involved.

It is especially important to remember that, if the court did not definitively deny a request you made earlier, you must renew that request after the charge in order to have a preserved issue. For example, if the court indicated it would grant your request, but then forgot to include it, specifically bring that omission to the court's attention. Or, if the court says, in effect, "I will charge that, but in my own wording," you must protest the wording it used; otherwise, the appellate court will assume that the court's wording was satisfactory to you.

G. Pay particular attention to charges given during jury deliberations

When jurors ask a question, it shows the focus of their deliberations, making it very difficult for the People to argue on appeal that any error in responding to the jurors was harmless. Therefore, it is important to listen with particular care to responses to jury questions, Allen charges, and anything else the court tells the jurors during deliberations, and to register any objections on the record.

Pay particular attention to the balance in supplemental jury instructions. For example, if the court gives an Allen charge, does it strike the appropriate balance between urging the jurors to listen to each other and telling them they have the right and duty to stick to their guns if convinced they are correct? Does it strike the appropriate balance between those favoring conviction and those favoring acquittal, or does it suggest that those with a reasonable doubt should be able to explain it, but not place a similar burden on those inclined toward conviction? Be aware that an Allen charge that may be acceptable in the abstract may not be

appropriate if the jury has indicated it is deadlocked 10 to 2 or 11 to 1.

H. Pay particular attention to materials provided to the jury

For example, even as revised, C.P.L. §310.20(2) provides for only limited annotation of verdict sheets, absent consent. If you sign the verdict sheet, that will be taken as consent. And, while silence may not necessarily equal consent, an appeal with a clear objection is always easier to win than an appeal with a silent, and arguably ambiguous record.

PRESERVING BATSON & KERN CLAIMS

A. The three-step process

It is important to keep in mind the three distinct steps involved in any Batson or reverse-Batson (Kern) challenge:

> **STEP 1:** The opponent of the peremptory strike must make out a *prima facie* case of discrimination, in his/her adversary's use of peremptory strikes, against a cognizable racial or gender group.
>
> **STEP 2:** Assuming a *prima facie* case is made out, the burden then shifts to the proponent of the strike to come forward with a race- or gender-neutral explanation.
>
> **STEP 3:** Assuming the court finds the reason to be race- or gender-neutral, the burden then shifts back to the opponent of the strike to establish that the ostensibly race- or gender-neutral explanation is a mere pretext for discrimination.

B. Preserving a Batson challenge

1. You Must Make a *Prima Facie* Showing that the Prosecutor is Discriminating Against a Cognizable Group

First and fundamentally, in making a Batson claim, you should make crystal clear that you are "objecting" on "Batson grounds" or

making a "Batson challenge." The appellate court will not consider mere generalized observations such as, "the prosecutor's use of peremptories against the last two black jurors is highly suspect," or "Judge, those last two jurors were Asian," as constituting a Batson challenge and the issue will not be available on appeal.

Second, make sure that your argument for a *prima facie* case of discrimination includes more than a bare assertion that the DA used most of his/her strikes against a particular group (*e.g.* "four out of five of the DA's challenges were against Hispanics" or the DA "struck four out of five Hispanics on the panel"). If such a bare assertion is summarily rejected by the trial court, the appellate court will consider the record inadequate for appellate review. Your Step 1 trial record should, ideally, reveal the race (or gender) makeup of the prospective jurors the DA had to choose from when exercising strikes, along with some showing that the strikes cannot be explained by the stricken jurors' backgrounds or *voir dire* responses.

A proper Batson challenge would include:

1. The magic words, "I object on Batson grounds."

2. Your basic claim: "the DA used 4 of his 5 peremptories to strike all 4 of the African-Americans on the panel."

3. A claim that the struck jurors either a) fit a profile ordinarily considered favorable to the prosecution (*e.g.*, crime victim, relative of police officers) or b) had backgrounds similar to those of unstruck jurors (*e.g.*, the DA struck an African-American teacher who had a friend arrested for forgery, but not a white high school counselor who had a friend arrested for car theft). In other words, you want to argue that the strikes cannot be explained by the jurors' *voir dire* answers alone.

