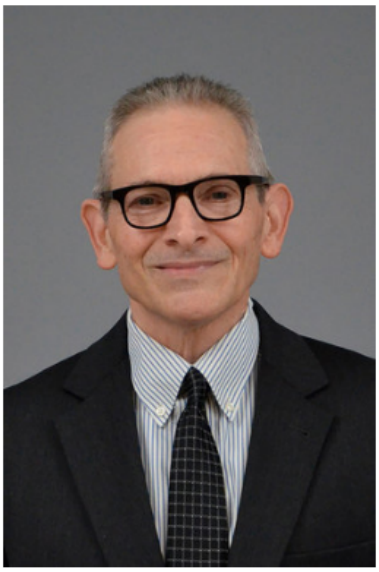
OAD | OFFICE OF THE APPELLATE DEFENDER

PRESERVATION TRAINING FOR TRIAL LAWYERS

Tuesday, January 23, 2018
6:00 p.m. – 8:00 p.m.

NYU Law School
Vanderbilt Hall, Room 210
40 Washington Square South
New York, NY 10012

Joseph M. Nursey



Supervising Attorney, Office of the Appellate Defender (1999-present); Private Practitioner, criminal defense and civil rights litigation, Atlanta, GA (1994-1999); Supervising Attorney, Office of the Appellate Defender (1992-1994); Attorney and Director of Interns, The Team Defense Project, Atlanta, GA (1978-1992); Assistant Public Defender, Tallahassee, FL (1977-1978). Argued Burger v. Kemp, 483 U.S. 776 (1987), in U.S. Supreme Court.

Instructor at numerous state and regional programs on death penalty defense and criminal defense, including: Faculty, National Defender Training Project, 2017 Trial Advocacy Program, University of Dayton School of Law, Dayton, OH, June 2017; Faculty, Ohio State Public Defender, Appellate Defender Training, Dayton, OH, March 2016; Faculty, Federal Defender Services, Persuasive Writing Workshop, Washington, DC, August 2015; Faculty, National Legal Aid & Defender Association and National Alliance of Indigent Defense Educators, Appellate Defense and Persuasive Writing Skills Institute, New Orleans, LA, January 2015; Faculty, Public Defender Association of Pennsylvania, Appellate Advocacy Training, The Dickinson School of Law, Carlisle, PA, March 2011; Faculty, Public Defender Association of Pennsylvania, Trial Advocacy Training, The Dickinson School of Law, Carlisle, PA, June 2008.

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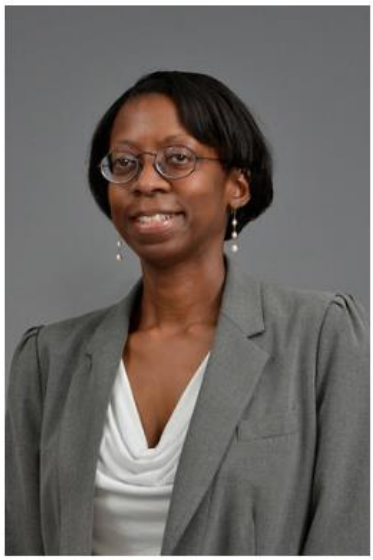

Adjunct Professor of Clinical Law, New York University School of Law (2003-present); Director of Recruitment and Outreach, Office of the Appellate Defender (2003-present); Supervising Attorney, Office of the Appellate Defender (2001-present); Staff Attorney, Office of the Appellate Defender (1998-2000); Law Clerk, Hon. Eric L. Clay, U.S. Court of Appeals for the Sixth Circuit (1997-1998); Law Clerk, Hon. Susan J. Dlott, U.S. District Court for the Southern District of Ohio (1996-1997). Research Assistant, Hon. F.L. Norcott, Jr., Associate Justice, Connecticut Supreme Court (1995-1996); Summer Legal Intern, Dept. of Justice, Civil Division (1995); Legal Intern, People for the American Way (1995); Summer Intern, NAACP Legal Defense and Educational Fund, Inc. (1994); Summer Associate, Shearman & Sterling (1994).

Yale Law School, J.D., 1996; Ohio State University, B.A., summa cum laude, 1993.

