Appellate Advocacy College 2000

Lecture

Standards of Prejudice on Appeal

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FIRST DISTRICT APPELLATE PROJECT

STANDARDS OF REVERSAL on APPEAL in CRIMINAL CASES

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INTRODUCTION

[1] These materials incorporate and update "Standards of Review and Prejudice for Instructional Error" by J. Bradley O'Connell & Renée E. Torres (January 1995). FDAP gratefully acknowledges the assistance of Christine Kranich in the preparation of this outline.

There are three basic standards of reversal for all criminal cases:

(1) automatic reversal (per se) for structural defects in the trial mechanism;

(2) reversal unless the State can show that federal constitutional error was harmless beyond a reasonable doubt; and

(3) reversal for state law error only if appellant can show a reasonable probability of a better outcome.

A fourth category of cases do not fit neatly into one of the first three categories. For some of these, the standard of review – i.e., the standard for determining if error occurred – *is* also the standard of reversal. That is, if the error occurred, it is reversible without further inquiry into prejudice. For others, once error is demonstrated, prejudice is presumed, but may be rebutted by evidence of harmlessness.

This outline sets forth examples of reversible errors in all four categories. Because instructional error can call for reversal under any of the three major standards of reversal, it will be dealt with separately in its own section of this outline rather than as an example under each of the three major headings.

I. STRUCTURAL DEFECTS AND REVERSAL PER SE

"Structural defect" is a relatively new term for an old concept--error which is reversible per se. " '[S]tructural defects in the constitution of the trial mechanism" are errors that "defy analysis by 'harmless-error' standards" and "transcend[] the criminal process." (Arizona v. Fulminante (1991) 499 U.S. 279 [111 S.Ct. 1246, 1265]; Neder v. United States (1999) __U.S. ___ [119 S.Ct. 1827].) Under both federal and state law, all other errors are subject to some form of harmless error analysis. (Fulminante, supra; Neder, supra; see also People v. Cahill (1993) 5 Cal.4th 478 [each finding that an involuntary confession is not reversible per se].) Fulminante listed the most of the errors which call for per se reversal:

- ♦ total deprivation of the right to counsel (Gideon v. Wainwright (1963) 372 U.S. 335).

- ♦ trial by an impartial judge (Tumey v. Ohio (1927) 273 U.S. 510). See also Gomez v. United States (1989) 490 U.S. 858, 872 [109 S.Ct. 2237, 2246[voir dire conducted by magistrate].)

- racial discrimination in grand jury selection (Vasquez v. Hillery (1986) 474 U.S. 254).

- denial of the right to self-representation (McKaskie v. Wiggins (1984) 465 U.S. 168, 177-178, n.8. See also People v. Jones (1998) 66 Cal.App.4th 760 [timely Faretta motion]; People v. Sherrod (1997) 59 Cal.App.4th 1168 [denial of continuance resulted in denial of fair trial to *pro per* defendant].)

- denial of a public trial. (Waller v. Georgia (1984) 467 U.S. 39, 49, n.9).

Although Fulminante doesn't mention these, per se reversal is also the rule for:

- race- or gender-based discrimination in the use of peremptory challenges. (Batson v. Kentucky (576 U.S. 79; J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 141; see also People v. Wheeler (1978) 22 Cal.3d 258.)

- erroneous removal of a juror (United States v. Symington (9th Cir. 1999) 195 F.3d 1080, 1088.)

- misdescription of reasonable doubt (Sullivan v. Louisiana (1993) 508 U.S. 275 [113 S.Ct. 2078]; People v. Crawford (1997) 58 Cal.App.4th 815 [omission of CALJIC 2.90].)

II. FEDERAL CONSTITUTIONAL ERROR AND THE CHAPMAN STANDARD OF REVERSAL

Almost all categories of federal constitutional error that are not subject to per se reversal – i.e., "trial error" of federal constitutional magnitude– are subject to the harmless error rule of Chapman v. California (1967) 386 U.S. 18.[2] The Chapman standard places the burden on the government to demonstrate that the error is "harmless beyond a reasonable doubt." The Chapman test was first articulated in contradistinction to California's "more probable than not" test of prejudice, which was held to be too tolerant of prejudice to be the appropriate gauge of whether federal

[2] The exceptions are the ineffective assistance of counsel, "Brady error," and other constitutional violations which fall into the fourth category mentioned in the Introduction–i.e., errors governed by a "unitary" test in which the test for error is also the standard of reversal. (See Part V, *post*)

constitutional error warrants reversal. Chapman and Fulminante teach that most federal constitutional error "can be harmless" and Fulminante lists a great number of errors that have been held to be subject to the harmless error standard (See 111 S.Ct. at 1263)

The important thing to remember is that virtually every state law "trial error" can be characterized as federal constitutional error. It is always worth considering whether a particular error has federal constitutional ramifications. The federal constitutional "harmless beyond a reasonable doubt standard" is more defendant-friendly than the state constitutional standard of "more probably than not there would have been a better outcome." While both tests tend to be outcome-oriented, the federal standard is preferable for two reasons. First, unlike the state standard, it puts the burden on the state to show harmlessness, thereby giving the defendant the benefit of the doubt in a close case. Second, it theoretically requires less of a showing of prejudice than does the state law test. Some examples of trial errors that rise to the level of federal constitutional errors include:

- restriction on a defendant's right to cross-examine a witness for bias, in violation of his Sixth Amendment right to confrontation. (Delaware v. Van Arsdell (1986) 475 U.S. 673 [106 S.Ct. 1431]; Olden v. Kentucky (1988) U.S. [109 S.Ct. 480].

- introduction of rank hearsay [toddler's statement to pediatrician], in violation of the confrontation clause of the Sixth Amendment. (Idaho v. Wright (1990) 497 U.S. 805[110 S.Ct. 3139].

- prosecutorial misconduct that comments on the defendant's right to remain silent at trial, or in the face of Miranda warnings, or that injects unsworn testimony into the trial in violation of the defendant's confrontation rights (Griffin v. California (1965) 380 U.S. 609 [failure to testify]; Doyle v. Ohio (1976) 426 U.S. 610 [Miranda warnings]; People v. Gaines (1997) 54 Cal.App.4th 821[closing argument; DA as unsworn witness to matters outside record]; People v. Blackington (1985) 167 Cal.App.3d 1216 [DA uses questions to introduce unsworn evidence] See generally People v. Bolton (1979) 23 Cal.3d 208, 214-215, fn. 4.)

- Denial of search and seizure suppression motion: People v. Verin (1990) 220 Cal.App.3d 551 [erroneous denial of defendant's suppression motion

could not be deemed harmless beyond a reasonable doubt, since the seized heroin comprised the entire case against defendant].

- Admission of involuntary confession or one tainted by Miranda or Massiah error) (People v. Cahill (1993) 5 Cal.4th 478 [when a confession has been admitted that was obtained by means rendering it inadmissible under the federal Constitution, the prejudicial effect of the confession must be determined under the federal harmless-beyond-a-reasonable-doubt standard]

- Mistrial motion because of ex parte communication (People v. Delgado (1993) 5 Cal.4th 312) [error found harmless beyond reasonable doubt]

- Severance and joinder (U.S. v. Mayfield (9th Cir. 1999) 189 F.3d 895 [assuming Chapman applies and finding erroneous joinder prejudicial on ground that co-defendants' antagonistic defenses deprived Mayfield of fiar trial]

- Bruton Error. (U.S. v. Peterson (9th Cir.1998) 140 F.3d 823 [Once there has been a *Bruton* error, the prosecution has the burden of showing that the error was harmless beyond a reasonable doubt.]

III. STATE LAW ERROR AND THE WATSON STANDARD OF REVERSAL

All errors that are not of federal constitutional stature are governed by California's "miscarriage of justice" standard for determining whether reversal is required, as mandated by Article VI, section 13 of the California Constitution. People v. Watson (1956) 46 Cal.2d 818 encapsulates the constitutional test of prejudice: whether it is "reasonably probable" a result more favorable to the defendant would have been reached had the error not occurred.

Although the same constitutional standard applies in both civil and criminal cases, the Watson test has been stated in a more loser-friendly way in the civil context. For example, in College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 715 the Supreme Court held that while trial error is usually deemed harmless in California unless there is a "reasonabl[e] probab[ility]" that it affected the verdict, "[w]e have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (Compare People v. Brown (1988) 46 Cal.3d 432, 447; People v. Jackson (1996) 13 Cal.4th 1164, 1232

[reasonable-possibility standard, *not* Watson, used for all nonfederal penalty phase error].