4. A summary of all the jurors who have sat in the box up to the point at which the challenge is made (*e.g.* in the first round, there were 4 African-American prospective jurors, 3 Asian prospective jurors, . . . , and the DA used 2 strikes against African-American jurors and 1 against . . .; in the second round, . . . etc.). You want to demonstrate that the DA used a disproportionate number of strikes against the group at issue, compared to that group's representation on the panel(s). For example, you might want to argue that, by the time of your challenge, the DA had used 8 out of a total of 10 challenges, or 80% of his/her challenges, against African Americans, when African-Americans constituted only 9 out of 30, or 30%, of the prospective jurors in the box thus far.

If your challenge is to strikes of jurors within a cross race-gender (and/or age) grouping (African-American women, young

Hispanics), be prepared to argue that this is a cognizable group under Batson. See People v. Bridgeforth, 28 N.Y.3d 567 (2016)(skin color is cognizable classification. The Appellate Division, First Department has recognized race-gender groupings as cognizable classifications. People v. Watson, 141 A.D.3d 23 (1st Dept. 2016). The Second Department held in People v. Garcia, 217 A.D.2d 119 (2d Dept. 1995), that African-American women are a cognizable group. In People v. Hecker, 15 N.Y.3d 625 (2010), Judge Smith's concurrence notes that whether cross race-gender groupings constitute cognizable groups is an open question that should be litigated. 15 N.Y.3d 666-667.

B. STEP 2: The Prosecutor Must Give Race-Neutral Reasons

Once the court finds that you have made a *prima facie* case of discrimination, it must ask the DA to provide a race-neutral reason for each of the challenges he/she made against someone in the race or gender group at issue.

IMPORTANT: If the court first finds that you have made out a *prima facie* case of discrimination in round 2 or 3, be sure to ask that the prosecutor be made to come forward with race-neutral reasons as to all jurors struck up to that point, including those in prior rounds. It does not matter that the earlier round occurred the day before, that the jurors struck earlier have left the courthouse or otherwise become unavailable, or that you did not raise a Batson challenge during the prior round (a sufficient pattern of discriminatory strikes may not have been revealed by then). If the strike against a juror in a prior round is shown to have been discriminatory and that juror is no longer available, you are entitled to a mistrial.

Although a race-neutral reason can be grounded in almost anything (*e.g.*, length of hair, inattentive demeanor, prior arrest record), some explanations are clearly insufficient. For example, "I forgot," "I am not a bigot," "But you're striking whites," or "I refuse to give a reason because I disagree that a *prima facie* case has been established" are clearly not race-neutral reasons. Therefore, when the prosecutor provides a "reason" for his/her strikes, you should carefully consider whether to challenge it as so devoid of any meaningful content that it fails to satisfy the Step 2 burden of coming forward with a race- or gender-neutral reason. If you fail to make that challenge, any argument that the prosecutor has failed to provide race (or gender) neutral reasons is unpreserved for appellate review.

C. STEP 3: Your Argument that the Reason the DA Gave is a Pretext for Discrimination

Once the court accepts the DA's explanation for a strike as a race-neutral reason, you should object that this reason is a mere pretext for discrimination (assuming you believe it is). The burden is on you to make this objection and to establish pretext. If you fail to argue pretext, no such argument survives for appellate review.

There are several ways pretext can be argued. These include arguing that the ostensibly race-neutral reason is:

1. Too silly to be a true explanation for the strike (*e.g.*, the juror is wearing white shoes after Labor Day);

2. Merely a cover for discrimination (*e.g.*, residency in Harlem or Bensonhurst; wearing "inappropriate" clothing or having "messy" hair if the clothing or hairstyle in issue is generally associated with a particular racial group);

3. Not credible because the reason is generally accepted as making the prospective juror desirable to the prosecution (*e.g.*, the juror is a probation officer or has friends in law enforcement);

4. Not credible because not uniformly applied to prospective jurors of other backgrounds (*e.g.*, the DA says he struck an African-American juror because she had young children, but did not strike caucasian jurors with young children).

