

**THE DIDDLE OF HARMLESS ERROR:
(APOLOGIES TO JUSTICE TRAYNOR)¹**

By

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“Anyone who seeks on appeal to predicate a reversal of conviction on error must show that it was prejudicial.” (People v. Archerd (1970) 3 Cal.3d 615, 643.)

“When we find that a substantial injustice has been done, we look through the record for errors, and we damn well find them.”

Attributed to William Henry Beatty, Chief Justice of California (1884-1914)

Quoted in The Mooney Case, p. 243 by Richard H. Frost (1968)

¹ See Roger Traynor, The Riddle of Harmless Error (1970). In pointing to the strong policy need for a showing of prejudice, he wrote: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." (Id., at 50.)

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I. INTRODUCTION⁴

The law is planted thick with rules, and almost as thick with exceptions to those rules, and with distinctions which make a rule inapplicable. This is true in the area of harmless error. Nevertheless, there are some general statements that, generally speaking, hold true, generally. Here are a few.

Harmless error comes in three flavors. The sweetest flavor is for errors that require reversal without the need for the defendant to show that the error affected the outcome of the case. Often called structural error in the context of federal constitutional errors, and reversible per se errors in other contexts, for an appellate lawyer the appearance of such error is something devoutly to be wished for. The presence of per se reversible error requires reversal even if the trial was otherwise

³ See Roger Traynor, The Riddle of Harmless Error (1970). In pointing to the strong policy need for a showing of prejudice, he wrote: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." (Id., at 50.)

⁴ Some of the material in this paper is from a longer 1981 article (much updated here) "A Pool of Prejudice: Prejudicial, Reversible and Harmless Errors on Appeal," first published in the State Public Defender's Criminal Appellate Practice Manual. Also, we draw on additional ideas presented in Dallas Sacher's excellent paper, "A Primer on Prejudicial Error: The Applicable Tests and How to Satisfy Them."

perfect and error-free, and the evidence was not just overwhelming but absolutely conclusive and undisputed.

Less sweet, but sweet nevertheless, are federal constitutional errors other than structural errors. When such errors occur, the People bear the burden of showing beyond a reasonable doubt that they are harmless. And the defendant need only show that the People have not sustained this burden.

Within the confection analogy, state-law errors can be tart. They require that the defendant establish that if the error had not occurred, there is a reasonable probability that the outcome of the trial or sentencing proceeding would have been more favorable to the defendant. But the sweetness increases if the case contains indicia showing the error was particularly significant or the case was particularly close. Many of these indicia will be discussed later in this paper.

Sadly, most errors in a state-court appeal involve errors of state law, and therefore the burden is on the defendant to show the error was not harmless. For this reason, no portion of an appellant's brief is more important than that demonstrating trial errors prejudiced the appellant's opportunity for a fair trial. We all know that for such error, just showing that error occurred is not enough. Most trials are imperfect, and contain error. Too often we read: "Defendant was entitled to a fair trial but not a perfect one." (People v. Cunningham (2001) 25 Cal.4th 926, 1009.) Of course no defendant has ever contended that he is entitled to a new trial because his first one was not perfect. But it is fun for appellate courts to pretend that the defendant made this contention, or something very close to it, because it suggests that the defendant asked for something his attorney was too benighted to know he was not entitled to.

Writing an argument without addressing prejudice from error is like building a car without wheels – it goes nowhere. The law is clear – in most cases appellants have a duty not only to show error, but to demonstrate its prejudicial consequence:

“[O]n appeal from a judgment it is a cardinal rule that the duty devolves upon the appellant not only to specify the error of which he complains, but also to establish to a reasonable certainty that without such error having been committed, the result of the trial of the action would have been substantially different from that which was actually reached by the trial court.” (People v. Britton (1936) 6 Cal.2d 10, 13.)

Put more succinctly, “failure to specify the prejudicial feature of the evidence must be taken to mean that there is none. [Citations].” (People v. Shafer (1950) 101 Cal.App.2d 54, 61.)

A. Relevant Statutes and Constitutional Provisions

There are well-known constitutional and statutory mandates stating prejudice must be shown before relief on appeal can be granted. Article VI, section 13 of the California Constitution, adopted in 1911, states:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Penal Code section 1258 states:

After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.

Penal Code section 1404 states:

Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

Evidence Code section 353 states:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice. (Emphasis added.)

Evidence Code section 354 states:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the question asked, an offer of proof, or by any other means;

(b) The rulings of the court made compliance with subdivision (a) futile;

(c) The evidence was sought by questions asked during cross-examination or recross-examination. (Emphasis added.)

B. The Well-Known Prejudice Assessment Troika.

We are too much aware of the high rate of appellate affirmances of criminal convictions and the application of the “harmless error” salve as the curative for error.⁵

⁵ Jurists are not unaware of the phenomena and will to speak out about it: “This case exemplifies a disturbing and increasingly widespread trend among some courts to sanction egregious violations of the constitutional rights of criminal defendants by blandly reciting the formula ‘harmless error’ whenever it appears

(continued...)

As this audience well knows, there are three general standards by which the impact of an error is assessed: 1) the relatively rare reversal per se standard; 2) reversal unless the record demonstrates the error harmless beyond a reasonable doubt (the federal constitutional Chapman standard (Chapman v. California (1967) 386 U.S. 18); and 3) reversal if the record demonstrates that but for the error, it is reasonably probable that the defendant would have achieved a more favorable outcome. We know this as the Watson standard. (People v. Watson (1956) 46 Cal.2d 818, 836.)

The three categories are not rigidly structured categories and thus do not make for easy pigeonholing of errors simply by demonstrating their source (*e.g.*, federal or state law.) The more fundamental or clearly mandatory a right or prescribed procedure is, or the more difficult and speculative the job of assessing prejudice is, the more likely an error will be deemed prejudicial per se (category 1), or at least a Chapman error (category 2).

Further, these standards morph over time. With Watson standard, Justice Friedman noted concurring in People v. Reeder (1976) 65 Cal.App.3d 235, 244:

The purity of the Watson test has been alloyed by later emendations. Appellate judges are no longer safe to follow Watson as the sole standard of reversibility. The Supreme Court has approved a formula which it terms a “corollary” of the Watson rule although it is really a marked divergence. The formula is expressed as follows: “Where the evidence, though sufficient to sustain the verdict, is extremely close, any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.” (People v. Gonzales (1967) 66 Cal.2d 482, 493-494; People v. Briggs (1962) 58 Cal.2d 385, 407.)