Examples of common, state law errors that are subject to the Watson standard include:

- **Admission of Irrelevant Evidence (Evid. Code § 350)**: People v. Turner (1984) 37 Cal.3d 302, 321[error in admitting four photographs depicting a bloody crime, not prejudicial. "Although the admissibility of photographs lies primarily in the discretion of the trial court, it has no discretion to admit irrelevant evidence. Nevertheless, as the photographs are not gruesome and the evidence of guilt overwhelming, any error in admitting them was harmless."]

- **Admission of Unfairly Prejudicial Evidence (including "other offenses" and the like) (i.e., Evid. Code § § 1101, 352)**:
  People v. Scheid (1997) 16 Cal.4th 1, 21["even if we were to agree. . .that the trial court erred in admitting the photograph in question, we nonetheless would conclude that any error in admitting the photograph clearly was harmless under the Watson standard."]

  People v. Harris (1998) 60 Cal.App.4th 727, 741 [**reversed**: absent the evidence of 23 year-old act of unexplained sexual violence, it is reasonably probable that the jury would have acquitted the defendant.]

  People v. Maestas (1993) 20 Cal.App.4th 1482, 1498
  [**reversed**: abuse of discretion in admitting gang membership evidence resulted in a miscarriage of justice under the Watson test.]

  People v. Brown (1993) 17 Cal.App.4th 1389, 1398
  [**reversed:** error under §§ 1101 and 352 to admit evidence, found prejudicial; no standard stated.]

- **Exclusion of defense witness' testimony**

  People v. Cudjo (1993) 6 Cal.4th 585, 611, 612
  [abuse of discretion in excluding a witness' testimony that defendant's brother had confessed to the murder; however, under Watson standard,

error was harmless in light of the strong evidence of defendant's guilt and the lack of credibility of the witness and of the brother's confession. Federal Constitution not implicated. Even in capital cases, when defense evidence, including third-party-culpability evidence, is erroneously excluded under § 352, applicable standard of prejudice is Watson.] Despite Cudjo's holding, federalizing this type of issue should always be considered. See Justice Kennard's Cudjo dissent (id. at pp. 637-643), characterizing exclusion of third-party culpability evidence as violation of compulsory process and due process rights to present defense. (Cf. Chambers v. Mississippi (1973) 410 U.S. 284 [93 S.Ct. 1038]; Washington v. Texas (1967) 388 U.S. 14 [87 S.Ct. 1920];and other cases discussed in the dissent.)

♦ **Exclusion of expert testimony**

People v. Stoll (1989) 49 Cal.3d 1136, 1163
[**reversed**: error in excluding psychologist's testimony was prejudicial error under Watson because it was reasonably probable that erroneous exclusion of the proffered testimony affected the judgment.

♦ **Prosecutorial misconduct**

People v. Green (1980) 27 Cal.3d 1, 36
[DA's remark could not mislead the jury into believing he was asking for a verdict based on his opinion and evidence not introduced at trial. No miscarriage of justice.]

People v. Hill (1998) 17 Cal.4th 800, 844
[**reversed**: Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.]

Note: As mentioned in Part II, prosecutorial arguments and other tactics which infringe a defendant's specific enumerated constitutional rights (e.g., self-incrimination, confrontation) are reviewed under the Chapman test. Also, even where a prosecutor's tactics do not infringe *enumerated* constitutional rights, an especially egregious course of prosecutorial misconduct may represent a federal *due process* violation, if the misconduct "infect[ed] the trial with such unfairness as to make the

conviction a denial of due process." (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-643 [98 S.Ct. 1868]; cited in Hill, supra, 17 Cal.4th at p. 819.) (Nonetheless, most "generic" prosecutorial misconduct is still reviewed under Watson.)

♦ **No written copies of jury instructions**

People v. Blakley (1992) 6 Cal.App.4th 1019
[error in refusing to allow the jury to have written copies of the instructions not reversible, since no miscarriage of justice occurred as a result, meaning the result would not have been more favorable to defendant had the error not occurred.]

♦ **Untimely Faretta motion**
People v. Nicholsen (1994) 24 Cal.App.4th 584
[**reversed**: erroneous denial of an untimely Faretta motion was not harmless under the Watson test. Although defendants could not under any circumstances have been acquitted, they might have been able to avoid a true finding on the special circumstance allegation.]

♦ **Marsden motion**
People v. Washington (1994) 27 Cal.App.4th 940
[Marsden did not establish a rule of per se reversal. Failure to consider the purported Marsden motion did not deprived defendant of any arguments, or otherwise irrevocably affected the verdict or sentence; no chance defendant would have obtained a result more favorable to him had the motion been entertained. BUT NOTE: Marsden is rooted in Sixth Amendment right to counsel. Many federal courts treat Marsden-type error as reversible per se. (See e.g., Schell v. Witek (9th Cir. 1999) 181 F.3d 1094, rehearing en banc granted, opn. not citable.)

♦ **Shackling: harmless error standard unsettled**
People v. Givan (1992) 4 Cal.App.4th 1107
[shackling was an abuse of discretion, but error was harmless under either Chapman or Watson. Split of authority recognized.]

People v. Duran (1976) 16 Cal.3d 282, 296, n.15

[reversed under Watson standard, stating it expressed no opinion on whether any one or more of the errors warranted reversalas federal constitutional error under Chapman.]

People v. Jacla (1978) 77 Cal.App.3d 878, 891
[Chapman applied, but error harmless beyond a reasonable doubt.]

People v. Jackson (1993) 14 Cal.App.4th 1818 (1993)
[abuse of discretion found, but error harmless beyond a reasonable doubt. Extensive review regarding standard of review for prejudice in shackling cases.]

People v. Ceniceros (1994) 26 Cal.App.4th 266
[trial court abused its discretion in shackling *defense witnesses*. Watson applied; prejudice resulting from the improper shackling not so great that it resulted in a miscarriage of justice.]

People v. Hill (1998) 17 Cal.4th 800, 846
[reversed on other grounds. Prejudice inherent in shackling noted, but standard of reversal not broached.]

- **Sentencing**
  People v. Sanchez (1994) 23 Cal.App.4th 1680
  [trial court's failure to state reasons for sentencing choice requires reversal only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error.]

- People v. Axtell (1981) 118 Cal.App.3d 246
  [Although denial of probation was not abuse of discretion, even if court's remarks were improper or erroneous, a remand for resentencing is only required when it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of error.]

IV. STANDARDS OF REVIEW AND REVERSAL APPLICABLE TO INSTRUCTIONAL ERROR

Instructional errors can violate the federal constitution, the state constitution, and ordinary state law. Depending on the nature of the violation, an instruction's

prejudicial impact can be judged by the reversible per se, harmless beyond a reasonable doubt, or reasonable probability standard. Generally speaking, however, the question whether an instruction *creates* error in the first instance is not tethered to an "abuse of discretion" or any other standard of review discussed in the separate materials on Standards of Review. Instead, the question whether a confusing or ambiguous instruction is erroneous is answered with reference to the "reasonable likelihood" standard of review, set forth below.

A. The "Reasonable Likelihood" Standard of Review for Ambiguous or Confusing Instructions

1. What Is It? The Federal Test and its California Adoption

> "[I]n reviewing an ambiguous instruction..., we inquire `whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (Estelle v. McGuire (1991) 502 U.S. 62 [112 S.Ct. 475, 482], quoting Boyde v. California (1990) 494 U.S. 370, 380 [110 S.Ct. 1190].)

In McGuire the U.S. Supreme Court settled on the "reasonable likelihood" formulation and disapproved the slightly different language in some prior cases (how reasonable jurors "could have" or "would have" interpreted an instruction).

The California Supreme Court promptly followed McGuire in applying the "reasonable likelihood" test to federal constitutional issues on interpretation of jury instructions. (People v. Kelly (1992) 1 Cal.4th 495, 525-526 & n. 7.) Equally significant, the California Supreme Court also elected to adopt the "reasonable likelihood" test for review of state law instructional issues and even for review of alleged prosecutorial misstatements of the law:

> "We believe that the new test is proper for examining instructions under California law. We also deem it fit for use against prosecutorial remarks generally." (People v. Clair (1992) 2 Cal.4th 629, 663 [applying the test to claimed Griffin error].)

2. What's It For? The Function (and Inconsistent Application) of the Test

The "reasonable likelihood" test itself is straightforward enough. As a practical matter, it's not all that different from the "would have"/"could have" formulations

which it replaced. The more difficult question (at least judging from California cases) is when and at what stage in the analyis it applies.

The California Supreme Court has applied the "reasonable likelihood" test dozens of times over the past three years (principally in capital cases). But there has been less consistency in when and how it has applied the test. Nonetheless, we believe that two general principles emerge out of the cases applying (and not applying) the "reasonable likelihood" test:

First, it should apply only to claims of ambiguous or confusing instructions. Second, it is a standard of review, not a standard of prejudice.

