Appellate Advocacy College 2000

Lecture

Jury Instruction Issues in Criminal Appeals

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THE SEARCH FOR INSTRUCTIONAL ERROR BY THE APPELLATE ADVOCATE: A SUGGESTED APPROACH

By: Dallas Sacher

INTRODUCTION

Without doubt, the best way to obtain reversal of a conviction after a jury trial is to raise a meritorious claim of instructional error. Indeed, this reality has been confirmed by at least one court: "[F]rom our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252.)

As with most things in life, an appellate attorney can best hone his ability to spot and argue claims of instructional error by engaging in a lengthy process of self education. Obviously, such a process requires years of disciplined study. To the extent that many lawyers simply do not have the time to invest in the requisite educational process, this article has been written in order to suggest an approach under which instructional issues may be spotted by an appellate practitioner.

Since this article is intended to be solely an overview on the subject, its content is not exhaustive. Thus, while the article sets forth a certain degree of substantive law, no attempt has been made to catalogue or mention all areas of the law concerning instructions. Such being the case, it is suggested that the reader should consult additional sources once the following approach has been digested.

I. The Cardinal Principle: Be Creative

When an appellate attorney reviews the instructions given at a trial, it is essential that the instructions be examined with an open mind. Thus, although an attorney may have read a standard CALJIC instruction on many occasions, it is counsel's duty to study the instruction as if it were newly minted.

In this regard, it must be emphasized that CALJIC is not the legal equivalent of the Bible. (*People v. Vargas* (1988) 204 Cal.App.3d 1455, 1464; CALJIC instructions "are not sacrosanct;" Standards of Judicial Administration Recommended By The Judicial Council, Section 5; trial judge must give “no less consideration” to instructions requested by a party than to those contained in CALJIC.) Over the years, creative advocates have caused the appellate courts to write literally dozens of opinions which have found fault with many CALJIC instructions. Thus, even though a CALJIC instruction may be one of longstanding, it is never too late to challenge its legitimacy.

In the same vein, it is important to note that CALJIC is in a constant state of flux in that its editors are always changing, removing and adding instructions. Given this state of affairs, appellate counsel should carefully review <u>any</u> change which has been made in CALJIC. In many cases, such a review will lead to the conclusion that the CALJIC editors have made a substantial error.

Aside from carefully studying the standard CALJIC instructions from the standpoint of their general correctness, counsel should also be sensitive to how the instructions relate

to the specific facts of the case under review. In this regard, it may well be that a generally proper instruction is misleading when it is employed in a certain factual context. Thus, counsel must always be attuned to the interplay of the instructions given and their relation to the specific facts of the case. (See *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446; "[e]ven an accurate statement of the law may be erroneous as an instruction if it is likely to mislead or misdirect a jury upon an issue vital to the defense . . . .")

In short, there is no substitute for an open mind. By carefully and slowly reviewing the instructions, an appellate attorney will often come up with a clever argument which would have been overlooked had a more cursory review been undertaken.

II. How to Spot Issues.

In the summer of 1979, I was a 23 year old student who had just finished his first year of law school. I had the good fortune that summer of clerking with a veteran San Francisco defense attorney, Paul Briefer. Among other things, Mr. Briefer taught me that there is no substitute for substantive knowledge of the law. In his words, "a lawyer cannot see an issue unless he first knows the law."

Consistent with Mr. Briefer's wisdom, a good appellate lawyer is one who routinely educates himself. In this regard, an appellate lawyer must: (1) read a daily legal newspaper which publishes the new appellate opinions (or review the new opinions on the AOC's website); and (2) read the cases for a second time when they are published in the advance sheets. By carefully reviewing the new cases, a lawyer is able to remain current on emerging

issues. Insofar as federal appellate decisions are often better than California decisions, an appellate lawyer should also remain abreast of at least Ninth Circuit opinions. In this way, counsel can properly frame issues in order to exhaust them for later federal review. (See pp. 32-33, infra.)

Other than studying the new cases and learning the law, there are essentially two methods by which a lawyer can look for instructional issues. These methods are separately discussed below.

A. Forecite Is An Indispensable Resource.

In 1990, appellate lawyer Tom Lundy published the first edition of Forecite.[1] In its present edition, Forecite is available in both book and computer disk form. Forecite uses the identical numbering system as CALJIC and offers defense versions and commentary on a large number of the CALJIC instructions. In addition, Forecite includes many instructions and legal points which are not included in CALJIC.

In every jury trial case, Forecite is an invaluable asset in that appellate counsel can compare Forecite's instructions with those given at trial. In many instances, Forecite will discuss defects in the CALJIC instructions. In addition, Forecite can often provide existing briefing and analysis of suggested issues. Thus, Forecite will sometimes spot and argue the issue for you.

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[1] I have been an editor of Forecite since its inception. I do not share in its profits. However, I receive an hourly fee for my services.

B. Each and Every CALJIC Instruction Given By The Trial Judge Should Be Compared To The Version Found In The Book.

Aside from subscribing to Forecite, an appellate lawyer must obtain a subscription to CALJIC. Although the work can be extremely tedious, appellate counsel should carefully compare the CALJIC instructions read by the trial judge with the instructions found in the CALJIC book. Believe it or not, this simple method often yields meritorious issues since trial judges occasionally leave out important words, phrases or even paragraphs.

C. An Example Of How To Spot An Issue

A number of years ago, I was the assisting attorney on a case where the defendant was convicted inter alia of the rarely charged offense of maintaining a place for the use of drugs. (Health and Safety Code section 11366.) Insofar as there was no CALJIC instruction for the offense, the judge merely read the statutory language to the jury. Intuitively, it appeared to me that the mere reading of the statute was not sufficient.

Upon researching the case law on section 11366, I ascertained that the statutory phrase "maintaining a place" has a very specific meaning (i.e. the place must be continually used for the proscribed illegal purpose). In light of this case law, we argued on appeal that the trial court had erred by failing to instruct sua sponte on the meaning of "maintaining a place." The resulting published opinion reversed the conviction. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 489-491.)

III. Standards of Review.

There is only a single standard of review with respect to instructional issues. Insofar as instructional claims necessarily involve a trial court's ruling on an issue of law, the defendant is entitled to independent and de novo review by the appellate court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217; "an appellate court reviews a trial court's instruction independently: The underlying 'question is one of law, involving as it does the determination of . . . applicable legal principles . . . .' [Citation.]")

However, there are two important subsets regarding the standard of review. Each will be addressed separately below.

A. A Special Standard of Review Applies To Ambiguous Instructions Which Arguably Implicate The Federal Constitution.

In *Estelle v. McGuire* (1991) 502 U.S. 62, the U.S. Supreme Court reviewed a California murder case where the jury was given an instruction regarding how it was to use evidence of the defendant's prior bad acts. The defendant contended that the instruction violated due process since it allowed the jury to infer that his prior infliction of injuries on the decedent established his propensity to commit violent acts. Since it viewed the instruction as being ambiguous, the court applied the following test: "in reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. [Citation.]" (*Id*., at p. 72, fn. omitted.)

Although this point is not addressed in *Estelle,* it is essential to note that a "reasonable likelihood" standard is not a "reasonable probability" test. Under the latter standard, a defendant would have to show that it is more probable than not that error occurred. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, under a "reasonable likelihood" test, the defendant's burden of persuasion need not reach this level. Rather, it should be sufficient to show "a significant but something-less-than-50 percent likelihood" that the jury was misinstructed. (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.)