5. Not true (*e.g.*, contrary to the DA's claim, the prospective juror was not inattentive).

However you make this Step 3 argument, you must make it or it will be unpreserved for appellate review. Try to make your argument in as much detail as possible, since arguments you do not make will be unavailable to appellate counsel. Should the court find against you on the question of pretext, object again and, if possible, specifically take issue with the court's conclusions and give a reason for doing so.

Note that the pretext discussion could go back and forth: if the prosecutor seeks to rebut your claim of pretext by giving a further explanation for a strike, you should respond. Do not stand mute just because you made an initial argument. Otherwise, it may look like you accepted the further explanation.

C. Creating an appellate record when you are defending against the People's Kern claim

A. STEP 1: No Prima Facie Case; No Cognizable Group

The prosecutor's Kern (reverse-Batson) challenge to your use of peremptory strikes may cause your hackles to rise, given the underlying implications of that accusation. Do not let the challenge throw you off.

Your first response should not be a denial that you are a racist or an explanation for your strikes. Rather, your first response should be that no *prima facie* case has been made out, since there is an insufficient showing that your strikes were disproportional. Remember, it is not enough that you used a high number (or even most) of your strikes against a particular group. To show disproportionality, the DA must show, in one way or another, that the portion of your strikes used against that group exceeded the group's representation in the box. It is not discriminatory to use 80% of your strikes against caucasians if they constitute roughly 80% of the jurors left in the box after the DA has exercised his/her peremptory strikes.

Alternatively, be prepared to argue that the mere disproportionality of your strikes is insufficient to make out a *prima facie* case. In support of this argument, you can point out that, despite the appearance of disproportionality, you had particular reasons for challenging the jurors you challenged. You may have challenged a disproportionate number of caucasians, but that was only because a disproportionate number of them happened to be closely related to police officers.

B. STEP 2: Stating Your Race-Neutral Reason

IMPORTANT: No matter how great an argument you have that the DA failed to make out a *prima facie* case of discrimination, if the court finds that one was made out and directs you to provide race-neutral reasons for your challenges, you must do so. As a general rule, on appeal, Step 1 cannot be relitigated once the court proceeds through Steps 2 and 3. Therefore, never rely on your Step 1 argument alone.

Remember that you must give a reason that has some meaningful content. "I forgot," "I am not a racist," or "But the D.A. is challenging all the whites" are not adequate, race-neutral reasons. Also non-race-neutral is the explanation that your client wanted you to challenge this juror; your client is not allowed to discriminate any more than you are.

The court may direct you to provide a "non-pretextual" reason at Step 2. You should gently remind the court that at Step 2 you are only required to give a race-neutral reason, and it is the prosecutor's burden to claim and establish pretext. That will give you the last word in defending your challenge.

C. STEP 3: Defending Against a Claim of Pretext

Once you have given your race-neutral reason, the DA or the court itself may challenge it as pretextual. Although it technically is not your burden to establish lack of pretext, the fact that the DA bears the burden is of little practical use to the appellate defense lawyer after your challenge has been stricken and your client convicted. You have to make a case against pretext.

The prosecutor may claim that your reasons for striking juror A, who is Asian, also applied to juror B, who is white, and whom you did not strike. In response, you should establish that you used your strikes uniformly, by explaining why you struck juror A but not juror B. For example, while both A and B were crime victims, A became visibly emotional or angry when relating her victimization, while B did not.