(a) Ambiguous or Confusing Instructions

Since California's adoption of the "reasonable likelihood" test, the Attorney General has at times taken to treating it as an all-purpose test for review of instructional claims--even where the instructions were concededly erroneous or incomplete. In other words, the Attorney General's view would require all instructional claims to clear this additional hurdle.

In fact, the test's application is (or should be) more limited. In both Boyde and McGuire, the U.S. Supreme Court explicitly described "reasonable likelihood" as the standard for reviewing an "ambiguous" instruction. (Boyde, supra, 494 U.S. at p. 380; McGuire, supra, 112 S.Ct. at p. 482; see also Victor v. Nebraska (1994) 511 U.S. 1 [114 S.Ct. 1239, 1247-1248 [applying "reasonable likelihood" test to CALJIC 2.90, including its "ambiguous" term, "moral certainty"].) The California Supreme Court has similarly described it as a test for assertedly "ambiguous" or confusing instructions. (E.g., People v. Roberts (1992) 2 Cal.4th 271, 338; People v. Clark (1993) 5 Cal.4th 950, 1021; see also People v. Proctor (1992) 4 Cal.4th 499, 546-549, aff'd sub. nom. Tuilepa v. California (1994) 512 U.S. 967[114 S.Ct. 2630].)

By its very nature, the "reasonable likelihood" test is designed for instructions which *require interpretation*; it involves an assessment of the probability that the jurors *misinterpreted* a particular instruction. "The suggested standard, however, and the cases cited to support it do not concern the standard of prejudice for *omission* of a required instruction from the final charge; rather, `reasonable likelihood' is the standard for determining whether an instruction is *impermissibly ambiguous or subject to misinterpretation*." (People v. Elguera (1992) 8 Cal.App.4th 1214, 1220 [emphasis added].) Thus, for instance, "reasonable likelihood" does not apply to

omission of CALJIC 2.90 (Elguera), but it does govern whether CALJIC 2.90 itself is constitutionally defective (Victor).

By the same token, "reasonable likelihood" should not apply to an instruction which is plain on its face, but simply wrong. A clear instruction does not require "interpretation," and it is gratuitous to require an additional inquiry into the likelihood the jurors "misunderstood" or "misinterpreted" it.

(b) Standard of Review, Not a Standard of Prejudice

For the most part, the Supreme Court has utilized "reasonable likelihood" of juror misinterpretation as a test for *whether error occurred*. (E.g., People v. Kelly (1992) 1 Cal.4th 495, 524-528; People v. Freeman (1994) 8 Cal.4th 450, 507; People v. Berryman (1993) 6 Cal.4th 1048, 1077-1078 & n. 7; People v. Clark (1993) 5 Cal.4th 950, 1021.)[3] But on a few occasions, both the California Supreme Court and the Ninth Circuit Court of Appeals have used it as a type of prejudice or harmless error test--that is, after explicitly finding that an instruction was erroneous, these courts went on to find the "error" non-reversible because there was no "reasonable likelihood" the jurors were misled or applied the instruction in an unlawful way. (E.g., People v. Rowland (1992) 4 Cal.4th 238, 282.)

[3] People v. Kelly, supra, the Court's first post-McGuire use of the test, best illustrates this point. Kelly involved an instruction which incorrectly stated that it was possible to rape a dead body, but correctly provided that the felony-murder rule and special circumstance only applied to a rape attempted while the victim was alive. The Supreme Court found a "reasonable likelihood" of juror misunderstanding as to the rape count itself, but not as to the murder count and special circumstance. The Supreme Court did ultimately reverse the rape count, but only after analyzing the prejudicial effect of the error under the Chapman "harmless beyond a reasonable doubt" standard.

More recently, the United States Supreme Court has unmistakeably signalled that the “reasonable likelihood” standard is a test of error, not prejudice. In Calderon v. Coleman (1998) 525 U.S. 141 [119 S.Ct. 500] the Court remanded a capital case to the Ninth Circuit because that court had reversed the penalty upon finding a “reasonable likelihood” of juror misunderstanding, neglecting to take the next step of assessing prejudice under the appropriate habeas standard. Despite the occasional inconsistency, the California Supreme Court apparently also views "reasonable likelihood" as a standard of review rather than as a "harmless error" or prejudice test.

(c) Lessons for Appellate Counsel

Counsel should fight for the first principle--restricting the test to ambiguous or confusing instructions--and probably will just have to live with the second. That means that a showing that there was a "reasonable likelihood" of juror misinterpretation will establish error, but generally will not be dispositive of the instructional claim. There will always be an additional stage of the analysis--but the standard applicable to that next stage will depend on the nature of the error. If the ambiguous instruction falls into the narrow category of "structural defect" (discussed below), the "reasonable likelihood" finding will end the analysis because such error is reversible per se. But, for all other instructional error, it will be necessary to go on to show prejudice under the harmless error standard applicable to that species of error. As noted earlier, the "reasonable likelihood" test applies to both federal and state law claims concerning ambiguous instructions. Consequently, the prejudice stage of the analysis may be either Chapman or Watson, depending on the nature of the claimed error.

B. STRUCTURAL DEFECTS

To date, only a few categories of instructional error have been recognized as "structural defects":

1. Invalid Legal Theories?

In two contexts, the Ninth Circuit has found that submission of a constitutionally invalid legal theory also is a form of structural defect, not susceptible to harmless error analysis:

(a) Late submission of an alternative theory of liability (e.g., felony murder) without adequate notice to the defense ("an ambush"). (Sheppard v. Rees (9th Cir. 1989) 909 F.2d 1234.) While California courts have professed to find Sheppard's constitutional jurisprudence persuasive, none have ever reversed on this theory, instead distinguishing it on its facts. (See People v. Gallego (1990) 52 Cal.3d 115; People v. Lucas (1997) 55 Cal.App.4th 721, 738.) Subsequent federal cases have likewise found Sheppard almost *sui generis*. (See e.g., Calderon v. Prunty (9th Cir. 1995) 59 F.3d 1005, 1009-1010.) To date, apparently only one case has reversed for lack of notice, relying on Sheppard. (Alford v. State (Nevada 1995) 906 P.2d 714.)

(b) Submission of a "non-existent" alternative theory of liability (e.g., felony-murder instruction for a predicate felony barred by the "merger" doctrine). (Suniga v. Bunnell (9th Cir. 1993) 998 F.2d 664.)

The California Supreme Court hasn't explicitly spoken to whether errors such as these are "structural defects." (See e.g., People v. Guiton (1993) 4 Cal.4th 1116, discussed in a subsequent section.)

2. Denial of a Defense (Federal View)

The Ninth Circuit has long held the view that if the defendant's theory of the case is supported by law and evidence, the failure to give an instruction on the defense theory is not governed by Chapman but is reversible per se. (U.S. v. Escobar De Bright (9th Cir. 1984) 742 F.2d 1196; U.S. v. Morton (9th Cir. 1993) 999 F.2d 435; U.S. v. Zuniga (9th Cir. 1993) 6 F.3d 569; U.S. v. Rodriguez (9th Cir. 1995) 45 F.3d 302, 306.) This is because the "[t]he right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct . . . can never be considered harmless error." (Escobar, supra 742 F.2d at 1201) "It is well established that a criminal defendant is entitled to adequate

instructions on the defense theory of the case [citation] ('... provided that it is supported by law and has some foundation in the evidence.') [Citations]" (Conde v. Henry (9th Cir. 1999) 198 F.3d 734; accord, e.g.,United States v. Abcasis (2nd Cir. 1995) 45 F.3d 39, 42; Tyson v. Trigg (7th Cir. 1995) 50 F.3d 436, 447-448.)[4]

Many other federal courts take the position that the denial of requested instructions on a defense theory which has evidentiary support is prejudicial error, unless other instructions adequately covered that defense. (E.g., Barker v. Yukins (6th Cir. 1999) 199 F.3d 867 [harmless beyond reasonable doubt]; United States v. Ruiz (11th Cir. 1995) 59 F.3d 1151, 1154-1155; United States v. Allen (2nd Cir. 1997) 127 F.3d 260, 265; United States v. Montanez (1st Cir. 1997) 105 F.3d 36, 39.)[5] In modern parlance, one might say it was "structural error." Despite the allusions basic rights and fair trials, however, the precise constitutional underpinnings of the federal cases remain murky, and the United States Supreme Court has not spoken on this issue.

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[4] Arguably, that principle applies equally to "a defense theory of the case" that would support a verdict on a lesser offense. (Conde, supra.) Moreover, any instructional defect which distorts the burden of proof applicable to a defense (as eliminating the defense altogether surely does) also seem to represent constitutional error. (People v. Spry (1997) 58 Cal.App.4th 1345, 1371-1372; see also People v. Dewberry (1992) 8 Cal.App.4th 1017, 1021-1022.) Also see generally Mathews v. United States, supra, 485 U.S. at p. 63; cf. Crane v. Kentucky (1986) 476 U.S. 683, 690 [106 S.Ct. 2142] ("Constitution guarantees ... 'a meaningful opportunity to present a complete defense'").