B. When The Jury Is Given Conflicting Instructions On The Same Point, Error Must Be Presumed.

In *Francis v. Franklin* (1985) 471 U.S. 307, the jury was given conflicting instructions on the specific intent element of a murder charge. On the one hand, the jury was told that it could presume that the defendant had the intent to act as he did. On the other hand, the jury was instructed that the government had the burden of proof regarding the elements of the offense. In finding reversible error, the Supreme Court held:

> "Even if a reasonable juror could have understood the prohibition of presuming 'criminal intention' as applying to the element of intent, that instruction did no more than contradict the instruction in the immediately preceding sentence. A reasonable juror could easily have resolved the contradiction in the instruction by choosing to abide by the mandatory presumption and ignore the prohibition of presumption. Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court

> has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Id*., at p. 322, fn. omitted.)

Given the reasoning in *Franklin*, it is manifest that error appears whenever the trial court gives conflicting instructions on any topic. Since inconsistent instructions are often given regarding the elements of an offense, this is obviously a fertile area to find reversible error. (See *United States v. Stein* (9th Cir. 1994) 37 F.3d 1407, 1410; "[w]here two instructions conflict, a reviewing court cannot presume that the jury followed the correct one. [Citation.]", overruled on another point in *Roy v. Gomez* (9th Cir. 1996) 81 F.3d 863, 866-867.)

As a corollary to the foregoing point, it should not be overlooked that the jury can be misled when a correct instruction is given regarding one offense but not another. *People v. Salas* (1976) 58 Cal.App.3d 460 illustrates this principle.

In *Salas*, the trial court correctly instructed the jury, per CALJIC No. 2.02, that it was to acquit the defendant of robbery if the inferences drawn from circumstantial evidence reasonably established that he lacked the specific intent to steal. However, the court neglected to give No. 2.02 with respect to the then Penal Code section 213 great bodily injury enhancement which drastically enlarged the punishment for robbery. On this record, the court reversed the great bodily injury finding since the jury was misled into believing that the principle stated in No. 2.02 did not apply to that allegation. (*Id*., at pp. 474-475.)

IV. Most Instructional Issues Are Cognizable On Appeal Without The Benefit Of An Objection In The Trial Court.

As a matter of statutory policy, California holds that "[t]he appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Penal Code section 1259.) Thus, if appellate counsel determines that: (1) an instruction is erroneous on its face; (2) the trial court failed to give a requested instruction; or (3) the trial court failed to give a required instruction sua sponte, no objection is required for the issue to be cognizable on appeal. (*People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.)

Notwithstanding section 1259, an appellate challenge cannot be made to a facially correct instruction. (*People v. Johnson* (1993) 6 Cal.4th 1, 52; *People v. Kimble* (1988) 44 Cal.3d 480, 503.) In this situation, the defense must have objected below. (*Kimble, supra*, 44 Cal.3d at p. 503;" because the trial court correctly instructed the jury regarding [the] law, it was defendant's obligation to request any clarifying or amplifying instruction on that subject. [Citation.];" see also *People v. Lang* (1989) 49 Cal.3d 991, 1024.)

In addition, it should not be overlooked that a trial court typically has no obligation to give limiting instructions sua sponte. (*People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23.) Thus, the omission to give such an instruction cannot be an appellate issue absent an objection in the trial court.

Finally, an appellate claim is barred when the trial court has given an erroneous instruction at the insistence of defense counsel. (*People v. Hernandez* (1988) 47 Cal.3d 315,

353.) However, the mere failure to offer an objection cannot be deemed a waiver. (*People v. Collins* (1992) 10 Cal.App.4th 690, 694-695; where defense counsel advised the judge that he found the instructions to be acceptable, waiver could not be found; see also *People v. Cooper* (1991) 53 Cal.3d 771, 830-831; "invited error" is found when defense counsel makes a "deliberate tactical choice" which causes the trial court to err.)

V. The Search For The Omitted Instruction: The Trial Court's Failure to Honor Its Duty To Instruct Sua Sponte.

In the course of studying the law on instructions, it is essential to master the list of those instructions which the trial court must give sua sponte. In this regard, a working knowledge of this area is required since it allows a claim of error to be made based on an omission in instructing the jury. Thus, every appellate lawyer is under a duty to become intimately familiar with this area of the law.

Generally speaking, the court must instruct sua sponte on the general principles of law relevant to the issues in the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'"The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*Ibid*.) This category includes: (1) defenses (*People v. Stewart* (1976) 16 Cal.3d 133, 140); (2) elements of the offense charged (*People v. McDaniel* (1979) 24 Cal.3d 661, 670); and (3) lesser included offenses (*Breverman, supra*, 19 Cal.4th 142, 154). Thus, in every case, appellate counsel must review the record in order

to ensure that the jury was instructed on all applicable aspects of the forgoing categories.

In addition to the above noted categories, California law also holds that the trial court must instruct sua sponte on a smorgasbord of other points of law. These points of law include: (1) the burden of proof and presumption of innocence (*People v. Soldavini* (1941) 45 Cal.App.2d 460, 463-464); (2) the definition of an accomplice and the rules governing accomplice testimony (*People v. Gordon* (1973) 10 Cal.3d 460, 470); (3) a cautionary instruction concerning the use of a statement made by the defendant (*People v. Beagle* (1972) 6 Cal.3d 441, 455); (4) the manner in which the jury is to view inferences drawn from circumstantial evidence (*People v. Wiley* (1976) 18 Cal.3d 162, 174); (5) a limiting instruction on the use of evidence of a defendant's prior felony conviction (*People v. Lomeli* (1993) 19 Cal.App.4th 649, 654-655; contra, *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278); (6) the requirement of a unanimous agreement by the jury as to a single act committed by the defendant when more than one act could be deemed sufficient to constitute the offense charged (*People v. Madden* (1981) 116 Cal.App.3d 212, 214); (7) the manner in which expert testimony is to be viewed (Penal Code section 1127b); (8) the requirement that the corpus delicti of a crime must be proved by evidence independent of a defendant's statement (*Beagle, supra*, 6 Cal.3d 441, 455); (9) the definition of conspiracy when the government seeks to rely on the conspiracy exception to the hearsay rule (*People v. Earnest* (1975) 53 Cal.App.3d 734, 744-745); and (10) the definition of terms which have a specific

technical meaning peculiar to the law (*People v. Kimbrel* (1981) 120 Cal.App.3d 869, 872).[2]

As should be readily apparent, the trial court has a broad duty to instruct sua sponte on a variety of legal points. Frequently, the court fails to satisfy its obligation in this regard. By becoming conversant with the many general principles of law upon which the court must instruct sua sponte, appellate counsel will be able to raise quite a few claims of instructional error. (For a list of those instructions which must be given sua sponte, see Appendix A, CALJIC (6th ed. 1996) pp. 655-663.)

[2] Please note that the foregoing list is not intended to be exhaustive. Moreover, counsel should not be discouraged from contending that the trial court must instruct sua sponte on points of law which have not yet been designated in the case law.

A. There Are Two Tests By Which An Uncharged Crime May Be Deemed A Lesser Included Offense.

Under California law, there are two tests for determining whether an uncharged offense is a lesser included offense of the crime which is charged: (1) the lesser offense is statutorily included in the greater offense; or (2) as a result of the allegations pled in the information, the greater offense cannot be committed without also committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Each test will be separately discussed below.

By far, the most common situation for finding a lesser included offense is where the lesser offense is statutorily included in the greater offense. Under this test, the question is simply whether the lesser offense is "'necessarily included'" in the greater offense. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.) A lesser offense is necessarily included if all of its elements are included in the greater offense. (*Ibid*.)

People v. Ramkeeson (1985) 39 Cal.3d 346 is a classic case involving a necessarily included lesser offense. In *Ramkeeson,* the defendant was an overnight guest in the victim's home. The victim was stabbed 28 times and certain property was taken. According to the defendant, he stabbed the victim in self defense. He also testified that he did not think about taking the victim's property until the stabbing had been completed. The defendant was convicted of robbery felony murder.