(Cited with approval in People v. Hickman (1981) 127 Cal.App.3d 365, 373; People

⁵ (...continued)

that the accused was factually guilty.” (Briggs v. Connecticut (1980) 447 U.S. 912, 913 [Marshall, J. dissenting from denial of certiorari].)

v. St. Andrew (1980) 101 Cal.App.3d 450, 465; People v. Stein (1979) 94 Cal.App.3d 235, 240.)

The Watson doctrine has now morphed even more to become a “reasonable chance” doctrine. That is, if there is a reasonable chance of a more favorable result absent the error, relief is warranted. (College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 715; People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888, 918; People v. Soojian (2010) 190 Cal.App.4th 491, 519; People v. Racy (2007) 148 Cal.App.4th 1327, 1335; People v. Elize (1999) 71 Cal.App.4th 605, 616.)

A more favorable result within the context of Watson is a hung jury, rather than an acquittal; the focus of the inquiry is therefore whether the absence of the error would have changed a single juror’s mind. (People v. Soojian, *supra*, 190 Cal.App.4th at 520-521.) Watson itself has some helpful language appearing on the page following the one normally cited when describing the test for reversal. It indicates that if a court finds there is an equal balance of reasonable probabilities on the question of whether the error affected the result, there necessarily is a reasonable probability that the result more favorable to the appealing party would have been reached in the absence of the error and the judgment must be reversed. (People v. Watson, *supra*, 46 Cal.2d at 837; *see also* People v. Mar (2002) 28 Cal.4th 1201, 1225, relying on this part of Watson.)

II. ASSEMBLING THE TOOLS TO ARGUE PREJUDICE

Even before plume hits parchment, the concept of prejudice must be uppermost in mind. At this time (just after the record has been reviewed), one must obtain those portions of the record which are not normally included on an appeal (pretrial motions, voir dire, opening arguments, bench conferences, etc.), if one has an inkling from the record, such as it is, or from the trial attorney, or the client, they may be helpful in demonstrating prejudice.

Failure to augment portions of the record pertinent to an argument may

constitute ineffective assistance of counsel. (People v. Barton (1978) 21 Cal.3d 513 [failure to provide the court a full transcript of a suppression hearing]; People v. Rodriguez (2011) 193 Cal.App.4th 360, 363 [Pitchess *in camera* record must be supplied the appellate court: “appellate counsel has failed to ensure that the Pitchess materials are part of the record on appeal. While we have exercised our discretion to order the record on appeal augmented to include the Pitchess materials, we publish a portion of this opinion to remind appellate counsel that it is counsel’s responsibility to ensure that the record is perfected in cases in which a Pitchess claim is raised”]; Boyd v. Newland (9th Cir. 2006) 467 F.3d 1139, 1150 [“we also must conclude that all defendants, including those who are indigent, have a right to have access to the tools which would enable them to develop their plausible Batson claims through comparative juror analysis,” *i.e.*, the complete voir dire transcript]; *see generally* People v. Gaston (1978) 20 Cal.3d 476 [closing arguments]; People v. Silva (1978) 20 Cal.3d 489 [closing arguments of both counsel and the oral delivery of jury instructions].)

The above principles would include acquiring opening statement, but a showing of some sort is required to inform the court why it would be helpful. Generally, when proceedings occurred or if evidence was introduced which *should be considered* on appeal, it is an abuse of discretion to deny the augment request. (McCarthy v. Mobile Cranes, Inc. (1962) 199 Cal.App.2d 500, 502.)

Finally, exhibits at trial may provide the basis of a prejudice argument and should be transferred to the Court of Appeal under the procedures stated in the California Rules of Court, rule 8.224.

III. WRITING AND ARGUING PREJUDICE: EXAMPLES

How do you convince three people to reverse a criminal judgment when their sensitivities to trial dynamics are often cauterized to utter numbness and deadened by

years of affirmances?⁶ To combat that, the statements of facts needs to pound on those FACTS showing how the error(s) undermined confidence in the correctness or fairness of the outcome. This approach focuses discussion on the importance of writing a statement of facts: if you can (and, of course, this may not always be possible) make the defendant appear sympathetic, *or* the prosecution case appear shakey, *or* the defense strong, or emphasize facts that stir the court to anger over the unfairness of the trial judge's or the prosecutor's conduct. Doing this gives you a much better chance of convincing the court to *want* to reverse and thus find errors prejudicial.

Some case examples: forcing a defendant to wear a stun belt is offensive to one's sensibilities,⁷ particularly when there is no cause shown requiring the defendant to wear it. This was the issue in People v. Mar (2002) 28 Cal.4th 1201. The Court re-affirmed and applied the rule of People v. Duran (1976) 16 Cal.3d 282, as to the limited circumstances under which a defendant may be tried in shackles. Prejudice was difficult to show, but appellate counsel got before the court of appeal law reviews and other articles about the impact of wearing stun belts on witnesses. The Supreme Court accepted these descriptions. In reversing the conviction, the Court noted that "the record indicates that the evidence was not totally one-sided." (28 Cal.4th 1224.)

⁶ By the way, trial courts are never to engage in harmless error evaluations when ruling on trial issues. The evidence is either admissible or not. Arguments are proper or not. (See People v. Aragon (1957) 154 Cal.App.2d 646, 662: "'Criminal cases should not be conducted with an eye to the saving grace of section 4 1/2, article VI of our state Constitution. Excepting motions for a new trial, the constitutional section is of no concern to the trial courts, and so far as its application goes, it is of interest only to the courts of review (People v. Black [1925], 73 Cal.App.13, 43 [238 P. 374]).' (People v. Lyons [1956], [47 Cal.2d 311], *supra*, p. 319.)")

⁷ Particularly the defendant's sensibilities given that the belt "delivers an eight-second-long, 50,000-volt, debilitating electric shock when activated by a transmitter controlled by a court security officer." (Id. at 1204.)

Resolution depended on the jury's evaluation of credibility, which in turn depended in large part on its observation of witness demeanor. (Ibid.) Although the Court could not tell from the cold record the effect of the belt on defendant's testimony, it relied upon his statements, when objecting to the belt, that it caused him not to think clearly and it made him nervous. (Ibid.) Thus, it had at least some impact on his demeanor while testifying. (Id. at 1225.) This was a case where the noxious nature of the error greatly aided in the evaluation of prejudice. The court found it prejudicial even under Watson. (Ibid.)