[5] See also United States v. Abeyta (10th Cir. 1994) 27 F.3d 470, 474-475; United States v. Zuniga (9th Cir. 1993) 6 F.3d 569, 571-572.

In contrast, until its recent demise, the "Sedeno test"[6] was generally used by California courts to assess the prejudicial impact of the denial of instructions on an affirmative defense. (E.g., People v. Lemus (1988) 203 Cal.App.3d 470, 478-480; see subsequent section on the Sedeno test.) As discussed further, infra, in the absence of a firm federal constitutional basis for applying a Chapman standard of reversal for instructions which omit or otherwise compromise the defense theory of the case, People v. Flood (1998) 18 Cal.4th 470 and People v. Breverman (1998) 18 Cal.4th 470, discussed infra, would seem to dictate that no higher standard of reversal than Watson applies to such error.

3. Misdefinition of the Reasonable Doubt Standard

Sullivan v. Louisiana (1993) 508 U.S. 275 [113 S.Ct. 2078]: "Cage error" is a structural defect since a defendant is entitled to have the *jury* apply the reasonable doubt standard in determining guilt. It is no substitute for a reviewing court to declare that the evidence was overwhelming or to hypothesize that a properly instructed jury would have come to the same verdict.

4. CALJIC 2.50.01 [prior sex offenses] or 2.50.02 [prior domestic violence offenses]

In two recent cases which have thus far survived petitions for review and de-publication, California courts of appeal have applied a reversible per se standard to the giving of CALJIC 2.50.01, even though other, correct instructions have also been given. In People v. Vichroy (1999) 76 Cal.App.4th 92 the court found that the vice of the instruction is that it permits the jury to bypass finding every fact necessary for the commission of the current crime beyond a reasonable doubt. Instead, the jury can rely on evidence of the defendant's commission of prior offenses to stand in as a "proxy" for proof of appellant's guilt of the current crime. (76 Cal.App.4th at 99). The court reversed the conviction because it could not assume the jury followed the constitutionally correct conflicting instructions, without citation to authority. (Id., at 101)

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[6] People v. Sedeno (1974) 10 Cal.3d 703 [error reversible unless the reviewing court can determine that the question posed by the omitted instruction was necessarily resolved by the jury, adversely to the defense, under other, correct instructions and verdicts].

In People v. Orrellano (2000) 79 Cal.App.4th 179, the court viewed the error in a similar light. It found that the giving of CALJIC 2.50.01 with 2.50.1 and 2.50.2 "permitted the jury to find by a preponderance of evidence that appellant committed the prior crimes, and to infer from such commission of the prior crimes that appellant had a disposition to commit such crimes, and to infer from such disposition that appellant 'did commit' the charged crimes, without necessarily being convinced beyond a reasonable doubt that appellant committed the charged crimes. If the jury followed these instructions literally and arrived at a guilty verdict in that manner, appellant was denied his due process right to require proof beyond a reasonable doubt of every fact necessary to constitute the charged crimes." (79 Cal.App.4th at 184.) Citing Sullivan and Vichroy, the court reversed because it was unable to determine wither the jury applied the correct burden of proof . (Id., at 186.)

Other courts have found no error, concluding that when all the instructions are taken as a whole, there is no reasonable likelihood that a jury could be misled into believing that it could convict on less than proof beyond a reasonable doubt. (People v. Van Winkle (1999) 75 Cal.App.4th 133, 147-149; People v. Regalado (2000) 78 Cal.App.4th 1056; People v. O'Neal (2000) 78 Cal.App.4th 1065.) So far, the California Supreme Court has not intervened to resolve the conflict, although early on it de-published two First District cases out of Divisions 2 and 3 which had likewise found CALJIC 2.50.01 constitutionally wanting and reversible per se as Sullivan error. (People v. Bersamina (1999) formerly at 73 Cal.App.4th 930 [Div. 2]; People v. Guzman (1999) formerly at 73 Cal.App.4th 103 [Div. 3]. (The Supreme Court denied review in Vichroy; the Orellano opinion is not yet final as of this writing.) The First District has issued at least two unpublished reversals consistent with the views expressed in Vichroy, Orellano and its depublished opinions.

C. FAILURE TO PROPERLY INSTRUCT ON ELEMENTS

1. Federal right to have facts essential to the elements decided by the jury, beyond a reasonable doubt

(a) Omitted/Misdescribed Elements of the Offense Subject to Chapman

What if all, or substantially all, of the elements of the offense are omitted from the instructions? What if only one element of the offense is omitted? What if no element of the offense is omitted, but the instructions are so conflicting that one of the elements is effectively withdrawn from the jury's

consideration? These burning questions were answered once and for all by the United States Supreme Court in Neder v. United States (1999) __U.S. ___ [119 S.Ct. 1827]. If one or some of the elements are omitted or misdescribed, the test is Chapman's "harmless beyond a reasonable doubt" standard. Equating omission of an element of the offense with its misdescription and with conclusive presumptions, the Court found that such errors necessarily foreclosed jury consideration of the facts underlying the occluded element. Nevertheless, since such errors do not vitiate *all* of the jury's findings, they are distinguishable from Sullivan. (119 S.Ct. at 1834) (Presumably, then, omission of instructions on all of the elements of the offense would be Sullivan error subject to reversal per se.)

The Court rejected a bid to limit harmless error review to situations where (1) the defendant was acquitted of the offense on which the jury was misinstructed, but claims the instruction affected another count (2) admitted the element on which the jury was misinstructed, or (3) other facts necessarily found by the jury are the functional equivalent of the omitted, misdescribed or presumed element. (Id., at 1835-36) The Court also refused to restrict the reviewing court's harmless error assessment to only those facts in the record which the jury actually considered. (Id., at 1837)

Neder, however, is not a complete loss. Its characterization of the Chapman test is more stringent than previous versions:

> "If, at the end of [a thorough examination of the record] the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to supprot a contrary finding – it should not find the error harmless.
>
> "A reviewing court making this harmless-error inquiry does not. . . 'become in effect a second jury to determine whether the defendant is guilty. [Citation] Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not

'reflec[t] a denigration of the constitutional rights involved.' [Citation.]" (119 S.Ct. at 1839.)

(b) Other Constitutional Defects in Instructions Also Subject to Chapman. (See Neder, supra, 119 S.Ct. at 1834)

- Mandatory, conclusive presumptions (Sandstrom v. Montana (1974) 442 U.S. 510 [99 S.Ct. 2450]; Carella v. California (1989) 491 U.S. 263 [109 S.Ct. 2419].)

- Mandatory, rebuttable presumptions (Rose v. Clark (1986) 478 U.S. 570 [106 S.Ct. 3101]; Yates v. Evatt (1991) 500 U.S. 391; 111 S.Ct. 1884 [not the overwhelming evidence Chapman review, but Chapman review that focuses only on the evidence that the jury was told to evaluate under the instructions, and decides whether a reasonable jury that found the predicate facts (i.e., the facts from which other facts may be presumed) could have found anything other than the presumed facts. (See Sullivan, supra, 113 S.Ct. at 2082) This test is similar, but not identical, to the now defunct Sedeno test of harmless error under the California constitution. Under Sedeno, if the jury didn't decide the issue posed by the omitted instruction in some other context, reversal was required. Query whether this aspect of Yates [and Carella, cited below] survives Neder. (See Neder, supra , 119 S.Ct. at 1837-1838)

- mis-statement of an element (Pope v. Illinois (1987) 481 U.S. 497 [107 S.Ct. 1918]; California v. Roy (1996) 519 U.S. 2 [117 S.Ct. 337].) (Note that Roy itself did not actually apply Chapman because the case arose on *federal habeas review* of a state conviction, rather than on *direct appellate review*; instead Roy directed the 9th Circuit to apply the special prejudice test applicable in federal habeas proceedings. (Cf. Brecht v. Abrahamson (1993) 507 U.S. 619 [113 S.Ct. 1710].) Because these materials are directed to the standards applicable on *direct appeals*, they do not discuss the Brecht test.)

(c) Pre-Neder California State Cases Applying Chapman to Instructional Error

- People v. Cummings (1993) 4 Cal.4th 1233. The trial court neglected to instruct on four of the five elements of robbery. Held: (1) if "substantially all" the elements of an offense are omitted, the error is reversible per se; (2) if the error affects "an aspect" of an element, but doesn't remove it completely, the error is analyzed under Yates.