On appeal, the defendant noted that theft is a necessarily included lesser offense of robbery. In light of his testimony that he did not decide to take property until after the

killing, the defendant argued that the trial court had erred by failing to instruct on theft. The Supreme Court agreed and reversed the murder conviction. (*Ramkeeson, supra*, 39 Cal.3d at pp. 350-353.)

On rare occasion, a lesser included offense can be found based solely on the language of the information. *People v. Marshall* (1957) 48 Cal.2d 394 is such a case.

In *Marshall*, the information alleged that the defendant had committed a robbery by stealing the victim's automobile. Although vehicle theft was not a statutory lesser offense of robbery, the trial court convicted the defendant of vehicle theft. On appeal, the Supreme Court upheld the conviction because the specific language of the information put the defendant "on notice that he should be prepared to defend against a showing that he took that particular kind of personal property. Because the information charged that the automobile was taken by robbery, defendant was put on notice that he should be prepared to defend against evidence showing the elements of that crime." (*Marshall, supra*, 48 Cal.2d at p. 405.)

In short, appellate counsel should become intimately familiar with the two tests for finding a lesser included offense. In this way, instructional error can often be found.

B. The Interplay Between the Trial Court's Duty to Instruct Sua Sponte on Lesser Included Offenses and the Doctrine of Invited Error.

Our Supreme Court has held that trial judges have a "broad duty" to instruct sua sponte on lesser included offenses. (*People v. Barton* (1995) 12 Cal.4th 186, 197.) Thus, the court must instruct sua sponte on a lesser included offense even if a party objects to the instruction. (*Id.*, at p. 196.) This is so since the function of the instruction is to allow the jury to reach a verdict consistent with the defendant's actual culpability. (*Ibid.*)

Notwithstanding the trial court's duty to ignore a defendant's erroneous objection to the giving of an instruction on a lesser included offense, trial judges often accede to the defendant's wishes. In this circumstance, the judge errs by failing to give the instruction. (*Barton, supra*, 12 Cal.4th at p. 198.) However, under the doctrine of invited error, the court's mistake cannot form the basis for an appellate issue.

In this regard, the invited error doctrine applies whenever the record shows that defense "counsel made a conscious, deliberate tactical choice between having the instruction and not having it." (*People v. Cooper, supra*, 53 Cal.3d 771, 831.) Thus, even if defense counsel had an erroneous view of the law when he made his decision, the invited error doctrine applies on appeal. (*Ibid.*) Assuming that counsel's tactical choice was an irrational one, "defendant can always claim he received ineffective assistance of counsel." (*Ibid.*)

C. A Trial Court Must Instruct Sua Sponte on a Lesser Included Offense When There Is Substantial Evidence in Support of Such an Instruction.

A trial court must instruct sua sponte on a lesser included offense "'when the evidence raises a question as to whether all of the elements of the charged offense were present . . . .'" (*Barton, supra*, 12 Cal.4th 186, 194-195.) Stated otherwise, an instruction on a lesser included offense must be given when it is supported by substantial evidence. (*Id.*, at p. 201.) In this context, "[s]ubstantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*Id.*, at p. 201, fn. 8.)

Application of the foregoing principle is illustrated by the facts of an unpublished Sixth District opinion. In *People v. Purcell*, H016662, the victim claimed that a man attempted to lure her into his van by scaring her with a gun. At the time, the van's engine was running and the man's pants were undone. The defendant was convicted of attempted kidnapping. On appeal, it was contended that the trial court had erred by failing to instruct on the lesser included offense of attempted false imprisonment. Reasoning that the defendant might have intended to sexually assault the victim without asporting her, the Court of Appeal agreed and reversed the judgment.

D. When the Trial Court Instructs on a Lesser, Non-included Offense, the Error Has Been Waived Absent an Objection at Trial.

For a period of fourteen years, California law held that a defendant could request an instruction on a lesser related offense. (*People v. Geiger* (1984) 35 Cal.3d 510.) Recently, this principle was abrogated. (*People v. Birks, supra*, 19 Cal.4th 108, 112-113.) Thus, absent the prosecutor's consent, a defendant cannot obtain an instruction on a lesser related offense. (*Id.*, at p. 136, fn. 19.)

However, it must be emphasized that a defendant may not challenge his conviction on a lesser related offense unless he objected at trial. (*Birks, supra*, 19 Cal.4th at p. 136, fn. 19.) If no objection was made, the defendant will be deemed to have consented to the conviction. (*Ibid.*) Thus, in such a case, a claim of ineffective assistance of counsel will have to be investigated to see if counsel had a viable tactical purpose for failing to object.

E. A Trial Judge Need Not Instruct on a Defense Sua Sponte When the Defense Is Inconsistent with the Defendant's Theory of the Case.

Unlike lesser included offenses, a trial court need not instruct on a defense sua sponte if it is "inconsistent" with the defense theory of the case. (*People v. Barton, supra*, 12 Cal.4th 186, 195.) Thus, while a court "'should ascertain from the defendant whether he wishes instructions on the alternative theory,'" error cannot be found if the court fails to give the instruction sua sponte. (*Ibid.*)

Given this rule, it is incumbent upon appellate counsel to argue for a limited scope to the concept of inconsistent defenses. In this regard, the mere existence of two lines of defense does not mean that the defenses are "inconsistent."

Foster v. Lockhart (8th Cir. 1993) 9 F.3d 722 is a case in point. In *Foster*, the defendant presented an alibi defense to a rape charge. Coincidentally, the defendant also happened to be impotent. Since the primary defense was alibi, defense counsel elected not to adduce the evidence of the defendant's impotency. In holding that defense counsel had been ineffective, the court held that the impotency defense was actually consistent with the defendant's alibi defense since it would have shown "it was even more unlikely Foster raped the victim." (*Id*., at p. 726.)

As *Foster* reveals, two defenses can be viewed as consistent even if they are factually distinct. Thus, in an appropriate case, appellate counsel can argue that the trial court should have instructed sua sponte on a secondary defense which was not expressly advanced by the defense.

VI. The Trial Court's Refusal To Give Instructions Requested By The Defense.

Without doubt, it is the duty of defense counsel to request appropriate instructions which will advise the jury of the defendant's theory of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7, overruled on other points in *People v. Breverman*, *supra*, 19 Cal.4th 142, 163, fn. 10 and *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) Assuming that the instruction proffered by defense counsel is a correct statement of the law,

the trial court must give the instruction. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.)

In this regard, it is essential to note that the law provides standards of appellate review which are quite favorable to the defendant. If the defense requests an instruction on a particular defense or a lesser included offense, an instruction must be given so long as there is substantial evidence in support of the defense or lesser included crime. (*People v. Wickersham* (1982) 32 Cal.3d 307, 324, overruled on another point in *People v. Barton, supra*, 12 Cal.4th 186, 200.) Importantly, doubt as to the sufficiency of the evidence must be resolved in favor of the defendant. (*People v. Flannel, supra*, 25 Cal.3d 668, 684-685.) Moreover, even if the evidence in support of the instruction is "incredible," the reviewing court must proceed on the hypothesis that it is entirely true. (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1143, relying on *People v. Modesto* (1963) 59 Cal.2d 722, 729.)