I. General Guidelines

Preservation is, with very limited exceptions, the surest way to guarantee that an appellate court will address your contentions on appeal. **Unless you preserve an issue, no appellate court is ever required to review it.**

It is, with very limited exceptions, the only way to keep open the possibility that the Court of Appeals will address your contentions on appeal. **Unless you preserve an issue, the Court of Appeals lacks the jurisdiction to review it.**

It is, with almost no exception, the only way to keep open the possibility that any federal court will review a federal constitutional issue on habeas corpus review.

It is an absolutely integral component of effective representation. Although your primary objective at the trial level is, of course, a positive result at the trial level, you have an additional obligation to protect your client's rights for appeal (in the event that, notwithstanding your efforts, you actually lose.)

Preserving issue for appeal is almost never inconsistent with giving your client the best shot at the trial level. You can always make a record of any objections outside the jury's presence, and that need never compromise your trial effort.

Preservation is not the same thing as making a factual record that is susceptible to review. That is, in addition to your obligation to preserve issues for appeal, you have an additional obligation to make sure that the record reflects factual matters that appellate counsel may need to refer to on appeal.

II. Steps for preserving an issue:

1. **Make a pretrial motion or motion *in limine*.** You can head off prejudicial evidence in advance and safeguard against failing to spot and address every error in the pressurized setting of a trial.

   Examples: *Molineux*, *Sandoval*, hearsay/confrontation challenge to 911 calls or medical records containing statements that aren't for diagnosis or treatment.

2. **Make a contemporaneous objection when the issue actually arises.**

3. **If the trial court sustains an objection, request a curative instruction, a sanction, and/or other relief, and move for a mistrial.**

4. **If the court overrules the objection, note an exception** to the court's ruling.

5. **Move to strike** evidence elicited or introduced either without fair warning or before you realized it was objectionable, and follow each of the steps listed in #3.

6. **Object and note an exception again after the court gives a curative instruction or other remedy.** Make it clear that any suggestions you offered with respect to a remedy were made solely to make the best of a prejudicial adverse ruling. Assert that the curative instruction does not remedy the error and state why.

   Example: prosecutorial misconduct

7. **Move to reargue** any earlier ruling(s) or reopen any hearings, motions, or proceedings, whenever new evidence comes to light that would have been relevant to the earlier ruling(s).

8. **Reassert objections and motions in a post-trial motion pursuant to CPL § 330.30.** While this will not serve to preserve an otherwise unpreserved issue and is not necessary for preservation, it can serve to elaborate on objections.

III. Miscellaneous preservation tips

Wherever possible, **assert both state and federal grounds** in support of every motion or objection. New York can be more protective. *E.g.*, right to counsel cases and government surveillance.

Frame motions and objections both as precisely and as broadly as possible. Motions and objections must be framed precisely because a one-word objection or motion will virtually never suffice to preserve a specific issue. On the other hand, issues should be framed broadly and overinclusively so as to be sure to cover every possible base, so that many different arguments will be available on appeal.

> For example, you could challenge a hearsay statement not only as a violation of New York's rules of evidence, but also as a violation of the due process clauses of the Fifth and Fourteenth Amendments, the Sixth Amendment right to confrontation and effective assistance of counsel, and analogous and often more expansive New York constitutional provisions.

Constitutionalize your claim. Simply objecting to an error is not sufficient to preserve the claim that the error denies the defendant a constitutional right. Trial counsel must argue both the basis for the error and the fact that the error deprives his client of a constitutional right. *People v. Kello*, 96 N.Y.2d 740 (2001) (objection to present sense impression does not preserve Confrontation Clause claim).

> This helps on merits, for habeas review, and for harmless error.

Always make your objections on the record. If a judge prohibits you from making a contemporaneous objection, put the argument on the record at the first possible opportunity in as much detail as necessary. Be sure to mention the fact that you were precluded from stating your position fully earlier.

Make a record of the prejudice you have suffered. Because so many errors are ultimately deemed harmless, merely preserving the fact that an error was committed is not always enough.

IV. Basic requirements for preserving an issue of law for appellate review

Objection must be **timely**; protest to a ruling or instruction must be registered "at the time of such ruling or instruction or at any subsequent time when the court had an opportunity to effectively change same." CPL § 470.05(2).

Objection must be **specific**. *See People v. Rivera*, 73 N.Y.2d 941 (1989) (general objection insufficient to preserve error in prosecutor's summation).