In People v. Woodard (1979) 23 Cal.3d 329, 341, the Court found Beagle⁸ error in the improper impeachment of a defense witness with felony convictions. In finding the error prejudicial, the court evaluated how the error impacted the major disputed issue in the case (identity) and then evaluated the impact of the impeachment error on that issue by looking to facts of record:

Identity of the perpetrator was the central issue in appellant's trial. Johnson and Spencer, the victim, were the only witnesses to testify as to identity. Therefore, Johnson's credibility was critical. Recognizing this, the prosecutor exploited the erroneously admitted prior convictions during final arguments to discredit Johnson as a witness.

Even though there was no indication that Johnson had perjured himself, the jury may have been persuaded that Johnson was such an unsavory character due to his prior convictions that his testimony should be disregarded. (Ibid.)

On the federal side, in Holley v. Yarborough (9th Cir. 2009) 568 F.3d 1091, a child molest appeal, the exclusion of alleged child victim statements about sexual activity with others was held to prejudicially violate the defendant's Sixth Amendment

⁸ People v. Beagle (1972) 6 Cal.3d 441, was substantially modified by the passage of Proposition 8 (article I, section 28 of Cal. Consti.) See People v. Castro (1985) 38 Cal.3d 301.

confrontation rights. Defendant Holley was accused by 11-year-old Raina of lewd and lascivious touchings while he was babysitting her and her 10-year-old brother Matt. Raina's testimony was uncorroborated. There was evidence that Raina and Matt were angry at Holley for refusing to buy them pizza. The state trial court refused to permit cross-examination and extrinsic evidence that Raina had told other kids about her sexual antics with her boyfriend, descriptions of which had elements in common with her accusations against Holley. The state appellate court held such matters irrelevant and unduly prejudicial. (Id., at 1099.) It also held there was "no evidence of the falsity of Raina's statements, no indication the statements were intended as accusations, and significant dissimilarities between the type of 'accusations'...." (Ibid.)

On federal habeas review, the Ninth Circuit found that the cross-examination and extrinsic evidence proffered by the defense were "clearly relevant to impeach Raina, and thus allow the jury to evaluate the credibility of her allegations." (Id., at 1099.) Evidence that Raina had a highly active sexual imagination or that she had a familiarity with sexual activities was relevant to counter the prosecution's theory of the case, as emphasized during closing argument, that a little girl like Raina would not fabricate things of a sexual nature. (Ibid.) The court also held that defense evidence could not be said to consume too much time when the prosecution has been given free rein to introduce evidence on the same subject in its part of the case. (Id., at 1100.)

In finding the error prejudicial to Holley, the Circuit noted: "The prosecution needed to characterize Raina as a child who could be relied on to tell the whole truth, and not exaggerate or fantasize about sexual issues, and this characterization might reasonably have been put into question by the evidence of her prior statements." (Id., at 1101.)

A. Always Separately Argue Cumulative Error and Cumulative Prejudice.

Review of a record often reveals no single error which is individually

prejudicial under any standard. Or you may be unsure if any single error is sufficient to result in reversal. In cases involving multiple errors, consider arguing that the total effect of the errors combined to prejudice the defendant's right to a fair trial. In a close case, or in a case with numerous errors, the cumulative effect of multiple errors may pool to constitute a miscarriage of justice. Like a person, a judgment can be killed not only by a single shot to the head, it also can be pecked to death by multiple pellets from a shotgun that individually would not to the job.

Consider People v. Hill (1998) 17 Cal.4th 800, 845, where the court stated “the sheer number of instances of prosecutorial misconduct *and other legal errors* raises the strong possibility that the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone.” (Italics added.) And “a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.” (Id. at 844.)

Some cases state that the litmus test for prejudicial cumulative error is whether the defendant received a fair trial. (People v. Cuccia (2002) 97 Cal.App.4th 785, 795; People v. Kronemyer (1987) 189 Cal.App.3d 314, 349.) However, other cases state that the litmus test for prejudicial cumulative error is whether, in view of the cumulative effect of the errors, a different result was reasonably probable. (People v. Holt (1984) 37 Cal.3d 436, 459; People v. Cardenas (1982) 31 Cal.3d 897, 907 [“Absent the several evidentiary errors, it is reasonably probable that the jury would not have convicted appellant of the charged offenses”]; People v. Zerrillo (1950) 36 Cal.2d 222, 233 [concluding that the cumulative effect of the errors resulted in a miscarriage of justice]; People v. Basuta (2001) 94 Cal.App.4th 370, 391.) Also, there is case law stating that the denial of a fair trial occurs when, in view of the cumulative effect of the errors, it is reasonably probable that the jury would have reached a result more favorable to the defendant. (People v. Kronemyer, *supra*, 189 Cal.App.3d at p.

349 [indicating that the absence of a fair trial occurs when the cumulative effect of the errors makes a result more favorable to the defendant reasonably probable].) Still other cases find that cumulative error requires reversal without specifying the specific standard for reversal which the court applied. (People v. Buffum (1953) 40 Cal.2d 709, 726; People v. Cruz (1978) 83 Cal.App.3d 308, 334; People v. Guzman (1975) 47 Cal.App.3d 380, 388; United States v. McLister (9th Cir. 1979) 608 F.2d 785, 791; *see also* Cooper v. Fitzharris (9th Cir. 1978) 586 F.2d 1325, 1333: “If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense – prejudice may result from the cumulative impact of multiple deficiencies.”)

Thus, although it is clear that courts review the cumulative effect of multiple errors, the specifics of how the appellate courts apply this rule are not at all clear. Generally speaking, it is best to avoid the formulation requiring the denial of a fair trial. That formulation is vague. And to the extent it is comprehensible, it suggests that more is required than the reasonable probability of a different result.

A very helpful cumulative prejudice case is Parle v. Runnels (9th Cir. 2007) 505 F.3d 922. There, the defendant had been convicted in state court of the first-degree stabbing murder of his wife during a domestic dispute. At trial, he contested only his state of mind at the time of the killing to argue he could be guilty of no more than second-degree murder or voluntary manslaughter. He got nowhere in state court, but on federal habeas, the district court found that multiple errors in the admission and exclusion of evidence accumulated to deprive him of a fair trial. All of those errors, of course, favored the prosecution and went against the defendant. They involved ruling affecting the admission of testimony from Parle’s psychiatrist, exclusion of testimony of petitioner’s expert medical witness, exclusion of evidence of the wife’s previous threats and her character for violence, and the admission of Parle’s previous

threat against a police officer. The resulting cumulative one-sided prejudice warranted habeas relief even under the very truncated review standard on habeas corpus. The court found that all of the errors were relevant to the intent to kill issue which was the issue in the trial.