Ideally, try to relate the distinction between the two jurors to the nature of the case on trial. For example, in a robbery case, you might explain that, while jurors A and B were both crime victims, A was the victim of a violent crime (or a robbery, or a crime involving a weapon, or a crime in which someone was injured), while B was the victim of a non-violent crime (or a different type of crime, or a burglary committed in his absence). If police credibility will be an issue, you might argue that there is a legitimate difference between someone related to a police officer, and someone related to a person with a more tangential relationship to law enforcement. Perhaps the juror you struck is a small landlord, as is the victim in your case, raising the possibility he will be identify with the victim more closely than would the small businessman you did not strike. Again, it is important that you respond to any further arguments by the prosecutor.

Note that, if you still feel that the step one ruling was incorrect, although you may not relitigate step 1 at step 3, the relative weakness of the prima facie case is relevant to step 3 analysis. People v. Hecker, 15 N.Y.3d 625, 660 (2010).

Especially hard to challenge on appeal is the court's rejection of your "soft-data" (*i.e.*, demeanor-based) reasons, such as juror inattentiveness or hostility. Hence, to empower your appellate counterpart you should describe for the record precisely how the juror was inattentive (*e.g.*, read a book, kept scanning the audience, slept) or hostile to you (*e.g.*, refused to make eye contact, used a different tone of voice when responding to you than

when responding to the DA, sneered). Otherwise, the appellate court will merely uphold the trial court's unfavorable ruling.

If the court disallows your peremptory challenge and seats the juror, note your objection for the record and, if possible, point out (with factual detail) the basis of your disagreement with the court's ruling. No matter how frustrating the court's ruling may be, if you have preserved the record, you may very well have created a solid appellate issue.

PROSECUTION SUMMATION CHECKLIST

When the DA:	Object to:
Uses the word "I" ("I believe," "I don't think," "I am confident that") or otherwise expresses what jurors may see as his/her personal or the office's opinion of the witnesses, evidence, strength of the case, etc.	"vouching"
Equates an acquittal with perjury or conspiracy by DA's witnesses, or argues they have no motive to lie	"vouching" + "burden-shifting"
If ID or other key issue turns on reliability, not just cred.	+ improperly "eliminating possibility of mistake"
Misstates the evidence	"misstating the evidence"
Misstates the law	"misstating the law" + "usurping court's function"
States or hints at facts as to which there is no evidence	DA becoming an "unsworn witness" or referring to "fact not in evidence"
Makes arguments that are not fair inferences from the evidence	"unfair inference"
Uses evidence admitted for a limited purpose for another purpose (e.g., impeachment evid. as if evid. in chief; Molineux evidence to show general criminal disposition; evid. admitted only as to co-defendant used as to defendant)	"exceeding purpose for which that evidence was admitted" (+ "propensity," etc.)
If defendant being tried for more than one crime, uses evidence of first crime as evidence of the second	+ "commingling" evidence
Suggesting defendant is guilty because of association with unsavory person, location, etc.	"guilt by association"
Use of non-evidentiary facts (e.g., co-defendant pled guilty; grand jury indicted; result of prior trial)	fact "not in evidence" + that fact is "entitled to no evidentiary weight"
Refers to defendant's prior record to suggest he is guilty, or otherwise dwells on it	"propensity"
Suggests defendant's guilt of ongoing or wide-spread crimes when trial is for single incident	improper "speculation" + fact "not in evidence"
Suggests defense should prove its case, explain away People's evidence, show why witnesses would lie, etc.	"burden-shifting"