An objection is sufficient if counsel attempts to object but is continually cut off by the court. *People v. Resek*, 3 N.Y.3d 385 (2004).

A sustained People's objection to a line of questioning by defense counsel may not preserve a claim that examination was improperly curtailed. *People v. George*, 67 N.Y.2d 817 (1986) (where defense counsel simply moved on to another subject, without apprising the court of the purpose of the question or disputing the prosecution's claim that it was irrelevant, the error was not preserved).

Unless explicitly joined by defense counsel, **it's not enough that the co-defendant's counsel objected**. *People v. Buckley*, 75 N.Y.2d 843 (1990) (co-counsel's request for a lesser-included charge does not preserve issue for appellate review in that there are tactical reasons for which co-defendants might take different positions on the desirability of various instructions to the jury).

An issue presented for the first time in a post-verdict CPL § 330.30 motion will not act to preserve an otherwise unpreserved trial issue. *People v. Padro*, 75 N.Y.2d 820 (1990).

V. Waiver

When counsel remains silent in response to a curative instruction, this is deemed a waiver of the issue, because it is presumed that the jury will follow the court's instructions, and that the instructions cured the harm. *People v. Santiago*, 52 N.Y.2d 865 (1981).

However, failure to renew an application ruled upon by the court will not act to waive an objection. *People v. Rosen*, 81 N.Y.2d 237 (1993).

VI. Constitutional claims

Simply objecting to the error is not sufficient to preserve the issue that the error denies the defendant a constitutional right. Trial counsel must explicitly argue that the error deprives his client of a constitutional right. *See People v. Kello*, 96 N.Y.2d 740 (2001).

Counsel must articulate both federal and state constitutional standards and cite both federal and state case law.

A claim that the statute under which the defendant was prosecuted is unconstitutional may not be raised for the first time on appeal. *People v. Oliver*, 63 N.Y.2d 973 (1984).

VII. Specific areas of law

A. *Brady*

Request specific exculpatory material whenever possible. In those cases, the defense only needs to show a "reasonable possibility" that the non-disclosure changed the outcome—a lower threshold than the federal "reasonable probability" standard. *People v. Vilardi*, 76 N.Y.2d 67 (1990).

There is no *Brady* violation where the defense knows or should know of the government's failure to disclose exculpatory information. *People v. Lavalle*, 3 N.Y.3d 88 (2004).

A disclosure made on the eve of trial when it is too late for the defense to make effective use of it should be objected to as effective non-disclosure. *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001).

A *Brady* violation may occur when impeachment material relevant to a witness who testified at the suppression hearing comes out at trial. *People v. Williams*, 7 N.Y.3d 15 (2006). If this happens, object and request a new suppression hearing.

New York courts are divided on whether pleading guilty waives *Brady* claims. *People v. Kinney*, 107 A.D.3d 563 (1st Dep't 2013) ("alleged nondisclosure could not have materially affected defendant's decision to plead guilty"); *People v. Huggins*, 105 A.D.3d 760 (2d Dep't 2013) (defendant forfeited right to raise *Brady* claim by pleading guilty); *People v. Ortiz*, 127 A.D.2d 305 (3d Dep't 1987) (*Brady* claim not waived by guilty plea); *People v. DeLaRosa*, 48 A.D.3d 1098 (4th Dep't 2008) (*Brady* violation can be raised following an *Alford* plea).

> In a recent Court of Appeals case, the court failed to acknowledge the differing approaches of the appellate courts, and without any analysis appeared to hold that the standard is whether the evidence would have "materially affected the decision to plead rather than go to trial." *People v. Fisher*, 28 N.Y.3d 717 (2017).

B. *Rosario*

Remedies for a *Rosario* violation:

> Request to reopen a hearing if *Rosario* material relevant to that hearing comes out during trial.
>
> Request to re-examine a witness in the case of delayed disclosure. It is *per se* reversible error if court denies this request. *People v. King*, 241 A.D.2d 329 (1st Dep't 1997).
>
> Where *Rosario* has been lost or destroyed, request dismissal of the indictment (if severe prejudice to defendant), *People v. Martinez*, 71 N.Y.2d 937 (1988), preclusion of testimony by the witness whose notes/statements are unavailable, a reconstruction hearing, providing the defense with all other material (even if not otherwise discoverable) that covers the same subject as the lost or destroyed item, or an adverse inference charge, *People v. Joseph*, 86 N.Y.2d 565 (1995).