In finding cumulative prejudice, the court dismissed the Attorney General's argument that the evidence of intent to kill was overwhelming. "There is no question that Parle intended to kill his wife; the only issue before the California Court of Appeal was his state of mind at the time of this intentional killing, i.e., whether the killing was intentional and deliberated (first degree murder) or intentional but not deliberated (second degree murder). This court's prior decision is silent as to the strength of the State's evidence on this question." (Id. at 932.)

The bottom line: The combined effect of the trial court's multiple errors rendered Parle's defense "far less persuasive than it might have been," resulting in a substantial and injurious effect or influence on the jury's verdict and a denial of due process. (Id. at 934.)

Final example: when assessing whether ineffective assistance of counsel was prejudicial to the defendant, the courts view multiple instances of ineffective assistance of counsel cumulatively. (In re Jones (1996) 13 Cal.4th 552, 583; Lindstadt v. Keane (2d Cir. 2001) 239 F.3d 191, 199, and cases cited; Turner v. Duncan (9th Cir. 1998) 158 F.3d 449, 457; Harris v. Wood (9th Cir. 1995) 64 F.3d 1432, 1438-1439.)

B. Even Excluded "Cumulative" Evidence Can Be Prejudicial. This is a common argument the State makes to justify excluding evidence at trial. There is a reason for putting on cumulative evidence: it corroborates. "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value. [Citation.]. (People v. Mattson (1990) 50 Cal.3d 826, 871; People v. Filson (1994) 22 Cal.App.4th 1841,

1851, *overruled on other grounds in* People v. Martinez (1995) 11 Cal.4th 434, 452; accord, Skipper v. South Carolina (1986) 496 U.S. 1, 7-8; People v. Welch (1972) 8 Cal.3d 106, 116-117.)

“[I]f evidence has substantial relevance to prove material facts which are hotly contested and central to the case, it is not ‘merely cumulative.’” (People v. Lang (1989) 49 Cal.3d 991, 1016.) Two cases, People v. Brown (1995) 35 Cal.App.4th 1585, 1595-1597, and People v. Lucero (1988) 44 Cal.3d 1006, 1030-1031, deal specifically with the need for repetition (*i.e.*, corroboration) where credibility is at issue. In Brown, a witness gave testimony favorable to the defendant, but admitted that she had made contrary statements prior to trial, claiming that those pretrial statements were false. Because the credibility of the witness was the key issue in the case, the Court of Appeal held that the trial court did not err in allowing SEVEN witnesses to testify, over a 352 objection, to the pretrial statements.

In Lucero, the prosecution made several attacks on the validity of the defense mental health diagnosis. The Supreme Court held that the testimony of a second examiner could not be considered cumulative both because the second examiner was not vulnerable to some of the same attacks as the first and also because having two examiners reach the same conclusion might make the diagnosis more persuasive. Exclusion of corroboration evidence is prejudicial if the witness was important to the defense.

C. Mixed Error Formula: Watson + Chapman = Chapman

When errors of constitutional magnitude combine with non-constitutional errors, all errors should be cumulatively reviewed under the Chapman standard. In People v. Williams (1971) 22 Cal.App.3d 34, 58-59, the court summarized the multiple errors committed at the trial level and concluded:

Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied

beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, was not harmless error. [Citations.]

(People v. Holt (1984) 37 Cal.3d 436, 459 [“It is reasonably probable that in the absence of the cumulative effect of these errors the jury would have reached a result more favorable to him”]; see also In re Rodriguez (1981) 119 Cal.App.3d 457, 469-470; *accord* People v. Williams (1971) 22 Cal. App.3d 34, 40 [prejudicial combination of errors in close case]; see also Taylor v. Kentucky (1978) 436 U.S. 478, 487, fn. 15; Chambers v. Mississippi (1973) 410 U.S. 284, 298, 302-303; Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284, 285-288; Menzies v. Procnier (5th Cir. 1984) 743 F.2d 281, 288-289; Lincoln v. Sunn (9th Cir. 1987) 807 F.2d 805, 814, fn. 6..)

D. Domino Error

If a prejudice argument applies directly to one count, but not directly on others, argue that the wrongful conviction on that count prejudicially infected the jurors’ consideration of the others. (People v. Torres (1964) 61 Cal.2d 264 [exclusion of testimony from a meteorologist that it rained the day appellant claimed it did found to be prejudicial error on the count it affected *as well as* another count because of the impact of the error had on undermining appellant’s credibility].)

E. The State Has Waived the Issue of Prejudice.

While this seldom occurs, it is worthy of argument when, for example, the State spends all of its time arguing that there was no error and neglects to add the refrain, “but even if error, it was harmless.” In U.S. v. Kloehn, 620 F.3d 1123, 1130 (9th Cir. 2010), the Circuit applied the rule to reverse a federal conviction based on the trial court’s error in the denying a continuance to the defendant. The government argued there was no abuse of discretion (*i.e.*, no error). The Circuit disagreed. But the government had not argued the issue of prejudice. Applying the general rule that

when the government fails to argue harmlessness, the issue is waived, the appellate court reversed to conviction.

For use in State cases, turn the same forfeiture law around on the prosecution that is so often applied to the defense: “failure to specify the [*non*]prejudicial feature of the evidence must be taken to mean that” it is prejudicial. (Paraphrasing People v. Shafer (1950) 101 Cal.App.2d 54, 61.)

IV. EXAMPLES OF PREJUDICE ARGUMENTS

A. Failure to Instruct on the Defense Theory of the Case

When the court declines to instruct on a defense theory, a number of cases find that error reversible. (See Beardslee v. Woodford (9th Cir. 2003) 358 F.3d 560, 577 [“Failure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable”]; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [federal constitutional error for failure to instruct on the entrapment defense]; Davis v. Strick, 270 F.3d. 111, 123 (2nd Cir. 2001) [under New York homicide law, a defendant is entitled to have the jury instructed on justification and withholding of the instructions denies the opportunity to present his defense and constitutes a denial of 14th Amendment due process]; Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-740 [federal constitutional error to fail to instruct on included offense of simple kidnaping]; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867, 875-876 [instructional error on the state law of justification of constitutional dimension]; U.S. v. Douglas (7th Cir. 1987) 818 F.2d 1317, 1320-1321 [“failure to include an instruction on the defendant’s theory of the case [that he was a mere purchaser of drugs and not a conspirator] ... would deny the defendant a fair trial. (Citation.)”]; U.S. v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1201 [giving the defense its theory instructions is basic to a fair trial].)