- People v. Johnson (1993) 6 Cal.4th 1. The Court once again refused to reevaluate the validity of People v. Odle (1988) 45 Cal.3d 386 and holds that failure to instruct on an element of a special circumstance allegation is governed by Chapman standard of review, in its "overwhelming evidence" mode; the Yates variant does not apply, because the right to a jury trial on special circumstance is only state-conferred.

- People v. Harris (1994) 9 Cal.4th 407 In this most tortured of the California Supreme Court's recent discussions of harmless error, the majority holds, for reasons that are discussed infra, that the Green/Guiton prejudice test does not apply, and that Chapman, in its Yates mode, does. The Court characterizes the instructional error before it as "misinstruction on some aspect of an element" of robbery, and finds Yates' "misinstruction of the jury with a mandatory presumption" instructive. Dismissing Sullivan as a case about instructional error (misinstruction on reasonable doubt) that is "a breed apart," the majority takes vigorous issue with Justice Mosk's reading of Yates. The inquiry, according to the majority, is whether "it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on **evidence** establishing the requisite 'taking' element of robbery independently of the force of the [immediate presence] misinstruction."

  Conducting this inquiry, the majority finds that the issue affected by the misinstruction was whether there was a taking either from the victim's person or his immediate presence. Since

the jury was correctly instructed on taking from the person, the jury must have considered all the relevant evidence on that point. Since the force of that evidence was "overwhelming," the conclusion is inescapable that the erroneous instruction must have made no difference to the verdict.

J. Mosk cannot say beyond a reasonable doubt that the jury actually rendered its verdict without reliance on the misinstruction. This is because the evidence and the prosecution's theory of the case made it easy for the jury to rely on the "immediate presence" misinstruction to resolve the taking issue. It took more work on the jury's part to decide that a particular item was taken from his person. Thus, the effect of the misinstruction was not minimal.

To J. Kennard, the error is harmless because she finds that the defendant's guilt as an aider and abettor of robbery is established not by overwhelming evidence but by "undisputed facts." Because, in her view, the defendant never disputed the facts which establish his liability (since his legal theory was wrong, his defense was no defense), it apparently does not matter on what basis the jury actually rested its verdict.

U.S. v. Rodriguez, supra [discussed under Section IV B (2)] makes an interesting contrast to Harris. Both involve situations where the jury was given alternative theories of liability, one of which was legally insupportable. As noted, Rodriguez found the error reversible per se. See also Conde v. Henry (9th Cir. 1999) 198 F.3d 734, reversing partly for error eerily similar to the error in Harris, under the Chapman test articulated in Neder, as well as finding that the errors in combination constituted a structural defect.

♦ People v. Kobrin (1995) 11 Cal.4th 416. Following the supreme court's lead in U.S. v. Gaudin (1995) 515 U.S. 506 [115 S.Ct. 2310], the California Supreme Court held that materiality is an element of perjury under California law and reversed, suggesting (although not actually holding) that omission of an element of the

offense could be structural error that warrants reversal per se. Superceded by Neder and Flood (see infra).

- ♦ People v. Stankewitz (1990) 51 Cal.3d 72 [test for assessing prejudicial impact of failure to instruct on juror unanimity [CALJIC 17.01] is whether the evidence "demonstrated beyond a reasonable doubt" that the defendant committed the chargedoffense with with each unlawful act (Id., at 100)]; see also People v. Melhado (1998) 60 Cal.App.4th 1529, 1539 [conviction reversed because court "cannot say that, beyond a reasonable doubt, each of the 12 jurors agreed unanimously that the same act constituted the commitment of the crime."]; People v. Brown (1996) 42Cal.App.4th 1493, 1502; People v. Thompson (1995) 36 Cal.App.4th 843, 853.)

(d) Post-Neder Cases

- ♦ People v. Stanfill (1999) 76 Cal.App.4th 1137, 1157 [reversing time-barred conviction for failure to instruct on statute of limitations, using Neder formulation of Chapman standard.]

- ♦ Conde v. Henry (9th Cir. 1999) 198 F.3d 734 [reversing California kidnaping-for-robbery conviction where the trial court refused instructions on the defense theory that the offense was simple kidnaping (based on circumstances arguably undermining the "immediate presence" element of robbery), citing Neder.]

- ♦ U.S. v. Brown (4th Cir. 2000) 202 F.3d 691[reversing under Neder for failure to give a CALJIC 17.01-type unanimity instruction as to the predicate acts for a CCE offense.]

2. State constitutional right to have every material issue decided by the jury.

(a) Recent Decisions of the California Supreme Court

- ♦ People v. Flood (1998) 18 Cal.4th 470. In Flood the trial court had instructed the jury, in a Vehicle Code section 2800.3 prosecution, that the two police officers chasing the defendant in their marked car were "peace officers." One of the necessary elements is that the pursuing motor vehicle be operated by a statutorily defined

"peace officer." Flood held that (1) the failure to instruct on an essential element of the offense violated both the state and federal constitutions; (2) People v. Modesto (1963) 59 Cal.2d 722 was wrong when it held that the Watson "reasonable probability" standard did not apply to the failure to instruct on lesser included offenses (and, by later extension, on elements of the offense); (3) the correct test of reversibility under the California constitution is Watson, and no longer the Sedeno or any other exception to the to the Modesto rule of per se reversal, which it overruled; and (4) applying the Watson test, the error was harmless.

Recognizing that the error had federal constitutional ramifications that were not addressed by the Watson test, the court turned its attention to federal law and concluded that the Chapman test applied. Flood's federal constitutional analysis is largely irrelevant after Neder.

♦ People v. Ernst (1994) 8 Cal.4th 441. In the context of a court trial held without express waiver of the right to a jury, the Court holds unequivocally that the denial of the right to a jury trial is a "structural defect" that by its nature results in miscarriage of justice [citing People v. Cahill (1993) 5 Cal.4th 478, 493; People v. Holmes (1960) 54 Cal.2d 442, 444.]. This same reasoning had undergirded People v. Modesto (1963) 59 Cal.2d 722, and People v. Sedeno, supra . Query whether the thinking on Flood, supra and Breverman, infra will eventually bleed over to this context.

D. FAILURE TO INSTRUCT ON DEFENSES AND LESSER INCLUDED OFFENSES: THE DEFUNCT SEDENO TEST AND ITS REPLACEMENT(S): WATSON AND ?

1. The Sedeno Test: What Was It?

People v. Sedeno (1974) 10 Cal.3d 703, 721, stated an especially rigorous harmless error test for certain kinds of instructional omissions and other errors. It was essentially a reversal-per-se test with a narrowly drawn exception. Where Sedeno was applicable, an instructional error required reversal unless the question posed by the omitted instruction was necessarily resolved by the jury, adversely to the defense, under other, correct instructions and verdicts. Sedeno was principally grounded in the

state constitutional right to jury determination of every material fact (People v. Modesto (1963) 59 Cal.2d 722, 730) (though the California Supreme Court also sometimes employed it as part of its review of such federal constitutional issues as defective instructions on elements).

2. What Was It Used For?

The Sedeno test was most commonly invoked in three contexts:

1. Failure to instruct on a lesser-included offense (e.g., People v. Kelly (1992) 1 Cal.4th 495, 530);

2. Refusal of requested instructions on a lesser-related offense (People v.Geiger (1984) 35 Cal.3d 510, 532);

3. Failure to instruct on an affirmative defense (e.g., People v. Stewart (1976) 16 Cal.3d 133, 141-142; People v. Lemus (1988) 203 Cal.App.3d 470, 478-480.)

3. Sedeno Overruled in:

- People v. Breverman (1998) 19 Cal.4th 142. Breverman finished the task begun by Flood and explicitly overrules the Sedeno standard of reversal for failure to instruct on lesser included offenses, a staple of criminal appellate practice for 24 years. The failure to instruct *sua sponte* on a lesser included offense in a noncapital case is, at most, an error of state law alone, and is thus subject only to state standards of reversibility. Cal.Const., art.VI, section 13 provides for reversal only if an examination of the entire record establishes a reasonable probability that the defendant would have obtained a more favorable outcome had the error not occurred. Moreover, a failure to fulfill this duty is not a structural defect in the proceedings, but mere misdirection of the jury, a form of trial error committed in the presentation of the case and, as such, subject to the uniform standard of reversible prejudice applicable to most forms of state law trial error by virtue of the "miscarriage of justice" clause of Cal.Const., art. VI, section 13.

  Thus, while devoting most of its opinion to explaining why it was not dumping the part of Sedeno which requires the trial court

to instruct on lesser included offenses *sua sponte*, by stripping it of a reversible error rule that had some teeth, the court makes the *sua sponte* rule virtually unenforceable (a point made in Justice Brown's concurrence.).