On this latter point, *People v. Lemus* (1988) 203 Cal.App.3d 470 is a most illustrative case. There, the government presented witnesses who testified that the defendant had engaged in an unprovoked knife assault on the victim. In contrast, the defendant testified that the victim had tried to stab him and had threatened to kill him. Thus, according to the defendant, he stabbed the victim in self defense. On these facts, the trial court refused to instruct on a self defense theory. In so holding, the trial court apparently relied on the lack of independent proof that the victim possessed a knife. On appeal, the trial court's ruling was reversed:

> "We conclude there was evidence worthy of consideration by the jury that [defendant] was acting in self-defense. Regardless of how incredible that evidence may have

> appeared, it was error for the trial court to determine unilaterally that the jury not be allowed to weigh and assess the credibility of [defendant's] testimony . . ." (*Lemus, supra*, 203 Cal.App.3d at p. 478.)

In short, as *Lemus* demonstrates, the appellate courts are highly solicitous of the defendant's right to have the jury instructed on his theory of the case. Thus, in many cases, the trial court commits reversible error when it denies a defendant's requested instruction.

As a final point on requested instructions, it is essential to note that a proper instruction must pinpoint "the crux of the defense" without engaging in an argumentative recitation of the evidence. (*People v. Wright, supra*, 45 Cal.3d 1126, 1137.) Thus, when defense counsel drafts an instruction, it must be confined to the "`theory of the defendant's case'" without reference to specific evidence. (*Ibid.*, emphasis in original.) Nonetheless, even a defectively drafted instruction may not doom the defendant's cause.

In this regard, there is substantial authority for the proposition that the trial court has a duty to sua sponte correct any defects in an instruction requested by the defendant which bears on his theory of the case. (*People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Stewart, supra*, 16 Cal.3d 133, 140; accord, *People v. Cole, supra*, 202 Cal.App.3d 1439, 1446.) Thus, even when the defendant presented an improperly argumentative instruction, it may be contended on appeal that the trial court erred by failing to remedy its deficiencies.

In short, due process requires that the jury must be instructed on the defendant's theory of the case. (*People v. Modesto, supra*, 59 Cal.2d 722, 730.) Given this fundamental principle, appellate counsel should carefully review those instructions requested by the

defense which were not given by the trial court.

VII. The Search For The Unsupported Government Theory.

In many cases, the government will proceed against a defendant on a number of theories. For example, in a murder case, the government might simultaneously rely on theories of express malice, implied malice, felony murder and aiding and abetting. In such a case, the jury usually returns a general verdict which does not specify the theory or theories upon which its judgment is based. When this kind of case comes before the appellate court, defense counsel's duty is an obvious one.

Insofar as prosecutors often advocate theories which are weakly supported by the law or the facts of a particular case, it is quite possible that one or more of the government's theories will be subject to attack. Thus, in this type of case, it is incumbent upon appellate counsel to slowly and carefully dissect each and every government theory in order to discern whether it was actually applicable to the facts at hand. Assuming that at least one of the government's theories was erroneously employed, a viable claim of reversible error will lie.

With respect to the issue of prejudice, the key question will be whether the erroneous theory was one of fact or law. If the error is one of law, the standard of per se reversal should apply. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) As to factually unsupported theories, the question is whether there is a reasonable probability that the error was prejudicial. (*Id*., at pp. 1129-1130.) The application of the *Guiton* rule will be discussed further below. (See pp. 38-39, infra.)

VIII. The Mandatory Presumption: An Improper Topic of Instruction.

As is well settled, it is a violation of due process when the jury is instructed that it is required to draw a mandatory presumption from certain predicate facts. (*Carella v. California* (1989) 491 U.S. 263, 265-267; *People v. Roder* (1983) 33 Cal.3d 491, 498-499.) Given this legal principle, appellate counsel should be on the lookout for any instruction which compels the jury to reach a conclusion based on certain evidence. While this type of improper instruction is only rarely found, it is interesting to note that a Beverly Hills misdemeanor defendant obtained a reversal on these grounds in the U. S. Supreme Court.

In *Carella v. California, supra,* 491 U.S. 263, the defendant was charged with the theft of a rental car which he had failed to return on time. Over his objection, the jury was instructed to presume the defendant's criminal intent based on his failure to return the car within a specified period of time. On appeal, the Supreme Court found a prejudicial violation of the due process clause since the improper instruction erroneously "relieved the State of its burden of proof . . ." (*Carella, supra*, 491 U.S. at p. 266.)

Without spilling needless ink, the message of the *Carella* case is clear. If a misdemeanor defendant can obtain relief from the U.S. Supreme Court based on instructional error, any defendant should be entitled to a remedy when he has been the victim of erroneous jury instructions.

IX. The Trial Court Has a Duty to Instruct Sua Sponte on Which Party Has the Burden of Proof and on the Nature of That Burden.

Although there is little case law on the subject, the California Legislature has clearly stated that a trial court has a mandatory obligation to instruct the jury on burdens of proof. Specifically, Evidence Code section 502 provides:

> "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt."

In light of section 502, a fertile area to find reversible error may exist when the defendant has relied on an affirmative defense. As section 502 makes clear, it is the court's obligation to instruct the jury as to the appropriate burden of proof concerning the defense. Thus, if the court fails to so instruct, prejudice may well be found.

People v. Simon (1995) 9 Cal.4th 493 is such a case. In *Simon*, the defendant was charged with selling unqualified securities. The defendant claimed that the securities in question were exempt. In instructing on this defense, the court advised the jury only that: "'The burden of proving an exemption is upon the defendant.'" (*Id*., at p. 501.) Insofar as the exemption defense was "not collateral to the defendant's guilt," the Supreme Court found that the trial court had reversibly erred by failing to further instruct the jury that the defendant's "burden was only to raise a reasonable doubt that the securities were not exempt." (*Ibid*.)

It is essential to note that the principle addressed in *Simon* is applicable any time that

an affirmative defense is offered. In such a case, the instructions should be carefully reviewed in order to ascertain if the jury was advised on the applicable burdens of proof. If it was not, a good appellate issue exists. (See *People v. Adrian* (1982) 135 Cal.App.3d 335, 337-341; trial court erred by failing to instruct the jury that the defendant only had to raise a reasonable doubt as to whether he acted in self defense.)

A. With Respect to Defenses, Appellate Counsel Should Carefully Distinguish Between Those Which Are Collateral to Guilt and Those Which Are Not.

A defendant's burden of proof will vary depending upon the nature of the defense in question. As to defenses which "'raise factual issues collateral to the question" of guilt or innocence, the defendant may bear the burden of proving the defense by a preponderance of the evidence. (*People v. Figueroa* (1986) 41 Cal.3d 714, 721.) However, if a defense tends to negate proof of an element of an offense, the defendant "'need only raise a reasonable doubt as to the existence or non-existence of the fact in issue.' [Citation.]" (*Ibid*.)

Generally speaking, most defenses relate to the elements of the offense. Thus, defenses such as alibi, unconsciousness, accident and self defense require acquittal unless there is proof beyond a reasonable doubt that the defense has not been established. (*Figueroa, supra,* 41 Cal.3d at p. 721; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 390.)

Entrapment is an example of a defense which is "collateral" to guilt or innocence. (*Figueroa, supra,* 41 Cal.3d 714, 721.) In an entrapment case, there is no factual question

as to the conduct or intent of the defendant. However, for policy reasons, the defendant may be able to claim that the government's own conduct precludes a conviction.

In short, appellate counsel must carefully analyze the nature of a particular defense. In this way, the appropriate burden of proof can be determined.

X. The Search For Errors In CALJIC.

The editors of CALJIC have made countless errors over the years. Thus, when the trial court utilizes standard CALJIC instructions, appellate counsel should review the instructions in order to ascertain whether they contain correct statements of the law. In a surprising number of instances, they do not. Moreover, it bears emphasis that there are, without doubt, existing errors in the present CALJIC. While space limitations preclude an analysis of all of these errors, an example should suffice to demonstrate why appellate counsel must study CALJIC with a critical eye.