As stated in People v. King (1978) 22 Cal.3d 12, 15-16, with respect to the right

to instructions on the issue of self-defense:

Because the right to instructions on self-defense is the central issue in this appeal,^[n2] our recital of the evidence introduced at trial is necessarily one emphasizing matters which would justify such instructions, rather than the customary summary of evidence supporting the judgment. (See, e.g., People v. Holt (1944) 25 Cal.2d 59, 62 [153 P.2d 21]; People v. Jackson (1965) 233 Cal.App.2d 639, 640 [43 Cal.Rptr. 817].)⁹

People v. Elize (1999) 71 Cal.App.4th 605, 616 (reversing because “[t]he trial court should have allowed the jury to determine the self-defense issue by instructing upon it when requested.”)

B. Failure to Instruct on a Lesser Included Offense

People v. King, *supra* echoes the more recently stated version of the rule that an instruction on the lesser offense is required “so long as the record contain[s] substantial evidence *from which a jury could reasonably conclude* that defendant was not guilty of [the greater offense] but only of [the lesser offense].” (People v. Barton (1995) 12 Cal.4th 186, 201; emphasis added.)

While a reasonable inference of guilt will support sustaining a conviction on sufficiency even if there are alternative and opposite inferences that could be drawn from the evidence, that is not the review standard on LIO (or, for that matter, defense instructional error). In People v. Breverman (1998) 19 Cal.4th 142, 178, a case where the court said manslaughter lesser instructions should have been given, on the prejudice assessment for denying the LIO, the court said:

Application of the Watson standard of appellate review may disclose that, though error occurred, it was harmless.ⁿ²⁵

⁹ See also People v. Flannel (1979) 25 Cal.3d 668 (If defendant proffers evidence enough to deserve consideration by the jury, i.e., evidence from which a jury composed of reasonable men could have concluded that there was diminished capacity sufficient to negate the requisite criminal intent, he is entitled to the instruction).

-----Footnotes-----

ⁿ²⁵ On the other hand, we disagree with Justice Mosk’s assertion that if the defendant was convicted of the charged offense on substantial evidence, any error in failing to instruct on a lesser included offense must be harmless per se. Justice Mosk’s premise is that such error affects only the lesser offense of which the defendant was not convicted. *But the very purpose of the rule is to allow the jurors to convict of either the greater or the lesser offense where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, “after an examination of the entire cause, including the evidence” (Cal. Const., art. VI, § 13), it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice. Depending on the circumstances of an individual case, such an examination may reveal a reasonable probability that the error affected the outcome in this way.*

Accord People v. Lee (1999) 20 Cal.4th 47, 62-63 (error in not giving involuntary manslaughter instructions held harmless where other involuntary manslaughter instructions were given and: “It is not likely that had it been properly instructed the jury would have returned an involuntary manslaughter verdict”); *see also* Traynor, The Riddle of Harmless Error (1970), p. 28 (“[I]n review of error, the crucial question is not whether there is substantial evidence to support the judgment, but whether error affected the judgment.”)

C. Neder: Failure to Instruct, or Misinstruction, on an Element

Too often the courts of appeal have misapplied the controlling holding in Neder v. United States (1999) 527 U.S. 1 to deem errors harmless based on the appellate court’s assessment of the quality of the trial evidence. Neder stated the appropriate review standard when the element of the offense is missing from the jury instructions:

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 “reflect a denigration of the constitutional rights involved.” Rose [infra] 478 U.S. at 577.

(Id. at 19-20.) Thus, where the defendant contests the omitted element and introduced evidence sufficient to support a contrary finding, the error cannot not be deemed harmless. As Neder holds, “where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.” (Id., at 19.)

Often, appellate courts divert from Neder’s two-pronged approach: 1. was the issue contested, and 2. was there evidence a rational jury could have used to reject the element? Instead, they misapply or fail to apply Neder at all. Instead, they take on the role of a trial jury in assessing the facts of the case to hold harmless errors by finding “overwhelming evidence.” This is the precise danger Justice Scalia, joined by Justices Souter and Ginsburg, dissenting in Neder, predicted, that is, that the remedy for the constitutional violation by the trial court is now a repetition of the same violation by judges sitting on the courts of appeal. (527 U.S. at 30-40.) See Justice Steven’s Neder concurrence stating that harmless error doctrine “may enable a court to remove a taint from proceedings in order to preserve a jury’s findings, but it cannot constitutionally supplement those findings.” (Neder, *supra* at 27.) See also Carter, “Sporting Approach to Harmless Error in Criminal Cases: the Supreme Court’s ‘No Harm, No Foul’ Debacle in Neder v. United States,” 28 Am. J. Crim. L. 229, 241 (2001) (“Allowing an appellate court to decide guilt or innocence on an element of a crime ‘throws open the gate for appellate courts to trample over the jury’s function,’” quoting Justice Scalia’s dissent).

Neder cannot be allowed to morph the standard of review of this issue into a broad talisman for appellate courts to affirm convictions based on appellate redeterminations of evidentiary weight. (See Davis, 25 T. Marshall L. Rev. 45, 77, “Harmless Error in Federal Criminal and Habeas Jurisprudence: the Beast That Swallowed the Constitution” [“reviewing judges may be tempted merely to affirm the

action below by relying on their feeling that, having considered the whole record, the end result below was probably justified, and any errors in the process of reaching the end result therefore must have been harmless”].)

D. Dealing with People v. Sedeno (1973) 10 Cal.3d 703¹⁰

Sedeno holds (in one of many rulings) that an error in failing to instruct the jury on a lesser included offense (or a defense) is harmless when the jury necessarily decided the factual questions posed by the omitted instructions adversely to defendant. (Id. at 721.) As it is now phrased:

In determining whether instructional error was harmless, relevant inquiries are whether “the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions” [citation] and whether the “defendant effectively conceded the issue.” [citation.] A reviewing court considers “the specific language challenged, the instructions as a whole[,] the jury’s findings” [citation], and counsel’s closing arguments to determine whether the instructional error 'would have misled a reasonable jury...

(People v. Eid (2010) 187 Cal.App.4th 859, 883.)