Suggests defense be held to same standard as People, trial is search for truth, victim as well as defendant has rights, presumption of innocence is only a presumption	"dilutes People's burden of proof" + belittles/demeans defendant's rights
Refers to race (ethnicity, religion, national origin) in any way, even to make an otherwise legitimate argument	"injecting race" (etc.) into trial +/or "appeal to prejudice"
Seeks sympathy for victim, dwells on victim's injuries or vulnerability or awful nature of crime, asks jury not to let victim/witness down	"inflammatory" + invoking "sympathy"
Speculates on what worse things might have happened (e.g., "thank God" the police arrived in time, burglary victim might have been injured if she had been home)	"inflammatory" + "speculation"
Invokes religion or morality ("Thou shalt not kill")	"inflammatory" + jury must apply "legal standard"
Tried to get jurors to identify with victim ("you want to feel safe in your home," "you would want to be believed if this happened to you")	"personalizing" crime or asking jurors to "identify with victim"
Plays upon fear of crime, violence, community censure (e.g., our streets must be safe, how acquittal will be received by public, acquittal would invite further crime)	"safe streets" argument + "inflammatory"
Denigrates the defense (e.g., counsel trying to confuse jurors or avoid evidence, defense theory insulting or silly, defense trying to manipulate jurors)	unfairly "denigrates" the defense (or defense counsel) + suggests counsel does not believe in client's innocence
Defendant listened to People's case and then tailored his testimony	"penalizes defendant for exercising his rights" (to be present, confront, accusers, testify)
Calls the defendant or a defense witness names (liar, killer, gangster, criminal, bum, fraud)	"inflammatory" + "abusive"
Comments, directly or indirectly, on the failure to present a defense	"burden-shifting"
If the defendant is the only available witness on the disputed issue	+ improper comment on defendant's "silence" at trial
Comments, directly or indirectly, on defendant's exercise of right to counsel, to remain silent, not to consent to search	"penalizing" defendant for "exercise of constitutional right" (to counsel, remain silent, etc.)

JURY CHARGE CHECKLIST

	Okay	Problems
EVIDENCE IN GENERAL		
Indictment is proof of nothing		
Role of Judge and Jury		
Judge has no opinion		
What constitutes evidence		
Evidence admitted for limited purpose		
Impeach. of wits. - prior statements		
Prior crimes/bad acts admitted as to credibility only - limited relevance		
Evidence stricken from record		
Credibility of witnesses		
Interested witnesses		
Police witnesses		
Character witnesses		
Expert witnesses		
Missing witnesses		
Witnesses other than Defendant		
No infer. from Def. not testifying		
Jury may not consider punishment		

BURDEN OF PROOF & PRESUMPT. OF INNOCENCE

Presumption of Innocence

Burden of Proof Remains on People

Reas. Dt. applies to each & every element

Reasonable Doubt Standard

AS TO FIRST COUNT: List each element; check if submitted and defined:

Elem. #1 _____

Elem. #2 _____

Elem. #3 _____

Elem. #4 _____

(REPEAT FOR ADDITIONAL COUNTS)

CHARGES RELATING TO PARTICULAR COUNTS

Mental Culpability (Intent, Recklessness, Criminal Negligence, Knowingly)

Attempt

Accessorial Liability

Def. must have required mental culp.

Consider evidence separately

Reach separate verdict as to each

Circumstantial Evidence

Wholly circumstantial case

Two possible inferences

Corroboration (if insuffic. & no other evidence, must acquit)

Accomplice

Confession

Unsworn witness

Other

Evidentiary presumptions (permissive, rebuttable)

Confession

Was it made?

Was it voluntary?

Jury should not be told of pre-trial ruling

Consciousness of guilt evid. (flight, false statements, etc.)

Application of law to facts of case

Adequate for juror understanding

Fairly balanced

OTHER: _____

CHARGES RELATING TO PARTICULAR DEFENSES

Mistaken ID

Clear RD standard applies to ID

Adequate explan. how to consider

Alibi

Burden remains on People

Disbelief of alibi does not establish ID

No sugg. alibi wits. get special scrutiny

Agency - no sugg. negated profit alone

Affirmative Defenses

Should be charged only on request

Make clear People still have burden beyond RD as to other elements, defenses

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OTHER: _____

DELIBERATIONS & VERDICT

Be open minded, discuss case

Retain conscientious beliefs

Unanimous verdict

Can rehear test., ask Qs, have exhs

Separate verdicts on each count

Responses to jury Qs during delibs.

Defense given input

Answers responsive & balanced

Allen charge to deadlocked jury - balanced & non-coercive