A defendant will be deemed to have waived a claim if the existence of *Rosario* material is disclosed in court, or if the defense should have been aware of the existence of the materials and he fails to seek production and/or sanctions for late or non-disclosure. *People v. Graves*, 85 N.Y.2d 1024 (1995); *People v. Bailey*, 275 A.D.2d 663 (1st Dep't 2000).

An attorney may be found ineffective for waiving a valid *Rosario* claim. *Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000).

C. Speedy trial

A written CPL § 30.30 motion must be made prior to trial to preserve a claim. CPL §§ 170.30(1)(e), 210.20(1)(g). The motion only covers days prior to the date of the motion, even if other "chargeable" days accrue later on.

Motion papers must contain "sworn allegations that there has been unexcused delay in excess of the statutory maximum." *People v. Beasley*, 16 N.Y.3d 289 (2011). The papers must, on their face, indicate entitlement to dismissal. *People v. Lusby*, 245 A.D.2d 1110 (4th Dep't 1997).

If the prosecution fails to announce readiness within the designated period, the defendant must allege that in his motion papers; if the prosecution announced readiness but was not actually ready, the defendant must allege in his motion papers the specific time periods during which they were not actually ready and the reason(s) why. *People v. Jackson*, 259 A.D.2d 376 (1st Dep't 1999).

The defendant's initial burden doesn't require him to allege that certain periods are not excludable; it's the prosecution's burden to identify excludable time. However, once the prosecution identifies particular time periods they contend are excludable, the defendant has the burden to refute that argument. *People v. Luperon*, 85 N.Y.2d 71 (1995). Otherwise, the defendant will be deemed to have conceded that the periods are excludable. *People v. Notholt*, 242 A.D.2d 251 (1st Dep't 1997). If the alleged excludable time isn't disputed in the defendant's initial papers, the defendant must dispute the allegations with supplemental sworn allegations. *Beasley*, 16 N.Y.3d 292.

The defendant has the burden of proving that the People failed to establish readiness within the designated period, and must prove by a preponderance of the evidence that the declaration of readiness was illusory. *People v. O'Neal*, 99 A.D.2d 844 (2d Dep't 1984).

A defendant forfeits his 30.30 rights by pleading guilty. *People v. Attanasio*, 240 A.D.2d 877 (3d Dep't 1997).

Only those 30.30 contentions that a defendant argued in the lower court in his or her initial motion papers, reply papers, or at the hearing *or* those which the lower court addressed in its decision are preserved for appellate review. *People v. Allard*, 28 N.Y.3d 41 (2016); *People v. Goode*, 87 N.Y.2d 1045 (1996). The appellate court will only exclude those periods that the defendant specifically argued in the lower court were not excludable.

> For example, if a defendant argued that from January to July is not excludable because the prosecution's delay in responding to the omnibus motion was "unreasonable," the appellate court will consider only whether that entire period was not excludable. It will not consider, for example, the alternative argument that the

> shorter period from May to July was not excludable as being unreasonable delay. *Beasley*, 16 N.Y.3d 289. If the prosecution contends in its answering papers that a specific period is excludable, the defendant will have preserved his or her argument that the period is not excludable only to the extent that the prosecution's particular arguments were addressed in the defendant's original motion or reply papers. *People v Allard,* 28 N.Y.3d at 41; *People v. Henderson*, 120 A.D.3d 1258 (2d Dep't 2014); *People v. Brown*, 122 A.D.3d 461 (1st Dept 2014).
>
> In *People v. Allard*, 28 N.Y.3d 41 (2016), the Court of Appeals held that to preserve a § 30.30 issue for appeal, defense counsel must either file a reply "identifying any legal or factual impediments to the use of [the] exclusions" identified by the prosecution, or request a hearing on the motion. *See also People v. Jiminez*, 143 A.D.3d 422, 422 (1st Dep't 2016). It's not enough to simply assert that more than [#] days of includable time has passed.

Counsel is ineffective for failure to make a meritorious 30.30 motion for dismissal. *People v. Devino*, 110 A.D.3d 1146 (3d Dep't 2013).