The worst thing about *Breverman*, however, is not that it substitutes Watson for Sedeno but that *there is no alternative*. As the opinion correctly finds, there is no federal constitutional right to instructions on lesser included offenses in *non-capital* cases. (19 Cal.4th at 165-168.) The court handily rejects the argument, already rejected in People v. Wims (1995) 10 Cal.4th 293, that under Hicks v. Oklahoma (1980) 447 U.S. 343 the defendant has "a state-created liberty interest [as a matter of federal due process] in a jury determination . . . of all issues bearing on the offense of manslaughter as an alternative to the charge of murder." (Id., at 170)

The majority did not decide – because in its view the issue was not properly raised – the question whether "the instructions in this case are defective under federal law because they incompletely defined the malice element *of murder*." (Id., at fn. 19, emphasis in original.)

How exactly the application of Watson to this particular error will play out was not spelled out in the opinion. The court remanded that question to the Court of Appeal for resolution. Mosk's dissent is of no help here: he finds that there was no error to begin with, and even if it were there is no way it could be prejudicial . Justice Brown dissents because she believes *all* of *Sedeno* should have been thrown out -- the *sua sponte* rule as well as the reversibility standard.

Justice Kennard, in her dissent, reaches the federal question found not properly preserved by the majority opinion and concludes that under Mullaney v. Wilbur (1975) 421 U.S. 684 the failure to instruct on the heat of passion avenue to manslaughter was tantamount to incomplete instruction on the malice element of murder because under California law malice is defined, among other things, as the absence of provocation. This error, she posits, not only violates the requirement that the state prove every

elemental fact beyond a reasonable doubt, but also the due process requirement of fundamental fairness. Her dissent is the blue print for all future arguments of federal constitutional error in this instructional context. Unfortunately, it is of limited utility, insofar as few "lesser included offenses" can be characterized as flipsides of an element of any given offense.

4. Geiger overruled in:

- People v. Birks (1998) 19 Cal.4th 108. A unanimous court overruled People v. Geiger (1984) 35 Cal.3d 510, which had for 14 years granted defendants the right to instructions on lesser related offenses. The decision is no surprise, considering that federal law has repudiated the theory on which the Geiger Court had rested its holding.

5. What Now?

Now that Sedeno and Geiger have been overruled, the 64 million dollar question is whether California courts will recognize federal constitutional bases for for the necessity of instruction on lesser included offenses and defenses, and use a Chapman standard of reversal, or whether Watson will evolve to meet the need for a standard of reversal that realistically assesses the prejudicial impact of a failure to instruct on defenses and lesser included offenses. As noted under **Section IV B (2)**, some federal courts have long held the view that the right to instructions on the defense theory of the case is reversible error. No opinion, however, has ever fully developed a theory why this right flows from the federal constitutional due process right and/or Sixth Amendment right to present a defense. Cases from which such an argument may be patchwork-quilted together appear in the earlier section.

As for the evolution of the Watson test, cases provide both reason to hope and reason to despair. For example, in People v. Humphrey (1996) 13 Cal.4th 1073 the Supreme Court found erroneous an instruction that affirmatively told the jury to ignore evidence of Battered Women's Syndrome in connection with self-defense. The court applied the Watson test of prejudice, specifically rejecting application of the Chapman standard. "The erroneous instruction may have adversely affected the defense, but it

did not deprive her of the right to present one or deny her equal protection. In effect, the court excluded some evidence as to one element of the defense. When the reviewing court applying state law finds an erroneous exclusion of defense evidence, the usual standard of review for state law error applies: the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant. [Citations.]" (Id., at 1085) Nevertheless, applying the Watson standard, the Supreme Court reversed the conviction. But then see People v. Spencer (1996) 51 Cal.App.4th 1208, 1221 [trial court committed error akin to Humphrey error when it refused to include prior assaults or threats by the victim to third persons of which defendant was aware within ambit of self-defense instructions, but error was harmless under the *Watson* standard. On the other hand, post- Breverman/Flood cases have included a number of reversals, suggesting that when the trial court fails to instruct on a defense or lesser included offense supported by the evidence, the error is so palpably prejudicial that reversal is required under any standard.

6. Post-Breverman/Flood Cases on Instructional Error Affecting Defenses and Lesser Included Offenses.

- People v. Baker (1999) 74 Cal.App.4th 243[reversing murder convictions for failure to instruct on lesser included offenses and misinstructing on theories of first degree, under Watson.]

- People v. Elize (1999) 71 Cal.App.4th 605[reversing assault and battery convictions for failure to instruct on self-defense, under Watson.]

- People v. Gonzalez (1999) 74 Cal.App.4th 382, 391 [reversing conviction for wilful infliction of corporal injury, but declining to resolve whether Chapman or Watson applied to failure to instruct on "accident" defense, where error was prejudicial under either standard]

- People v. McCoy (2000) 79 Cal.App.4th 67[reversingmurder convictions for misinstruction on imperfect self-defense, under Chapman.]

E. SUBMISSION OF AN INVALID ALTERNATIVE THEORY--GUITON

Formerly People v. Green (1980) 27 Cal.3d 1, required reversal whenever a count went to the jury on a combination of valid and invalid theories (e.g., a valid

premeditation theory and a defective felony-murder theory) and the reviewing court was unable to determine which was the basis for the jury's verdict. In People v. Guiton (1993) 4 Cal.4th 1116, the California Supreme Court undertook to "harmonize" Green with the U.S. Supreme Court's Griffin opinion, which concerned appeals from federal convictions. (Griffin v. United States (1991) 502 U.S. ___ [112 S.Ct. 466]. The Guiton court adopted Griffin's elusive distinction between "factually inadequate" and "legally inadequate" theories: "`the term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or factual import of the evidence.'" (Guiton, supra, at p. 1125, quoting Griffin, supra, at p. 474.)

1. "Factual" Insufficiency--the Griffin Prong of Guiton

"If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (Guiton, supra, at p. 1129 [emphasis added].) Guiton continues that where the defect in the alternative theory is "merely factual" the error is subject to the state Watson test: The defense must affirmatively demonstrate a "reasonable probability" that the jurors actually relied on the factually unsupported ground. (Id. at pp. 1129-1130.) Though the "entire record" is subject to review for this purpose, appellate counsel should pay particular attention to such matters as the jury's verdicts on other counts and enhancements, prosecutorial arguments below, and jurors' questions during deliberations. (See ibid.)

The Supreme Court viewed Guiton itself as a case of a "factually inadequate" alternative theory. There was sufficient evidence that Guiton transported cocaine, but insufficient evidence that he sold it. The Supreme Court assumed that the jurors relied on the factually-supported transportation theory.

2. "Legal" Insufficiency--the Green Prong.

The Green rule still survives in some form where a theory was "legally" insufficient: "But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in Green, the Green rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (Guiton, supra, at p. 1129.)

The Guiton Court described Green as an example of a legally insufficient alternative theory. In Green one alternative basis for kidnapping was the movement of the victim for 90 ft. Though there was sufficient evidence that the defendant did indeed move the victim 90 ft., that distance was insufficient as a matter of law to satisfy the asportation element of kidnapping.

Guiton's distinction between "legal" and "factual" inadequacy is anything but clear. But Guiton suggests that the Green rule should still apply where the alternative theory of liability can be characterized as legally invalid, rather than merely factually unsupported. (But see Harris, discussed below.)

Though the Guiton court preserved the Green rule in some form for review of "legally" invalid theories, it ominously added, "we need not decide the exact standard of review of cases governed by Green." (Id. at p. 1130.)[7]

3. The Uncertain Effect of Harris on the Green Prong

In People v. Harris 9 Cal.4th 407, the Supreme Court further curtailed what remains of the Green rule. In Harris, any one of four distinct takings could have supported a robbery conviction, but the trial court's misinstruction on the "immediate presence" element was potentially applicable to two of those possible factual bases. The Supreme Court insisted that this was not the type of "legal" error covered by Green and Guiton. "In using the terminology `legally incorrect theory' in Green, we were therefore referring specifically to instructional error, or a `legally incorrect' theory of the case which, if relied upon by the jury, could not as a matter of law validly support a conviction of the charged offense." (Id. at p. 82 [emphasis in original].)

Harris indicates that an instruction which mangles an element of an offense does not come within the narrow Green rule for submission of a legally invalid alternative theory. But Green should still apply where a court instructs on an alternative legal theory which, as a matter of law, could not support a conviction. A likely example would be submission of felony-murder instructions for a predicate felony not covered by the felony-murder rule (e.g., a first-degree felony-murder instruction predicated on grand theft). Several recent appellate decisions have found legally erroneous alternative theories reversible, under a Green-type analysis, where the reviewing court could not tell whether the jury relied on the valid or the invalid theory. E.g., People v. Smith (1998) 62 Cal.App.4th 1233, 1238 [erroneous felony-murder theory predicated on extortion]; see also
People v. *Barnes* (1997) 57 Cal.App.4th 552 [legally erroneous constructive possession theory]; People v. Llamas (1997) 51 Cal.App.4th 1729 [Reversal under

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[7] The only previously recognized basis for affirmance in Green situations was the Sedeno exception--where verdicts on other charges affirmatively show that the jurors found the defendant guilty on a valid theory. (See subsequent section on Sedeno test.) But the court left for "future cases" whether there may be "additional ways" to find Green error harmless. (Guiton, supra, at pp. 1130-1131.)