Under Penal Code section 76, it is a crime to threaten certain public officers. As was recently held, an element of the offense is that the officer must actually suffer fear as the result of the threat. (*People v. Andrews* (1999) 75 Cal.App.4th 1173, 1177-1178.) However, the present CALJIC instruction does not specifically advise the jury that the officer's fear is an element of the offense. (CALJIC No. 7.40 (6th ed. July 1999 pocket part) p. 66.) Thus, there is a manifest omission in the instruction.

In short, the editors of CALJIC are painfully human. Given this reality, appellate counsel should seize the opportunity to rectify the errors which regularly appear in CALJIC.

XI. The Search For "Technical Terms" Which Require Definition.

In instructing the jury, the trial court has an obligation to define those terms which have a "`technical meaning peculiar to the law.' [Citations.]" (*People v. Kimbrel, supra,* 120 Cal.App.3d 869, 872.) Thus, when appellate counsel reviews the instructions given to the jury, it is important to look for words whose meaning might be less than obvious to a layperson. If a technical term is employed in defining the elements of a crime or a defense, it is manifest that the failure to define the term may result in reversible error.

For example, prior to 1985, the then CALJIC No. 10.30.1 advised the jury that the use of "force" was an element of a lewd and lascivious act on a child. However, the term "force" was not defined in the instruction. Insofar as the term "force" has a specific meaning unknown to the layperson, an appellate court held that it was error when the trial court failed to define the term sua sponte. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52.)

As the foregoing example demonstrates, terms which are well known to lawyers are not familiar to the average juror. As a result, appellate counsel must read instructions with the mind of a layperson. By so doing, meritorious claims of reversible error may well be the result.

XII. The Use of Outdated CALJIC Instructions.

As every criminal attorney should know, CALJIC contains a pocket part where revisions of instructions are included. For reasons of sloppiness or stupidity, an occasional

case will arise where the jury has been instructed pursuant to an outdated and incorrect CALJIC instruction which was set forth in the bound volume. Thus, in every case, appellate counsel should be sure to check whether the jury has been properly instructed with the most recent CALJIC instruction.

XIII. Appellate Counsel Should Become Familiar with Those Cautionary Instructions Which Are Helpful to the Defense.

Unlike other areas of instructional law, the subject of cautionary instructions has no set rules. In this regard, there are some cautionary instructions which must be given by the court sua sponte. (See CALJIC Nos. 1.04, 2.70-2.72 and 3.18; Penal Code sections 1127b and 1127c.) There are other cautionary instructions which the court must mandatorily give upon request. (CALJIC Nos. 2.60-2.61; Penal Code sections 1127a and 1127f.) Importantly, there is little rhyme nor reason for determining why one cautionary instruction is the subject of a sua sponte duty and another is not.

Nonetheless, there are certain basic cautionary instructions whose omission can lead to an arguable appellate issue. For example, the court's failure to give CALJIC No. 3.18 sua sponte regarding accomplice testimony is a frequently seen error. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 564.) Similarly, the failure to instruct sua sponte on shackling (CALJIC No. 1.04) or a defendant's oral statement (CALJIC Nos. 2.70 and 2.71) can be a persuasive appellate contention. (See *People v. Duran* (1976) 16 Cal.3d 282, 291-292; *People v. Ford* (1964) 60 Cal.2d 772, 799-800.)

Although it may be difficult to show prejudice, a viable claim of ineffective assistance of counsel might be presented in a case where defense counsel failed to request a cautionary instruction. In this regard, the statutory instruction regarding in-custody informants is illustrative.

Pursuant to Penal Code section 1127a, subd. (b), a defendant is entitled to request an instruction which will advise the jury that the testimony of a jailhouse snitch is to be "viewed with caution and close scrutiny." Obviously, in a case where an in-custody informant is at the heart of the government's presentation, a defense lawyer would be a fool not to ask for the instruction. Thus, in an appropriate case, defense counsel's failure to request a cautionary instruction may be deemed the ineffective assistance of counsel.

XIV. The Claim Of Ineffective Assistance of Counsel: A Necessary Contention In Some Instances.

As has been mentioned above, trial counsel has the duty to request appropriate jury instructions. (*People v. Sedeno, supra,* 10 Cal.3d 703, 717, fn. 7.) Upon occasion, counsel will fail to satisfy his responsibility in this regard. Importantly, insofar as the trial court does not have an unlimited obligation to instruct sua sponte on all relevant aspects of the law, it is sometimes necessary to raise instructional issues under the rubric of ineffective assistance of counsel. In this regard, two areas of the law are particularly important: (1) the omission to request limiting instructions; and (2) the omission to request pinpoint instructions regarding a defense theory.

With respect to limiting instructions, the general rule in California is that, absent unusual circumstances, the trial court has "no duty to instruct on the limited admissibility of evidence in the absence of a request. [Citation.]" (*People v. Lang, supra,* 49 Cal.3d 991, 1020.) Thus, insofar as highly prejudicial information is often admitted for only a single limited purpose (character evidence being one example), it is incumbent upon counsel to request proper limiting instructions. If counsel fails to request a limiting instruction with respect to highly inflammatory evidence, a claim of ineffective assistance of counsel may be appropriate. (*United States v. Myers* (7th Cir. 1990) 892 F.2d 642, 648-649; counsel erred by failing to request a limiting instruction on the use of a co-defendant's statement.)

Insofar as pinpoint instructions are concerned, it is often the case that the decisional law has not evolved to the point where the trial court has a duty to instruct sua sponte on a

pivotal theory. An example can be drawn from an unpublished Fifth District case.

For many years, it has been the rule that a person may act more quickly and harshly in self defense when the person has previously been threatened by his assailant. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065; *People v. Moore* (1954) 43 Cal.2d 517, 527-529; *People v. Bush* (1978) 84 Cal.App.3d 294; 302-304.) However, there is presently no case authority holding that the trial court must instruct on this principle sua sponte.

In *People v. Marshall* (Dec. 16, 1992, F016198), defense counsel failed to request an antecedent threats instruction even though it was clearly supported by the evidence. Given the vital importance of the instruction, the Court of Appeal found that defense counsel was ineffective.

Another example can be drawn from the depublished case of *People v. Webb* (1994) 27 Cal.App.4th 242. Under California law, the trial judge has no sua sponte duty to instruct on intoxication insofar as it relates to the defendant's mental state. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117-1120.) In *Webb*, defense counsel failed to request that CALJIC No. 4.21 be modified so that the jury could consider the defendant's intoxication with respect to the element of premeditation and deliberation. Viewing the omitted instruction as being critical, the Court of Appeal reversed.

Although it is a federal case, *United States v. Span* (9th Cir. 1996) 75 F.3d 1383 provides a final example of a successful claim of ineffective assistance of counsel. In *Span*, the two defendants tussled with police officers. There was ample evidence that the police used excessive force. However, defense counsel did not request an instruction for the

proposition that citizens have a right to defend themselves against the use of excessive force. In finding ineffective assistance of counsel, the court reasoned:

> "We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of presenting." (*Span, supra*, 75 F.3d at p. 1390.)

In short, no one takes pleasure from pursuing a claim of ineffective assistance of counsel. However, in those instances where the defendant has suffered prejudice from his attorney's failings, it is appellate counsel's duty to raise the issue.

XV. The Trial Court's Responsibility To Respond To The Jury's Request For Additional Guidance.

Given the complexity of our modern jury instructions, a deliberating jury will often request additional guidance from the trial court. When the jury does so, it is the trial court's "`mandatory duty' to clear up any instructional confusion expressed by the jury. [Citations.]" (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1212; see also *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613.) Given the importance of the instructions which are given to a deliberating jury, it has been said that "there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." (*People v. Thompkins, supra*, 195 Cal.App.3d 244, 252-253.)