In People v. Stewart (1976) 16 Cal.3d 133, a defendant’s conviction on nine counts of grand theft was reversed because the failure to give a good faith instruction “might well have led the jury to conclude that the existence of defendant’s subjective belief was irrelevant.” (Id. at 142.) As to the harmless error analysis, the court stated:

¹⁰ In Sedeno, the defendant was convicted of murdering a police officer who was attempting to apprehend him. The defendant testified that the officer's gun, which he grabbed in a struggle, went off by accident and that he did not intend to shoot him. On appeal, he argued inter alia that the trial court should have instructed sua sponte on imperfect self-defense and heat of passion manslaughter. In holding there was no sua sponte duty to instruct on such defenses, the Court relied on the state of the evidence and particularly the defendant's testimony that the shooting was an accident. (Id. at 717-718.) “Since there was no evidence that defendant believed he was acting in self-defense, there was likewise no basis for an instruction on the effect of an unreasonable belief that deadly force was necessary in defense of self.” (Id. at 718.)

[T]he People urge that even if the court erred in failing adequately to instruct the jury on defendant's theory, such error was not prejudicial since, under the instructions given which defined embezzlement and the requisite intent, the jury must necessarily have determined the issue of intent against the defendant. We must reject the argument. ". . . [A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence, . . ." (People v. Sedeno, supra, 10 Cal.3d, at p. 720.) An erroneous failure to instruct on an affirmative defense relied upon by the defendant constitutes a denial of this right which "is in itself a miscarriage of justice..." (People v. St. Martin, supra, 1 Cal.3d 524, 532; and see People v. Oehler (1970) 7 Cal.App.3d 685, 688-689 [86 Cal.Rptr. 703], in which a conviction was reversed for failure to instruct on the defense theory in an embezzlement prosecution.) ". . . [Such] error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would . . ." not have convicted the defendant. (People v. Sedeno, supra, at p. 720 [Italics added].)

It is true that a failure to instruct where there is a duty to do so can be cured *if it is shown that "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions."* (People v. Sedeno, supra, 10 Cal.3d, at p. 721[Italics added].) In the instant case, under the general instructions defining fraudulent intent, we conclude the jury did not necessarily find that defendant lacked a good faith belief that he was acting in a manner authorized by his employer.

Id. at pp. 141-142, italics added.)

The appellate practitioner needs to be aware that the test in Sedeno does not apply as broadly as it once did. Originally, Sedeno applied to failure to instruct on a lesser included offense. (People v. Sedeno, supra, 10 Cal.3d at 719-721.) People v. Breverman (1998) 19 Cal.4th 142, 164-179, held that the failure to instruct on a lesser

included offense is an error of state law subject to the Watson “reasonable probability of a more favorable result” standard for determining prejudice. Stewart, however, is a case involving an error in instructing on a defense, rather than an error in instructing on a lesser included offense. As noted above, the failure to instruct on a defense is federal constitutional error. (Harris v. Alexander (2d Cir. 2008) 548 F.3d 200, 203-206; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1098-1099; Davis v. Strack (2d Cir. 2001) 270 F.3d 111, 131-132; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867, 874-876.)

Although this entitles a defendant to application of the Chapman standard, the Sedeno standard actually is more favorable to a defendant. More importantly, although the California Supreme Court held in Breverman that Sedeno does not apply to the failure to instruct on a lesser included offense, it has not held that Sedeno does not apply to the failure to instruct on a defense. Accordingly, under binding California Supreme Court case law, such as Stewart and People v. Mayberry (1975) 15 Cal.3d 143, 157-158, the test in Sedeno applies to the failure to instruct on a defense.

E. The Chapman Standard

If the record shows federal constitutional error that is not structural error, and therefore not reversible per se (see the next subsection), the test for reversal is that in Chapman v. California (1967) 386 U.S. 18. As Bible students know by heart the first line of Genesis, we all know by heart the classic statement of the Chapman standard – the beneficiary of the constitutional error, i.e., the People, must “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (Id. at 24.) But there is more, much more, than this to the proper application of the rule.

Some – perhaps even much – of the much more is in Chapman itself. In Chapman, the U.S. Supreme Court discussed a then-recent case, Fahy v. Connecticut (1963) 375 U.S. 85, where the Court said, “‘The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the verdict.’” (Chapman at 23, quoting Fahy.) The Court went on to say: “An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless.” (Chapman at 23-24.) The Supreme Court also said: “There is little, if any, difference between our statement in Fahy v. Connecticut about ‘whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction’ and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (Chapman at 24.) These statements from Chapman can supplement an ordinary Chapman analysis. If it appears that one of the alternate formulations for the test in Chapman is a more promising standard for reversal, use it.

You would not be the first to do this. Look at People v. Stritzinger (1983) 34 Cal.3d 505, a case in which the California Supreme Court reversed for constitutional

error related to the admission of evidence. There, the Court mentioned the “reasonable possibility” test in Fahy and Chapman. (Id at 520.) It then said: “Where a fundamental constitutional right is at issue, erroneous evidentiary rulings are seldom harmless under this standard...” (Ibid.) After all, “where federal constitutional error occurs and prejudice can be assessed from the record, there is a strong presumption that the defendant was prejudiced.” (People v. Whitt (1990) 51 Cal.3d 620, 649; *see also* People v. Guzman (2000) 80 Cal.App.4th 1282, 1290 [burden of proving error was harmless beyond a reasonable doubt is a “heavy” one].)

Another point to keep in mind related to the language in Chapman stating that the beneficiary of the error must prove beyond a reasonable doubt that the error “did not contribute to the verdict obtained.” (Chapman, *supra* at 24.) “To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” (People v. Neal (2003) 31 Cal.4th 63, 86, *quoting* Yates v. Evatt (1991) 500 U.S. 391, 403.) If the error does not relate to something unimportant, reversal is required.

It also is important to remember that under Chapman it is the beneficiary of the error that must show the error is harmless. This means that “the government must demonstrate that the error was harmless; a defendant need not affirmatively show harm.” (United States v. McKinney (7th Cir. 1992) 954 F.2d 471, 475.) So what happens if it is impossible to show the effect of the error? Let’s run through an example based on this apparently rhetorical question.