D. *Batson* claims

A *Batson* objection is timely made after jury is selected but prior to trial. *People v. Scott*, 70 N.Y.2d 420 (1987).

Simply stating that a certain number of prospective jurors constitute a pattern is not sufficient to preserve a *Batson* objection: defense counsel must explicitly state which jurors that were challenged by the prosecution are encompassed by the *Batson* challenge and must explicitly state that the reasons provided are pretextual in order to preserve the issue. *People v. James*, 99 N.Y.2d 264 (2002).

E. Juror dismissal

Defense counsel must object to the dismissal of a juror at a time when the trial court can correct the error. *People v. Hopkins*, 76 N.Y.2d 872 (1990).

It is sufficient for preservation purposes that counsel make an application to challenge a juror for cause. Counsel's use of a peremptory challenge when the cause challenge is denied does not waive the preservation of the cause challenge. *People v. Smith*, 297 A.D.2d 495 (1st Dep't 2002).

> In fact, the defense must peremptorily challenge the objectionable juror and exhaust all peremptory challenges in order to preserve a cause challenge issue for appeal. CPL § 270.20(2).

For cause challenge, dispute that questioned juror has been rehabilitated.

> *People v. Wright*, 30 N.Y.3d 933 (2017) (trial court erred in denying defense for-cause challenge to prospective juror, where "juror's statements raised serious doubt regarding her ability to be unbiased, and the trial court did not inquire further to obtain unequivocal assurance that she could be fair and impartial").

F. Identifications

Recent statutory changes as of July 2017 (CPL §§ 60.25, 60.30, 710.20, 710.30):

> Photo arrays used to only rarely come into evidence, but now are admissible in the prosecution's case in chief in any case if the "proper" procedure is followed and notice is given.
>
> Police must use a blind/blinded procedure, *i.e.*, the person administering the ID procedure does not know when the witness is viewing the suspect.
>
> The prosecution must give notice of all types of ID procedures, including when a witness IDs a client in a video, Facebook, or other electronic means.
>
> Lineups don't require a double-blinded procedure—instead, DCJS will promulgate written protocols or best practices. If NYPD doesn't follow them, it's not grounds for suppression.

Litigation Strategies

> Argue for suppression of ID if new guidelines (blind/blinded procedure) were not followed, or on a presumption that they were not followed.
>
> Argue that the blind/blinded procedure is still suggestive – cases and science argue that double-blind is the appropriate method.
>
> Cross-examine on why double-blinded wasn't used when it's the preferable method, how the witness was shown the array, whether police took a confidence statement from the witness, whether the procedure was recorded (video or audio), instructions given to the witness, what the witness said, and whether any previous ID procedures were conducted.
>
> Request that an attorney be present for all ID procedures, request that only double-blind procedures be conducted, and request that they all be recorded.

Preservation tips:

File written motions with scientific evidence cited and attached (mistaken eyewitness IDs are leading causes of wrongful convictions; mugshot exposure causes bias; post-ID feedback/info and confidence malleability). *People v. Legrand*, 8 N.Y.3d 449 (2007); *People v. Abney*, 13 N.Y.3d 251 (2009); *People v. Santiago*, 17 N.Y.3d 661 (2011).

Object as these IDs are introduced at trial, restating grounds for suppression and suggestiveness arguments.

Request jury instructions. Consider asking that the jury be instructed that police have many sources of photos, including DMV and other licensing records, and to not speculate about the source of the photo, and that failure to follow preferred procedures (double-blind) is a factor in considering whether the array was suggestive.

If the defendant moves for suppression of identification after unsuccessful motion to preclude, any argument regarding lack or insufficiency of notice is waived. *People v. Kirkland*, 89 N.Y.2d 903 (1996).

G. Suppression issues

Any error must be preserved by a specific objection. *People v. Shabazz*, 99 N.Y.2d 634 (2003) (where defendant never challenged the reliability of the officer's information at the suppression hearing, issue was not preserved as a matter of law, and defendant could not argue on appeal that the prosecution had a burden to establish the reliability of the information); *People v. Martin*, 50 N.Y.2d 1029 (1980) (where defense counsel argued at suppression hearing that seizure of physical evidence should have been suppressed because police engaged in an unauthorized "general search" of his home, but did not raise issue that warrant was required for search, *Payton* issue was not preserved as a matter of law).