Given this reality, appellate counsel should carefully review the record with an eye towards the jury's requests for assistance and the court's response to those requests. In this

regard, it is essential to note that the court's failure to respond may be as prejudicial as an erroneous response. This is especially true if the court merely repeats instructions which the jury indicates that it either does not understand or finds to be unhelpful. (*Thompkins, supra*, 195 Cal.App.3d at p. 253; "[i]t is hardly preferable for a judge to merely repeat for a jury the text of an instruction it has already indicated it doesn't understand;" accord, *People v. Gonzales, supra*, 74 Cal.App.4th 382, 390-391.)

In sum, a guilty verdict which rests upon a misapprehension of the law constitutes a miscarriage of justice. Thus, when the court either misleads or fails to assist a confused jury, reversal of the judgment is required.

XVI. Whenever Possible, Appellate Counsel Should Seek To Federalize An Issue.

A primary responsibility of appellate counsel is to raise and exhaust federal constitutional issues so that his client can file a federal petition for writ of habeas corpus if necessary. Thus, whenever a claim of instructional error is raised, it is incumbent upon counsel to federalize the issue if at all possible. This should be done regardless of whether California law treats a particular error as arising under the federal Constitution. An example follows.

In *People v. Mendoza* (1998) 18 Cal.4th 1114, the California Supreme Court held that intoxication can negate the specific intent element of aiding and abetting liability. Insofar as the defendant had requested appropriate instructions on this defense, the court remanded

the case to the Court of Appeal for reconsideration. In so doing, the court held that any "error would have the effect of excluding defense evidence and is thus subject to the usual standard for state law error: 'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' [Citation.]") (*Id*., at pp. 1134-1135.)

Without doubt, the *Mendoza* holding is in conflict with federal authority. In the Ninth Circuit, the failure to instruct on the defendant's theory of the case constitutes federal constitutional error. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741; *United States v. Escobar DeBright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.) Thus, notwithstanding *Mendoza*, a viable federal claim can be stated when the trial court has erred by failing to instruct on the defense of intoxication.

XVII. Being Aware Of the Various Tests For Prejudicial Error.

Generally speaking, when an instructional error has been demonstrated, four possible tests for prejudice may be applicable: (1) the federal standard of per se reversal for structural error (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282); (2) the California standard of per se reversal regarding legally unsupported government theories and the omission to instruct on defenses; (3) the federal standard of whether a constitutional error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24); or (4) the California standard of whether it is reasonably probable that the defendant would have received a more favorable result in the absence of the error (*People v. Watson, supra,* 46

Cal.2d 818, 836). Although the case law concerning the tests for prejudice is becoming increasingly more complex with the passage of time, the following information should provide a rudimentary background for the newcomer.

A. Errors That Are "Structural" In Nature Under The Federal Constitution.

Under U.S. Supreme Court precedent, virtually all constitutional errors are subject to harmless error analysis. (*Neder v. United States* (1999) 527 U.S. 1 [144 L.E.2d 35, 46].) The sole exception to this rule are those errors which are termed "structural" in nature. (*Ibid.*) In order to qualify as a "structural" error, a constitutional deprivation must affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

For the moment, the only instructional error which qualifies as a "structural" error under U.S. Supreme Court precedent is one which serves to dilute the standard of proof beyond a reasonable doubt or which directs a verdict against the defendant. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 281-282; *United States v. Martin Linen Supply Company* (1977) 430 U.S. 564, 572-573.) Importantly, the analysis in *Sullivan* has potentially broad application.

In *Sullivan,* the court noted that harmless error analysis is impossible when the jury has not been properly instructed on the standard of proof beyond a reasonable doubt. This is so because the dilution of the reasonable doubt standard "vitiates all the jury's findings."

(*Id*., at p. 281, emphasis in original.) Thus, since the consequences of the error "are necessarily unquantifiable," per se reversal is required. (*Id*., at p. 282.)

Under the *Sullivan* reasoning, per se reversal should be required whenever the jury is given an improper understanding of the quantum of evidence required for a guilty verdict. A case pending in the California Supreme Court will examine this principle. (*People v. Tobias*, S085471, rv. granted March 29, 2000.)

In *Tobias*, the Court of Appeal held that the trial court erred by failing to instruct the jury that a daughter (the alleged victim) was an accomplice of the defendant in his incest prosecution. (*People v. Tobias* (1999) 77 Cal.App.4th 38, 53-61.) Although the Court of Appeal did not acknowledge the argument, the defendant contended that per se reversal is required under *Sullivan* since the jury had no clue that it was required to find corroboration for the daughter's testimony. (See CALJIC Nos. 3.11 and 3.12.) In other words, there can be no harmless error analysis since the misdescription of the burden of proof vitiated the jury's findings. (*Sullivan, supra*, 508 U.S. at pp. 279-280.)

In short, appellate counsel should carefully review every record with an eye toward finding *Sullivan* error. Although all of the circumstances cannot be identified, such error will exist whenever the jury is misinstructed regarding corroboration requirements and the like.

Aside from U.S. Supreme Court precedent, it is important to note that the Ninth Circuit has held that per se reversal is required whenever the trial court fails to instruct on the defendant's theory of the case. (*Conde v. Henry, supra,* 198 F.3d 734, 740-741; *United States v. Escobar De Bright, supra,* 742 F.2d 1196, 1201-1202.) Thus, in any case where

the trial court has failed to instruct on a lesser included offense or a defense, appellate counsel should demand per se reversal. (*Ibid.)*

B. Under Existing California Law, Per Se Reversal Can Be Sought in Two Circumstances.

Currently, there are two areas where California law allows for per se reversal for instructional error: (1) the omission to instruct on a defense; and (2) instruction on an erroneous legal theory advanced by the People. Each of these areas will be briefly discussed below.

Historically, *People v. Modesto, supra,* 59 Cal.2d 722 was the most important California case on the subject of prejudice. In *Modesto,* the court held that a defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*Id.,* at p. 730.) Given this constitutional right, subsequent cases went on to apply a standard of per se reversal (with specified exceptions) when the trial court failed to instruct on a lesser included offense, an affirmative defense, or an element of the crime. (See *People v. Croy* (1985) 41 Cal.3d 1, 12-13; *People v. Garcia* (1984) 36 Cal.3d 539, 550-558, and cases cited therein.) Unfortunately, these cases have been relegated to the dustbin of history.

Under current California law, the failure to instruct on a lesser included offense requires only *Watson* review. (*People v. Breverman, supra,* 19 Cal.4th 142, 149.) Insofar as it constitutes federal constitutional error, the failure to instruct on an element of the offense mandates *Chapman* review. (*People v. Flood* (1998) 18 Cal.4th 470, 475.)

Importantly, the California Supreme Court has not yet renounced its rule regarding the failure to instruct on defenses.

In this regard, the longstanding rule is that the omission to instruct on an affirmative defense constitutes reversible error unless "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' [Citation.]" (*People v. Stewart, supra,* 16 Cal.3d 133, 141; accord, *People v. Lee* (1987) 43 Cal.3d 666, 675, fn. 1.) While it is quite likely that the California Supreme Court will reconsider its position on defenses in the near future, the cited cases have yet to be expressly overruled. Thus, appellate counsel should continue to rely on the traditional rule unless and until it no longer exists. (But see *People v. Gonzales, supra*, 74 Cal.App.4th 382, 391; *People v. Elize* (1999) 71 Cal.App.4th 605, 616; indicating that either *Chapman* or *Watson* applies to the failure to instruct on a defense.)