The U.S. Supreme Court has held that in a criminal case a defendant is entitled “to be present from the time the jury is impaneled until its discharge after rendering the verdict.” (United States v. Shields (1927) 273 U.S. 583, 589.) This right is based on the due process clause of the Fourteenth Amendment. (Kentucky v. Stincer (1987)

482 U.S. 730, 745.) Suppose the defendant is not present and it cannot be determined what would have happened if he had been present. Must the defendant show what he would have done if he had been present and that the result might have been different if he had been present? Not under Chapman. The State has the burden of showing affirmatively that he had nothing to add and nothing would have been different. But they cannot make this showing because they have no idea what the defendant would have done and therefore no idea on the impact this mysterious and unknown participation might have had. In such a situation, the error requires reversal. (See Hill v. State (N.D. 2000) 615 N.W.2d 135, 141.) In similar situations, the error also would require reversal.

F. Per Se Reversal

In 1986, the United States Supreme Court limited the scope of reversal per se for federal constitutional error in Rose v. Clark (1986) 478 U.S. 570. The majority held Chapman's harmless-error test, rather than the *per se* reversal standard, should usually be applied when federal constitutional error is found. (Id., at 578.) Rose said that only the most fundamental types of constitutional error require reversal per se:

The State of course must provide a trial before an impartial judge, [citation] with counsel to help the accused defend against the State's charge, [citations]. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, [citation] and no criminal punishment may be regarded as fundamentally fair. Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury. [citations.] (Emphasis added.)

Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury.... (Rose v. Clark, *supra*, 478 U.S. at p. 578.)

The majority opinion then summed up:

We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule. (Id. at 578.)

In Pope v. Illinois (1987) 481 U.S. 497, an Illinois trial judge instructed a jury that the issue of whether a particular work was obscene was to be judged by applying community standards. After finding this instruction clearly erroneous, the Court held the Chapman standard, and not reversal per se, should be used to determine whether the conviction must be reversed. It also suggested pre-Rose opinions applying the per se standard to similar errors are no longer good authority:

By leaving open the possibility that petitioner's convictions can be preserved despite the instructional error, we do no more than we did in Rose. To the extent that cases prior to Rose may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, . . . [citation omitted] . . . after Rose, they are no longer good authority (Pope v. Illinois, supra, 481 U.S. at 504, fn. 7.)

Since Rose v. Clark was decided, the Supreme Court has reversed convictions using the *per se* standard in only a few cases. The standard was used in a case where a state court permitted appellate counsel to withdraw, leaving the client unrepresented while the appeal was pending (Penson v. Ohio (1989) 488 U.S. 75.)¹¹ Then it was used to reverse a conviction under an Ohio pornography statute. (Osborne v. Ohio (1990) 495 U.S. 103.) The trial court in Osborne entirely omitted instructions defining

¹¹ The California Supreme Court has followed Rose in applying Chapman to most federal constitutional violations. (People v. Rodriguez (1986) 42 Cal.3d 1005, 1013; People v. Lee (1987) 43 Cal.3d 666, 674-675.) In People v. Hedgecock (1990) 51 Cal. 3d 395, the court reversed a conviction where a trial court completely deprived the jury an opportunity to consider an element of the crime of perjury. Although this error appears to fit squarely within language of Rose requiring per se reversal, the California Supreme Court refused to say it was applying the per se standard, instead saying it would reverse whether Rose or Chapman applied

lewdness, an element of the charged offense.¹² The high court reversed and remanded for a new trial without reference to Chapman harmless error analysis. (Ibid.)

The Supreme Court further limited federal per se reversal in Arizona v. Fulminante (1991) 499 U.S. 279.¹³ There, five justices held that harmless error analysis is applicable to “trial errors” – even those of a constitutional nature – a category which now includes admission of a coerced confession. Trial errors occur during the presentation of the case to the jury and therefore may be quantitatively assessed in the context of the evidence presented in order to determine whether the error is harmless beyond a reasonable doubt. (Id. at 307-308.) Structural errors are defects in the constitution of the trial mechanism which defy analysis by harmless-error standards, and affect the framework within which the trial proceeds rather than being simply an error in the trial process itself. (Id. at 309-310.)

Justice White, voicing his dissent from the majority ruling, noted numerous errors which have been held to require reversal per se, despite overwhelming evidence of guilt including Gideon v. Wainwright, 372 U.S. 335 (1963) [total deprivation of the right to counsel at trial]; Vasquez v. Hillery (1986) 474 U.S. 254 [conviction set aside due to unlawful exclusion of members of defendant’s race from grand jury which indicted him]; Tumey v. Ohio (1927) 273 U.S. 510 [reversal required where case was tried before judge with a financial interest in outcome, despite lack of indication judge was improperly influenced by bias]; Waller v. Georgia (1984) 467 U.S. 39 [violation

¹² Osborne must be distinguished from cases where a trial court has **misinstructed** on an element of an offense, rather than completely omitted instruction on an element of an offense. Rose v. Clark was a case in which the jury was misinstructed concerning the intent required for murder. The Sixth Circuit Court of Appeals determined the error required reversal *per se* of a murder conviction. The Supreme Court granted certiorari to determine whether that was the correct standard for reversal. Answer: no. (478 U.S. at 576-78.)

¹³ The California Supreme Court has followed in Fulminante’s footsteps. (People v. Cahill (1993) 5 Cal.4th 478.)

of right to public trial requires per se reversal]; McKaskle v. Wiggins (1984) 465 U.S. 168, 177-178, fn. 8 [Faretta right of self-representation at trial.]

Other errors requiring reversal per se include denial of counsel of choice to a defendant who is financially able to retain counsel (United States v. Gonzalez-Lopez (2006) 548 U.S. 140, 150-151), the failure of counsel to subject the prosecution's case to meaningful adversarial testing (United States v. Cronin (1984) 466 U.S. 648, 668), the giving of a constitutionally deficient reasonable-doubt instruction (Sullivan v. Louisiana (1993) 508 U.S. 275, 280-282), denying the defendant access to his attorney during an overnight recess (Perry v. Leeke (1989) 488 U.S. 272, 278-279), instructing the jury that a defendant can be found guilty on a preponderance of the evidence (Jackson v. Virginia (1979) 443 U.S. 307, 320, fn. 14; People v. Phillips (1985) 41 Cal.3d 29, 84), issuing peremptory challenges against jurors on the basis of bias against a cognizable group (People v. Wheeler (1978) 22 Cal.3d 258, 283; People v. Silva (2001) 25 Cal.4th 345, 386; Windham v. Merkle (9th Cir. 1998) 163 F.3d 1092, 1096; United States v. McFerron (6th Cir. 1998) 163 F.3d 952, 955-956; Tankleff v. Senkowski (2nd Cir. 1998) 135 F.3d 235, 248), the failure to furnish a retried defendant with a free transcript of his prior trial (People v. Hosner (1975) 15 Cal.3d 60, 70), denying the defendant the right to present his defense (In re Eichorn (1998) 69 Cal.App.4th 382, 390-391), preventing defense counsel from arguing the defense theory of the case and instructing the jury that no evidence supported that theory (United States v. Miguel (9th Cir. 2003) 338 F.3d 995, 1000-1004), allowing the jury, during deliberations, to listen to audiotapes never played in open court (United States v. Noushfar (9th Cir. 1996) 78 F.3d 1442, 1444-1446), having the court clerk, rather than the court, rule on a request for a re-reading of testimony (Riley v. Deeds (9th Cir. 1995) 56 F.3d 1117, 1119-1120), having the judge absent during part of the trial (United States v. Mortimer (3d Cir. 1998) 161 F.3d 240 [closing argument]).