Either ask the prosecution to call the identifying witness at a *Wade/Rodriguez* hearing or call the witness for the defense. Don't just rely on hearsay delivered by police witnesses.

To preserve Fourth Amendment/suppression issues, counsel must assert facts sufficient to establish standing, *i.e.*, an expectation of privacy in the place or item searched. A defendant need not admit possession of, for example, a discarded object, in order to establish standing—he can instead rely on the statements of others. *People v. Burton*, 6 N.Y.3d 584 (2006). However, a defendant must allege that some personal right of his was violated—no automatic standing. *People v. Wesley*, 73 N.Y.2d 351 (1989).

Move to reopen the suppression hearing if trial testimony contradicts the hearing testimony—it often does.

H. Hearsay / Confrontation Clause issues

Counsel should object to the introduction of out-of-court statements based on both the hearsay rule and on the Confrontation Clause where possible. The mention of one will not preserve the other. *People v. Goldstein*, 6 N.Y.3d 119 (2005) (declining to reach a hearsay issue where defense only raised Confrontation Clause challenge); *People v. Kello*, 96 N.Y.2d 740 (2001) (hearsay objection does not preserve a claim that the evidence violated the Confrontation Clause).

> Raising constitutional errors whenever possible forces the prosecution to satisfy a much more stringent harmless error test on appeal. It also preserves federal claims for post-conviction review.

When raising a Confrontation Clause claim, counsel should explicitly cite the State constitution and the federal Sixth Amendment so as to preserve a claim that the state constitutional confrontation right is broader than the federal. *Cf. People v. Clay*, 88 A.D.2d 14 (2d Dep't 2011) (rejecting a Confrontation Clause claim on federal constitutional grounds and then declining to consider whether a different result should be reached under the state constitution because "appellant does not argue that the State Constitution is more protective of the right of confrontation than the Federal Constitution").

I. Jury instructions

Defense request for missing witness charge must be made at close of People's case; making the request at the close of the defense case is not timely. *People v. Gonzalez*, 68 N.Y.2d 424 (1986); *People v. Ruiz*, 176 A.D.2d 683 (1st Dep't 1991).

Must request circumstantial evidence charge in cases involving circumstantial evidence. *People v. Santiago*, 22 N.Y.3d 990 (2013). Failure to do so may be ineffective assistance.

K. Sufficiency/weight of the evidence

A general motion to dismiss for legal insufficiency is inadequate. Any argument must be specifically directed at the alleged error (*i.e.*, the element on which the proof is claimed to be deficient). *See People v. Finger*, 95 N.Y.2d 894 (2000); *People v. Gray*, 86 N.Y.2d 10 (1995).

Defense counsel must renew its motion to dismiss for failure of the prosecution to prove each and every element beyond a reasonable doubt at the close of all evidence; counsel's motion to dismiss at the close of the prosecution's case prior to the defense case is inadequate. *People v. Kolupa*, 13 N.Y.3d 786 (2009); *People v. Lane*, 7 N.Y.3d 888 (2006).

Although arguments that the verdict is against the weight of the evidence cannot be raised prior to appeal, preservation issues still affect reviewability. "The Appellate Division is constrained to weigh the evidence in light of the elements of the crime *as charged without objection by defendant*." *People v. Noble*, 86 N.Y.2d 814 (1995) (emphasis added).

L. Prosecutorial misconduct during summation

Counsel must identify the particular comments she claims are improper. General characterization of the summation as speculative and prejudicial is inadequate. *People v. Balls*, 69 N.Y.2d 641 (1986).

While the Appellate Division may rule on an unpreserved error in the interest of justice, it helps if trial counsel objects to at least some of the improper comments. Trial counsel may be held ineffective for failure to object. *People v. Wright*, 25 N.Y.3d 769 (2015).

If defense counsel has opened the door to certain comments based on her arguments in summation, the court often finds that otherwise improper prosecutorial comment is fair response. *People v. Overlee*, 236 A.D.2d 133 (1st Dep't 1997).

The court is more likely to find reversible error if defense counsel's objection to the prosecutor's comment was overruled by the trial judge, whereas the harm caused by a prejudicial comment may be mitigated if the court sustains the objection and instructs the jury to disregard the comment. *People v. Ashwal*, 39 N.Y.2d 105 (1976).