Aside from the area of instructions on defenses, the one remaining remnant of California's standard of per se reversal is the rule that an instruction on an erroneous legal theory cannot be deemed harmless. This point was authoritatively analyzed in *People v. Guiton, supra,* 4 Cal.4th 1116.

In *Guiton*, the Supreme Court addressed the situation where the government relied on both proper and erroneous theories at trial. As to legally erroneous theories, the court held that reversal per se is required. (*Id*., at pp. 1128-1129; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 37-38.) However, as to factually inadequate theories, it remains the defendant's obligation to establish prejudice under the *Watson* standard. (*Guiton, supra,* 4

Cal.4th at pp. 1129-1130.)

In applying *Guiton*, it is essential to note that it is less than clear when an error is one of fact or law. Indeed, an example given in *Guiton* indicates that many errors can be reasonably categorized as sounding in law.

In *Guiton*, the court analyzed its earlier reasoning in *People v. Green* (1980) 27 Cal.3d 1. There, the defendant was convicted of kidnapping. On appeal, the Supreme Court found that the trial court had erred by allowing the prosecutor to argue that moving the victim 90 feet was sufficient to satisfy the asportation element of kidnapping. As *Guiton* reaffirms, the error in *Green* was one of law.

> "The *Green* rule, as applied to the facts of that case, is readily construed as coming within the former category of a 'legally inadequate theory' generally requiring reversal. At issue was whether 90 feet was sufficient asportation to satisfy the elements, or the 'statutory definition,' of kidnapping. There was no insufficiency of proof in the sense that there clearly was evidence from which a jury could find that the victim had been asported the 90 feet. Instead, we held that the distance was 'legally insufficient.' [Citation.]" (*People v. Guiton, supra*, 4 Cal.4th at p. 1128, emphasis in original.)

In short, as the quoted analysis reveals, it is not always obvious whether an error is one of fact or law. Thus, defense counsel should dare to be creative when appropriate. In this way, counsel may be able to obtain the benefit of the reversal per se standard.

When arguing for the standard of per se reversal, appellate counsel should attempt to frame the error as being one of federal constitutional law. In this way, the standard of per se reversal can be obtained under U.S. Supreme Court precedent. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 526; "'[i]t has long been settled that when a case is submitted to the

jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. [Citation.];'" accord, *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062.)

As a final point concerning *Guiton*, it should be noted that the Supreme Court has hinted that there may be some type of vague and undefined exception to the rule of per se reversal. (*People v. Harris* (1994) 9 Cal.4th 407, 419, fn. 7.) For the time being, it is impossible to know what shape such an exception might take. Nonetheless, counsel should be aware that the case law may develop on this point in the future.

C. The Chapman Standard Applies to Any and All Errors Which Implicate the Federal Constitution.

As goes without saying, the *Chapman* standard is applicable to any error which arises under the federal Constitution. A classic example of federal error is the trial court's omission to instruct on an element of the offense charged. (*Neder v. United States, supra*, 144 L.E.2d 35, 47.)

For the purpose of this article, no attempt will be made to set forth a definitive list of federal constitutional violations which might arise from instructional error. However, appellate counsel must be creative in attempting to relate errors to fundamental constitutional principles. Two examples (one traditional and one cutting edge) are as follows.

It is settled law that a defendant may not be penalized when he exercises his Fifth Amendment right not to testify at his trial. (*Griffin v. California* (1965) 380 U.S. 609, 613.) Thus, when a trial court instructs the jury that it may consider a defendant's silence against him, a federal constitutional violation occurs. (*Id.*, at pp. 613-615.) Obviously, this circumstance presents a clear example of the manner in which an instructional error impacts on a federal constitutional right.

As our second example, there is an unsettled point upon which the U.S. Supreme Court has yet to speak. In this regard, the court has not yet determined whether a defendant has a constitutional right to an instruction on his defense (or theory of the case). However, reference to the Constitution tells us that the federal Constitution must certainly apply to this

error.

The Supreme Court has clearly held that a defendant has a due process right to adduce evidence in his defense. (*Rock v. Arkansas* (1987) 483 U.S. 44, 53-56; *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) In light of this rule, it necessarily follows that a corollary right to an instruction on the defense theory is also required. Indeed, absent an appropriate instruction, the right to present evidence would be entirely meaningless. (*United States v. Escobar De Bright, supra*, 742 F.2d 1196, 1201-1202; "[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.")

As the foregoing examples reveal, federal constitutional principles are often included in the jury instructions. Thus, appellate counsel should not hesitate to argue the *Chapman* standard in an appropriate case.

D. For The Moment, Appellate Counsel Should Argue That an Instructional Error Regarding the Elements of a Conduct Enhancement Requires Application of the *Chapman* Standard.

At present, the California rule is that an instructional error regarding the elements of a conduct enhancement implicates only the *Watson* standard. (*People v. Wims* (1995) 10 Cal.4th 293, 298.) This is allegedly so since U.S. Supreme Court cases have never applied the Sixth Amendment right to a jury trial to matters relating to sentencing. (*Id.*, at p. 305.)

Importantly, the U .S. Supreme Court has recently indicated that it may be changing its thinking on this point. In *Jones v. United States* (1999) 526 U.S. 227 [143 L.E.2d 311], defendant was charged with carjacking under a federal statute which provided that a person possessing a firearm who "takes a motor vehicle . . . by force . . . shall (1) be . . . imprisoned not more than 15 years . . . , (2) if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . ., and (3) if death results, be . . . imprisoned for any number of years up to life . . . ." (*Id*., at p. 318.) Neither the indictment nor the jury instructions made any reference to the factual matters in subsections (2) or (3). However, the trial court imposed a 25 year sentence because one victim suffered serious bodily injury. The trial court rejected the contention that serious bodily injury was an element of the offense and the failure to submit it to the jury violated the Sixth Amendment. (*Id*., at pp. 318-319.)

The Supreme Court reversed, reasoning that, in order to be consistent with the Constitution, the statute had to be interpreted as enumerating separate substantive offenses to which the right to jury trial and due process apply. If the statute were interpreted as containing mere penalty provisions rather than substantive crimes, it would be open to serious constitutional doubt. As the court explained:

> "If serious bodily injury were merely a sentencing factor . . . then death would presumably be nothing more than a sentencing factor under subsection (3) . . . If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15 year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing an unlimited legislative power to

> authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." (*Jones*, *supra*, 143 L.E.2d at p. 326.)

At present, the U.S. Supreme Court is considering a case which squarely presents the issue of whether due process is violated when a state allows for enhancement of a sentence based on a sentencing factor which requires only proof by a preponderance of the evidence. (*Apprendi v. New Jersey*, No. 99-478, cert. granted Nov. 29, 1999.) Thus, until *Apprendi* is decided, counsel should contend that the *Chapman* standard applies to an error regarding the elements of an enhancement.

E. The Watson Standard Applies to Any Error Arising under State Law.

Little need be said regarding the *Watson* standard. If an error does not arise under the federal Constitution or does not fit within the limited categories of reversal per se under California law, prejudice must be measured under *Watson*.

XVIII. Regardless of the Applicable Harmless Error Test, There Are a Number of Factors Which May Be Used to Show Prejudice in a Particular Case.

After handling appeals for a number of years, a defense attorney will become familiar with the appellate courts' mantra that the errors were harmless because the evidence was "overwhelming." While the evidence is truly overwhelming in some cases, the reality is that many jury trial cases involve shaky government witnesses, weak circumstantial evidence or some other evidentiary deficiency. In these cases, it is imperative that defense counsel focus on the objective factors found in the record which prove that the case against the defendant was not overwhelming. Although the following examples are not intended to be exhaustive, they are indicative of some of the factors which will enable a defendant to obtain a reversal.