Green-Guiton where Veh. Code § 10851 went to jury on proper theory (permanent deprivation of spouse's possession of car) and improper theory (temporary deprivation), and appellate court couldn't determine basis of jury verdict. (In light of community property rules, temporary deprivation wouldn't be crime.)]

F. EVIDENCE EVALUATION INSTRUCTIONS AFFECTING FEDERAL CONSTITUTIONAL RIGHTS--CHAPMAN REVIEW

Instructions on the elements of crimes and theories of liability are not the only instructions (or instructional omissions) which may pose federal constitutional issues. Just as evidentiary rulings before and during trial frequently involve constitutional issues (e.g., unlawful search, self-incrimination, confrontation, etc.), the instructions relating to that evidence and its permissible uses may raise federal issues as well. Where the evidentiary ruling was erroneous, the related instructions may compound the error. Perhaps more importantly, even when damaging evidence is admissible on some legitimate ground (e.g., impeachment), there may still be an instructional issue if the jurors received incorrect or inadequate guidance on the purposes for which they could consider the evidence.

Instructional errors which implicate federal constitutional rights are generally subject to the traditional Chapman test ("harmless beyond a reasonable doubt"). The examples listed below are simply illustrative. Any instructional error which allows jurors to use evidence (or other trial circumstances) for an unconstitutional purpose should be a candidate for Chapman prejudice review:

1. Limitations on Consideration of Evidence

(a) Use of "other offenses" evidence as proof of a defendant's "character" or criminal propensity offends federal due process because of the historic common law proscriptions against such evidence. (McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 [evidentiary error].) In People v. Garceau (1993) 6 Cal.4th 140, 186-187, the California Supreme Court "assumed without deciding" that an instruction which explicitly authorized jurors to consider "other offenses" evidence as proof of the defendant's "character" was reviewable under the Chapman standard. But the California Supreme Court recently rejected a McKinney-type due process challenge to a new statute, Evid. Code § 1108, which expressly allows use of prior offenses as "propensity" evidence in *sex offense* cases. (People v. Falsetta (1999) 21 Cal.4th 903.) (However, as noted earlier, two post-Falsetta opinions have found that the

instructions for treatment of such propensity evidence may still result in due process violations. See Vichroy and Orrellano, supra, discussed in Part IV-B-4, supra.)

(b) Necessity of instruction limiting use of unconstitutionally-obtained evidence for impeachment purposes only. (See generally People v. May (1988) 44 Cal.3d 309 [adopting the federal rule allowing impeachment with an un-Mirandized statement].) Denial of a limiting instruction (such as CALJIC 2.13.1) is subject to the Chapman standard. (People v. Duncan (1988) 204 Cal.App.3d 613, 620-622.) Note, however, that there's a split of authority whether such a limiting instruction is required sua sponte or must be requested. (People v. Wyatt (1989) 215 Cal.App.3d 255.) However, even under the view requiring a request, it may still be possible to raise the issue since the trial court almost certainly gave the usual instruction on prior inconsistent and consistent statements, CALJIC 2.13. The delivery of CALJIC 2.13 alone is error in the May situation, since that instruction affirmatively authorizes jurors to consider the un-Mirandized prior statement as substantive proof of the matter asserted. (See Duncan, supra) Hence, while failure to raise the issue below arguably waives the omission of CALJIC 2.13.1, the erroneous delivery of 2.13 should permit appellate review. (See Pen. Code, § 1259)

(c) The effect of CALJIC 2.13 is a handy point to keep in mind in any other situation where a prior statement should only have been considered for a limited purpose. It permits an attorney to frame the issue as delivery of an erroneous instruction (which doesn't require an objection), rather than just omission of a limiting instruction (which usually requires a request below).

(d) Instructional Bruton error. A non-testifying co-defendant's extrajudicial statement is admissible in a joint trial, provided that the statement doesn't explicitly refer to the other defendant and the court clearly instructs the jurors to consider the statement as to the declarant co-defendant only and not as to the other defendant. (Richardson v. Marsh (1987) 481 U.S. 200 [107 S.Ct. 1702].)[8]

[8] Compare Cruz v. New York (1987) 481 U.S. 186 [107 S.Ct. 1714] (co-defendant's statement which explicitly refers to other defendant isn't admissible in joint trial, even with limiting instructions).

Presumably, instructions which allowed the jurors to consider the extrajudicial statement against both defendants would trigger Chapman review, just as other forms of Bruton error do.[9]

[9] Usually, CALJIC 2.07 and 2.08 should be sufficient to limit such statements, but, in an unusual case, further or repeated instructions may be necessary.

2. Inferences from other Circumstances at Trial

(a) Instructional Griffin error--an instruction authorizing an adverse inference from a defendant's exercise of his Fifth Amendment privilege not to take the stand. (People v. Vargas (1973) 9 Cal.3d 470, 477-478; People v. Diaz (1989) 208 Cal.App.3d 338 [each applying Chapman].)

(b) Presumably, the same goes for "Carter error"--refusal of a defense-requested instruction (such as current CALJIC 2.60 & 2.61) explicitly admonishing jurors not to draw any such inference from the defendant's failure to take the stand. (Carter v. Kentucky (1981) 450 U.S. 288 [101 S.Ct. 1112]; James v. Kentucky (1984) 466 U.S. 341 [104 S.Ct.1830] [leaving open question of harmless error].)

(c) Where the defendant is shackled at trial and the restraints are visible to the jurors, the court must sua sponte deliver CALJIC 1.04 or a comparable instruction admonishing them to "disregard this matter entirely." (People v. Duran (1976) 16 Cal.3d 282, 291-292, 296 n. 15 [stating sua sponte rule, but not resolving applicable prejudice standard]; People v. Jackson (1993) 14 Cal.App.4th 1818, 1827-1830 [applying Chapman]; People v. Jacla (1978) 77 Cal.App.3d 878, 890-891 [same].)

(d) Adverse inference against prosecution as sanction for loss or destruction of potentially exculpatory evidence (Trombetta error). As an alternative to the drastic remedy of dismissal or exclusion of prosecution evidence, the trial court should instruct the jurors to infer that the lost evidence would have been exculpatory, and the erroneous refusal of such an instruction is reviewed under Chapman. (People v. Zamora (1980) 28 Cal.3d 88, 102-104 & n. 11 [court should have instructed jurors that the lost complaint records would have shown that the police used excessive force on other occasions]; cf. Arizona v. Youngblood (1988) 488 U.S. 51, 54 [109 S.Ct. 333] [where court did deliver a remedial instruction].)[10]

[10] Unfortunately, however, in order to obtain even this lesser sanction of a remedial instruction, the defense must show that the loss of the evidence represented a due process violation--under the daunting standards of Trombetta, Youngblood and their progeny. (See People v. Cooper (1991) 53 Cal.3d 771, 811-812.)

(e) Retroactive application of California Supreme Court cases overruling prior standards (e.g.., Carlos error re: intent) violative of due process. (People v. Johnson (1993) 6 Cal.4th 1, 44-45); People v. Fierro (1991) 1 Cal.4th 173, 227; People v. Farley (1996) 45 Cal.App.4th 1697, 1704-1709; In re Baert (1988) 205 Cal.App.3d 514, 519-520.)

G. EVERYTHING ELSE--THE STATE WATSON STANDARD

All instructional errors which don't fit into one of the categories above are subject to the state Watson test--the burden is on the appellant to show that it's reasonably probable that the outcome would have been more favorable without the error. (People v. Watson (1956) 46 Cal.2d 818.) Some of the more common instructional issues subject to Watson are listed below:

- Accomplice instructions. (E.g., People v. Gordon (1973) 10 Cal.3d 460, 470-473.)

- Cautionary instructions (e.g., oral admissions, CALJIC 2.70, 2.71, etc.). (E.g., People v. Heishman (1988) 45 Cal.3d 147, 166.)

- Identification instructions (CALJIC 2.91, 2.92) and most other defense-requested "pin-point instructions" drawing the jurors' attention to particular aspects of the evidence. (People v. Wright (1988) 45 Cal.3d 1126.)

- "Dewberry error" (People v. Dewberry (1959) 51 Cal.2d 548), failure to instruct specifically on the application of the reasonable doubt rule to the choice between greater and lesser offenses.