Even if the court sustains an objection and instructs the jury to disregard the comment(s), this may not be sufficient to eliminate the prejudicial effect. *People v. Calabria*, 94 N.Y.2d 519 (2000).

Appellate courts often find that even though the prosecutor made improper remarks during summation, they didn't deprive the defendant of a fair trial because there was no showing of an "obdurate pattern of inflammatory remarks or of egregious and pervasive prosecutorial misconduct" or there was overwhelming evidence of guilt. *People v. Gonzalez*, 249 A.D.2d 24 (1st Dep't 1998).

> Thus, it is beneficial to object to multiple errors and argue that they cumulatively caused prejudice. *People v. Calabria*, 94 N.Y.2d 519 (2000); *People v. LaPorte*, 306 A.D.2d 93 (1st Dep't 2003).

Types of prosecutorial comments to object to in summation.

Evidentiary errors

Referring to matters not in evidence. *People v. Collins*, 12 A.D.3d 33 (1st Dep't 2004).

Misstating/misrepresenting the facts. *People v. Lantigua*, 228 A.D.2d 213 (1st Dep't 1996).

Drawing unwarranted inferences from the evidence. *People v. Hemingway*, 240 A.D.2d 328 (1st Dep't 1997).

Arguing a possibility known to be false. *People v. Hicks*, 100 A.D.3d 1379 (4th Dep't 2012).

Suggesting that there is more evidence. *People v. Wright*, 41 N.Y.2d 172 (1976).

Denigration

Calling the defendant a liar. *People v. Mehmood*, 112 A.D.3d 850 (2d Dep't 2013).

Impugning the defendant. *People v. Russell*, 307 A.D.2d 385 (3d Dep't 2003).

Impugning defense counsel or defense theory of the case. *Mehmood*, 112 A.D.2d 850.

Denigrating defense witnesses. *People v. Levandowski*, 8 A.D.3d 898 (3d Dep't 2004).

Burdening rights (*i.e.*, arguing that the jury should infer guilt based on a defendant's assertion of a constitutional right)

Commenting on defendant's exercise of his right to remain silent / not testify as evidence of his guilt, shifting the burden to defendant or arguing that he had the burden of coming forward with evidence. *People v. Torres*, 223 A.D.2d 741 (2d Dep't 1996).

Impeaching defendant with his pretrial or post-arrest silence. *People v. DeGeorge*, 73 N.Y.2d 614 (1989).

Implying that defendant fabricated/tailored his testimony after hearing the testimony of other witnesses, thus burdening his right to be present at trial and confront his accusers. *People v. Fiori*, 262 A.D.2d 1081 (4th Dep't 1999).

Commenting negatively on the presence of defendant's family at a public trial. *People v. Robinson*, 260 A.D.2d 508 (2d Dep't 1999).

Implying that defendant shouldn't have exercised his right to a trial because he was "caught red-handed." *People v. Pagan*, 2 A.D.3d 879 (2d Dep't 2003).

Vouching

Prosecutor expressing his or her personal belief as to the credibility of witnesses, urging the jury to give weight to the prosecution's case based on the prosecutor's own credibility or the prestige of the district attorney's office or the police (*e.g.*, by implying that police are always truthful), acting as an unsworn witness against defendant. *People v. Griffin*, 125 A.D.3d 1509 (4th Dep't 2015); *People v. Ortiz*, 33 A.D.3d 432 (1st Dep't 2006); *People v. Collins*, 12 A.D.3d 33 (1st Dep't 2004).

Arguing that a particular witness had no motive to lie or frame defendant. *People v. Roman*, 150 A.D.2d 252, *vacated by reason of appellant's death*, 153 A.D.2d 812 (1989).

Improper appeals

Appeals to sympathies, prejudices, or the emotions/passions of the jury; attempts to achieve vengeance or protection for the community. *People v. Nevedo*, 202 A.D.2d 183 (1st Dep't 1994); *People v. Payne*, 187 A.D.2d 245 (4th Dep't 1993).

Eliciting pity for prosecution witnesses based on their "courage" in testifying, victimization, or difficult life circumstances. *People v. LaPorte*, 306 A.D.2d 93 (1st Dep't 2003); *People v. Smith*, 288 A.D.2d 496 (2d Dep't 2001).