At the outset of this discussion, it cannot be overemphasized that the primary goal of defense counsel must be to dissect the evidentiary weaknesses in the government's case. Thus, if a government witness was granted immunity or was impeached in a substantial way, this point should be strongly discussed. Similarly, if there were inconsistencies in the government's case, this reality should be amply argued. Indeed, any and all weaknesses in the government's case must be carefully and precisely laid out for the reader.

By the same token, appellate counsel should also discuss the strength of the defense evidence. If no such evidence was presented, counsel should set forth the contents of defense counsel's closing argument. In so doing, counsel can hopefully show that the defense presented a relatively credible theory to the jury. If this goal is achieved, it will, of course,

make it very difficult for the appellate court to legitimately conclude that the government's evidence was "overwhelming."

As a final preliminary point, it is important to note that some errors are better than others. For example, errors in the admission of evidence that the defendant was a gang member or a drug addict, are highly prejudicial regardless of the strength of the government's case. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-907; admission of gang evidence leads to "a substantial danger of undue prejudice;" admission of evidence of narcotics addiction is "`catastrophic.'") Thus, appellate counsel should strive to find those case authorities which depict a particular error as being one which necessarily involves a high degree of prejudice.

Turning to the case specific factors which may serve to show prejudice, the most obvious indication of a close case is lengthy jury deliberations. (*People v. Cardenas, supra*, 31 Cal.3d 897, 907; six hours of deliberations is evidence of a close case; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612; nine hours of deliberations "deemed protracted.") While the Supreme Court has indicated that lengthy deliberations are not significant in a complex case (*People v. Cooper, supra,* 53 Cal.3d 771, 837), such deliberations in a short case can only mean that the jurors found some deficiency in the government's case. Thus, when the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana, supra*, 508 U.S. 275, 279; harmless error analysis requires the court to look at the impact of an error on the jury; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, overruled on an unrelated point in *People v. Martinez* (1995) 11 Cal.4th 434, 452; reversal ordered where the length of the jury deliberations exceeded the length of the evidentiary

phase of the trial.)

Another indication of a close case involving the jury's behavior is where there has previously been a hung jury. Obviously, this fact demonstrates that the government's case is less than overwhelming. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188.) Moreover, if a defendant is convicted on erroneously admitted evidence which was not presented to the hung jury, the inference is virtually compelled that the evidentiary error is prejudicial. (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.)

Aside from hanging, a jury may show that the government's case is weak when it acquits the defendant on one or more counts. In such a circumstance, an error relating to the count of conviction should be deemed prejudicial. (*People v. Epps* (1981) 122 Cal.App.3d 691, 698; *People v. Washington* (1958) 163 Cal.App.2d 833, 846.)

Even if the jury eventually convicts the defendant, its requests for additional instructions or the readback of testimony may establish that the case was a close one. (*People v. Filson, supra*, 22 Cal.App.4th 1841, 1852; request for additional instructions; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295; "[j]uror questions and requests to have testimony reread are indications the deliberations were close. [Citations.]"; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40; request for readback of critical testimony.) Moreover, if the jury hears an erroneous instruction or erroneously admitted testimony for a second time, it is manifest that the degree of prejudice to the defendant was only heightened. (*People v. Williams* (1976) 16 Cal.3d 663, 669; reversal ordered where the jury requested a rereading of an erroneously admitted statement and then quickly returned a guilty

verdict; see also *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876; rereading of an erroneous instruction warrants reversal; *People v. Thompkins*, *supra*, 195 Cal.App.3d 244, 249-252; erroneous response to a deliberating jury's question requires reversal.)

Regardless of the behavior of the jury, reversible error is likely to be found when the trial court has effectively precluded the defendant from presenting his case. This is so since errors "`at a trial that deprive a litigant of the opportunity to present his version of the case . . . are . . . ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment.' [Citation.]" (*People v. Spearman* (1979) 25 Cal.3d 107, 119.) Thus, when the trial court excludes evidence bearing on the defendant's theory of the case, reversal is appropriate. (*People v. Filson*, *supra*, 22 Cal.App.4th 1841, 1852.)

Conversely, if an error impacts in a strongly negative way on the defendant's theory of the case, reversal should also be the result. For example, where the defendant presented a diminished capacity defense in a murder case, the inadmissible "statements which intimated that appellant was fabricating his defense were most prejudicial." (*People v. Rucker* (1980) 26 Cal.3d 368, 391; see also *People v. Wagner* (1975) 13 Cal.3d 612, 621; erroneous impeachment of defendant required reversal since "the resolution of defendant's guilt or innocence turned on his credibility . . ."; *People v. Vargas* (1973) 9 Cal.3d 470, 481; *Griffin* error is prejudicial if it touches a "`live nerve'" in the defense.)

In contending that an error was prejudicial, defense counsel can often find a great deal of ammunition in the prosecutor's closing argument. Thus, if the prosecutor placed a great

deal of reliance on an erroneous instruction or an erroneously admitted piece of evidence, the appellate court will have a difficult time in finding that the error was harmless. (*LeMons v. Regents of University of California, supra*, 21 Cal.3d 869, 876; *People v. Cruz* (1964) 61 Cal.2d 861, 868; "[t]here is no reason why we should treat this evidence as any less `crucial' than the prosecutor - and so presumably the jury - treated it;" see also *People v. Woodard* (1979) 23 Cal.3d 329, 341; reversal ordered where the prosecutor "exploited" erroneously admitted evidence during his closing argument.)

As a final technique for showing prejudice, defense counsel should attempt to demonstrate in an appropriate case that a number of errors require reversal due to the cumulative prejudice which they caused. As our Supreme Court has recently said, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Thus, even in a case with strong government evidence, reversal may be obtained when "the sheer number of . . . legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. [Citation.]" (*Id.*, at p. 845.)

After reviewing the foregoing survey of the case law, defense counsel should employ it as a starting point, not an end. In this regard, each case is somewhat unique. Thus, while counsel should be familiar with the law, it is more important to closely study the record to see exactly how a particular error affected the dynamics of a trial. By being sensitive to the effect of an error in a particular case, defense counsel can often prepare a persuasive claim

of prejudicial error.

CONCLUSION

In metaphorical terms, the land of instructional error is a paradise for the creative appellate attorney. In my view, the open minded and clever appellate advocate can have an enjoyable time whenever he is called upon to study jury instructions. More importantly however, the diligent advocate can oftentimes find an instructional error which will result in a remedy for his client. Hopefully, after reading the foregoing overview, counsel will be well on the way to success as a practitioner in the area of instructional error.

QUIZ QUESTIONS

1. What are the two tests for determining whether an offense is a lesser included offense of the crime charged in the information?
2. What legal authority requires a trial court to instruct the jury that the testimony of an in-custody informant is to be "viewed with caution and close scrutiny?" Is the court required to give the instruction sua sponte?
3. In order for the "invited error" doctrine to apply, what must defense counsel have done?
4. In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the U.S. Supreme Court held that an error in a reasonable doubt instruction requires per se reversal. What was the court's rationale and how might this rationale be applied to other instructional errors?
5. What is the test for determining whether a pinpoint instruction requested by the defense should be given?
6. Under what circumstances may the trial court instruct on a lesser related offense?
7. What principle is stated in Penal Code section 1259?
8. If a trial court instructs sua sponte on an affirmative defense, must it also instruct the jury as to the applicable burdens of proof? What authority supports this result?

9. What is the prejudice test when the trial court instructs on a legally erroneous government theory? What is the prejudice test when the trial court instructs on a government theory which is factually unsupported?

10. What is the test for determining whether a trial court has an obligation to instruct sua sponte on a particular legal principle?