- "Kurtzman error" (People v. Kurtzman (1988) 46 Cal.3d 322), instructions which misinform jurors that they can't "consider" a lesser offense until they have actually returned a verdict of acquittal on the greater charge. (People v. Berryman (1993) 6 Cal.4th 1048, 1076-1077 n. 7.)

- Most other evidence- and inference-related instructions, including consciousness-of-guilt from flight, suppression of evidence, etc.

- Errors in "housekeeping" instructions (e.g., juror note-taking, etc.).

- Errors in enhancement instructions. People v. Wims (1995) 10 Cal.4th 293. The court holds that since the right to a jury trial on enhancement allegations is only state-conferred, the appropriate standard of reversal for failure to instruct on at all on any of the elements of any enhancement is Watson. The Sixth Amendment jury trial right doesn't apply to sentencing facts, even when those facts impose additional punishment over and above that proscribed by the basic crime, and when the enhancement shares all the fundamental characteristics of a of a crime. See also Almendarez-Torres v. U.S. (1998) 523 U.S. 224 [118 S.Ct. 1219]; People v. Clark (1997) 55 Cal.App.4th 709 [failure to instruct on elements of great bodily injury enhancement is harmless error]

- As noted in the separate materials on "Issue Spotting and Evaluation," Wims may no longer be good law. Recent U.S. Supreme Court cases appear to draw a distinction between *recidivist* statutes (i.e., enhancements for prior convictions) (Almendarez- Torres, supra) and statutes which increase the maximum potential term based on facts surrounding the *currently charged offense* (e.g., gun use, GBI, etc.). (See Jones v. U.S. (1999) 526 U.S. 227.) Jones suggests that (contrary to the Wims view) the Sixth Amendment jury trial guarantee and other traditional trial rights *do* apply to the latter category of charges. A case currently pending in the U.S. Supreme Court may answer some of these questions. *Apprendi v. New Jersey*, No. 99-478, cert. granted, Nov. 29, 1999 [concerning enhanced "hate crime" penalties].

V. UNITARY OR UNIQUE STANDARDS OF REVERSAL

This section is not intended to be exhaustive but merely illustrative of some of the more common errors that have peculiar standards of reversal.

1. Ineffective Assistance of Counsel. Strickland v. Washington (1984) 466 U.S. 668. To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate (1) that counsel's performance was professionally deficient and (2) that but for counsel's unprofessional errors, there is a reasonable probability that the result would have been different. (466 U.S. at 694) A reasonable probability is " a probability sufficient to undermine confidence in the outcome." (Ibid.)

2. Brady (Brady v. Maryland (1963) 373 U.S. 83) Violation. A prosecutor's breach of his or her duty to disclose favorable evidence is reversible error if the evidence is material. Evidence is material if there is a reasonable probability that, had [it] been dislosed to the defense, the result would have been different. " The question is not whether the defendant would morelikely than not have received a different verdict with the evidence, but whether it its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (Kyles v. Whitley (1995) 514 U.S. 419 [115 S.Ct. 1555].) Once materiality has been shown, the defendant does not shoulder a further burden of showing prejudice. (115 S.Ct. at 1566-1567). See also In re Brown (1998) 17 Cal.4th 873.

3. Motion for Mistrial. People v. Stansbury (1993) 4 Cal.4th 1017, 1066; People v. Wharton (1991) 53 Cal.3d 522, 565. A mistrial motion should be granted if the trial court is apprised of prejudice that cannot be cured by admonition or instruction. A trial judge is vested with considerable discretion in ruling on a mistrial motion, because whether a particular incident is incurably prejudicial is by its nature a speculative matter.

4. Motion for a New Trial Based on Newly Discovered Evidence. People v. Martinez (1984) 36 Cal.3d 816, 821. The evidence itself, not merely its materiality, must be newly discovered; the new evidence may not be cumulative; and it must render a different outcome probable. The ruling will not be disturbed absent an abuse of discretion.

5. Juror Misconduct. In re Carpenter (1995) 9 Cal.4th 634, 657. Prejudice is presumed once misconduct has been established, but the presumption is rebuttable. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. But a finding that the information was not inherently biasing, does not end the inquiry. Ultimately, the test for determining whether the juror misconduct likely resulted in actual bias is different from, and indeed less tolerant than, normal harmless error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. However, the presumption of prejudice can be rebutted by the strength of the evidence against the defendant because such evidence is relevant in determining bias in the first place. See also People v. Nesler (1997) 16 Cal.4th 561, 578-579[conviction reversed]; In re Hitchings (1993) 6 Cal.4th 97 [same]; People v. Von Villas (1995) 36 Cal.App.4th 1425 [affirmed].

6. Removal of a Holdout Juror [other jurors' accusations that "holdout" juror is"not deliberating."] United States v. Symington (9th Cir. 1999) 195 F.3d 1080 [reversal required where there was "reasonable possibility that [juror's] views on the merits of the case provided the impetus for her removal." Similar issues currently pending before Cal. Supreme Court in People v. Metters, S069442, and other cases.

7. Speedy Trial Ogle v. Superior Court (1992) 4 Cal.App.4th 1007, 1020 (1992). On a Pre-trial writ, prejudice is presumed when it is reasonable to assume sufficient time elapsed to affect adversely one or more of the interests protected by the speedy trial clause. On appeal, appellant must generally show specific prejudice. See People v. Martinez (2000) 22 Cal.4th 750.

VI. Cumulative Prejudice

Occasionally, no one error may warrant reversal by all by itself, but in combination with other errors, a successful case for reversal can be made on the grounds that the cumulative prejudice from all the errors in combination warrants it. Here are a few examples to cite.

- **People v. Hill** (1998) 17 Cal.4th 800, 844 [reversal for prosecutorial misconduct]

- **People v. Holt** (1985) 37 Cal.3d 436, 458-459; **People v. Cardenas** (1982) 31 Cal.3d 897, 907-910 (each involving cumulative prejudice from various types of "other crimes" or gang evidence)

- **U.S. v. Frederick** (9th Cir. 1996) 78 F.3d 1370. "In some cases, though no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice the defendant." Especially true where govt's case is weak. Errors were (1) prosecution attack on defense counsel, (2) prosecutorial misconduct (though not in bad faith) in description of certain witnesses' testimony; (3) evidentiary error re possibility of other molestation accusations. "Where, as here, there are a number of errors at trial, `a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all errors in the context of the evidence introduced at trial against the defendant."

VII. INDICIA OF A "CLOSE CASE"

1. Mixed Verdicts

- People v. Brown (1993) 17 Cal.App.4th 1389, 1398: “The jury apparently found it to be a close case because they were only able to reach a verdict on one of the two counts.” [error in admitting other offenses found prejudicial]

- Olden v. Kentucky (1988) 488 U.S. 227, 233 [109 S.Ct. 480]: "[T]he jury's verdicts ... cannot be squared with the State's theory of the alleged crime.”

- U.S. v. Kallin (9th Cir. 1995) 50 F.3d 689: "The partial acquittal indicates that the government's case was not definitive and that the jury's consideration of the impermissible inference may have been a factor resulting in conviction on some counts."

2. Lengthy Deliberations

- Rhoden v. Rowland (9th Cir. 1999) 172 F.3d 633{9 hrs over 3 days}.

- People v. Woods (1991) 226 Cal.App.3d 1037, 1052 {3 days deliberations & readback of prosecution witness}: “This indicates, if nothing else, an element of uncertainty in the jury’s deliberations.”

- In re Martin (1987) 44 Cal.3d 1, 51 [and prior Supreme Court cases cited there]; People v. Filson (1994) 22 Cal.App.4th 1841, 1852; People v. Day (1992) 2 Cal.App.4th 405, 420

- Kaljian v. Menezes (1995) 36 Cal.App.4th 573, 590; Logacz v. Limansky (1999) 71 Cal.App.4th 1149, 1166; Gutierrez v. Cassiar Mining Corp. (1998) 64 Cal.App.4th 148, 160; Nizam-Aldine v. City of Oakland (1996) 47 Cal.App.4th 364, 380. [same rule in civil cases]

3. Readback, Reinstruction and Clarification of Instructions

- People v. Day (1992) 2 Cal.App.4th 405, 420; People v. Cameron (1994) 30 Cal.App.4th 591, 600; see also People v. Thompkins (1987) 195 Cal.App.3d 244, 250-251[requests for clarification of instructions]

- Day, supra, 2 Cal.App.4th at p. 420; People v. Williams (1971) 22 Cal.App.3d 34, 40; see also Weiner v. Fleischman (1991) 54 Cal.3d 476, 490-491; People v. Woods, supra, 226 Cal.App.3d 1037, 1052 [requests for readbacks]