Arguing racial stereotypes. *People v. Thomas*, 129 A.D.2d 596 (2d Dep't 1987).

Asking the jury to "send a message" or making a "safe streets" argument. *People v. Espada*, 205 A.D.2d 332 (1st Dep't 1994); *People v. Payne*, 187 A.D.2d 245 (4th Dep't 1993).

Misstating the law

Prosecutor instructing the jury on the law, urging the jury to convict on a legally improper basis, misstating or misrepresenting the law to the jury. *People v. Pauli*, 130 A.D.2d 389 (1st Dep't 1987).

Shifting the burden of proof, *e.g.*, by implying that defendant had to prove complainant had a motive to lie, or commenting on defense's failure to call witnesses. *People v. Griffin*, 125 A.D.3d 1509 (4th Dep't 2015); *LaPorte*, 306 A.D.2d 93.

Arguing defendant's criminal propensity based on prior bad acts. *People v. Scott*, 217 A.D.2d 564 (2d Dep't 1995).

Improperly reducing jury's task to a credibility assessment or arguing that in order to find defendant not guilty the jury had to find that the prosecution witnesses lied. *Collins*, 12 A.D.3d 33; *People v. Hamilton*, 121 A.D.2d 176 (1st Dep't 1986).

Arguing the significance of the indictment as evidence of guilt. *People v. Sandy*, 115 A.D.2d 27 (1st Dep't 1986).

Note: In addition to objecting, make sure to request a mistrial.

M. *O'Rama* / Mode of proceedings errors

Court must notify counsel of the content of a written jury note and give them an opportunity to weigh in before responding, and the Court of Appeals has held that failure to do so is a mode of proceedings error that requires reversal irrespective of preservation. *People v. O'Rama*, 78 N.Y.2d 270 (1991).

However, a court's failure to do this before responding to jurors' oral follow-up questions which are substantively different from the jury's written request *does* require preservation for appellate review. *People v. DeRosario*, 81 N.Y.2d 801 (1993); *People v. Stewart*, 81 N.Y.2d 877 (1993).

In *People v. Nealon*, 26 N.Y.3d 152 (2015), the Court of Appeals held that it was *not* mode of proceedings error subject to *per se* reversal where the court fails to show counsel a jury note and then serially reads the note to the jury and responds to it without first seeking counsel's input (although the court must read the entire contents of the note verbatim).

N. Repugnant verdict claims

A claim that the verdict is repugnant must be made before the court has accepted the jury's verdict and before the jury is dismissed. *People v. Alfaro*, 66 N.Y.2d 985 (1985); *People v. Roberts*, 112 A.D.2d 18 (4th Dep't 1985).

Remedies:

> A court may either explain the defect and direct the jury to reconsider or resume deliberations, or it may dismiss verdicts on certain counts to the extent they are inconsistent. *People v. Robinson*, 45 N.Y.2d 448 (1978).
>
> If the jury persists in rendering a defective verdict, the court may either register the verdict as an acquittal or declare a mistrial. *People v. Salemmo*, 38 N.Y.2d 357 (1976).

Once the jury is discharged, it cannot be recalled to correct an erroneous verdict. Once the court accepts an erroneous verdict which

redounds to defendant's benefit, the verdict is final. *People v. Jackson*, 20 N.Y.2d 440 (1967); *People v. Calderon*, 113 A.D.2d 894 (2d Dep't 1985).

O. Predicate felon status

To preserve the issue, the defense must controvert the allegations of the predicate felony statement at the time of sentence. *People v. Smith*, 73 N.Y.2d 961 (1989); *People v. Hurley*, 75 N.Y.2d 887 (1990).

P. Guilty pleas

A claim concerning the factual insufficiency of the plea must be preserved by a motion to withdraw the plea or vacate the conviction.

> In rare cases, "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," the issue is preserved despite the absence of protest. *People v. Lopez*, 71 N.Y.2d 662 (1988).

Remember: the Appellate Division can reduce any sentence above the minimum in the interest of justice, even if the sentence is the result of a guilty plea.

> It is critical to create a sufficient record to argue excessive sentence on appeal. If possible, submit a pre-pleading or pre-sentencing memorandum containing biographical information, mental health history, social worker interviews, job history—anything that humanizes the client.
>
> If important mitigating information is absent from the record, it cannot be argued in an excessive sentence brief.