V. WHATEVER THE RULE OF REVIEW (CHAPMAN OR WATSON), CERTAIN FACTORS ARE OFTEN LOOKED TO IN A CLOSE CASE WHICH AID THE COURTS IN DECIDING IF THE ERROR IS PREJUDICIAL AND REVERSIBLE.

A. Answering the “Overwhelming Evidence of Guilt” Mantra.

This is often the refrain of the appellate court in finding no harm from an error. As Dallas Sacher has written, the place to start countering this knee-jerk mantra is Chapman v. California (1967) 386 U.S. 18. There, the evidence was very strong, yet the Court reversed the murder convictions finding the State failed to prove the error harmless beyond a reasonable doubt. The victim there was thrice shot in the head with a .22 and dumped in a remote area. Ms. Chapman bought such a gun less than a week earlier. Near the body, a check was found signed by Chapman. Blood, hair, and fibers from the victim were found in the defendants’ car. A snitch testified that co-defendant Teale¹⁴ confessed that he and Chapman committed the murder. Both defendants were seen with the victim hours before he died. Chapman gave a demonstrably false alibi to the police. Neither Teale nor Chapman testified. In the face of this evidence, the Court held that it was “impossible” to say the Griffin [v. California (1965) 380 U.S. 609] error by the prosecutor (and the judge’s instructions) did not contribute to the convictions of Chapman and Teale. (Chapman, supra, 386 U.S. 26.) When a case is close, a small degree of error in the lower court should be considered enough to have influenced the jury to wrongfully convict the defendant. (See People v. Wagner (1975) 13 Cal.3d 612, 621 [prosecutorial misconduct]; People v. Collins (1968) 68

¹⁴ Because Chapman is light on the facts of the case, they are drawn from the underlying state appeal of Chapman and Teale. (People v. Teale (1965) 63 Cal. 2d 178, 183-186.) As Dallas Sacher’s article states: given these facts and the reversal, “The Supreme Court intended that it would be very difficult for the government to show that a federal constitutional error was harmless.” (Sacher, p. 11.)

Cal.2d 319, 332.)

Factors to consider include:

1. LENGTH OF DELIBERATIONS/JUROR EXPRESSION OF DEADLOCK.

The courts in different ways use the time factor to show how close a case was in the eyes of the jury. Counsel can argue that a short deliberation time demonstrates prejudice (“see how quickly they came back”) (*see e.g.*, People v. Cook (1983) 33 Cal.3d 400, 412 [deadlocked jury returned verdict after 14 minutes of deliberations after judge’s improper comment on the defendant’s guilt]; People v. Markus (1978) 82 Cal.App.3d 477, 480), or that a long time shows the closeness of the case:

The jury apparently felt that the case was a close one. It first retired at 10:43 a.m. and did not reach its verdict until 8:57 p.m. A little earlier, at 8:05 p.m. the foreman of the jury had expressed the opinion that there was no reasonable possibility of a verdict being reached that evening. Admission of the rejected evidence could have raised a reasonable doubt. The error was prejudicial. (People v. Bennett (1969) 276 Cal.App.2d 172, 176.)

See also In re Martin (1987) 44 Cal. 3d 1, 51:

the case was evidently very close. The fact that the jury deliberated almost 22 hours over 5 days practically compels the conclusion. (People v. Cardenas (1982) 31 Cal.3d 897, 907 [184 Cal. Rptr. 165, 647 P.2d 569] [stating that the fact the jury deliberated for twelve hours was “a graphic demonstration of the closeness of this case”]; People v. Rucker (1980) 26 Cal.3d 368, 391 [162 Cal. Rptr. 13, 605 P.2d 843] [implying that the fact the jury deliberated for nine hours evidenced the closeness of the question of guilt]; People v. Woodard (1979) 23 Cal.3d 329, 341 [152 Cal. Rptr. 536, 590 P.2d 391] [stating that jury deliberations of almost six hours were an indication that the issue of guilt was not “open and shut.”].)

See also People v. Collins (1968) 68 Cal.2d 319, 332 [eight hours]; People v. Rolon (1967) 66 Cal.2d 690, 694 [“Even with this improper information before it, however, the jury found it necessary to deliberate from noon of one day until midmorning of the next before returning a guilty verdict”]; People v. Fabert (1982) 127 Cal.App.3d 604, 610 [the fact that the deliberations lasted six hours “underscores the closeness of the case”]; Gentry v. Roe (9th Cir. 2003) 320 F.3d 891, 902 [finding a reasonable probability of a different result after disagreeing that the evidence of guilt was overwhelming and noting that the jury deliberated for six hours before reaching a verdict]; Rhoden v. Rowland (9th Cir. 1999) 172 F.3d 633, 637 [finding error not to be harmless after noting “the jurors deliberated for over nine hours over three days, which suggests that they did not find the case to be clear-cut”] Gibson v. Clanon (9th Cir. 1980) 633 F.2d 851, 855 and fn. 8 [finding a reasonable probability of a different result and that the case against the defendant was close, based, in part, on jury deliberations having lasted nine hours].)

2. REQUEST BY JURORS FOR TESTIMONY OR INSTRUCTIONS TO BE REREAD OR ASKS QUESTIONS.

A jury’s request for additional instructions on a particular point shows that the jury is “troubled” by the point. (People v. Filson (1994) 22 Cal.App.4th 1841, 1852.) “Juror questions and requests to have testimony reread are indications the deliberations were close.” (People v. Pearch (1991) 229 Cal.App.3d 1282, 1295; see also People v. West (1983) 139 Cal.App.3d 606, 610 [“The closeness of this case is demonstrated by the fact that the jury asked for rereading of a substantial portion of the testimony, asked for a rereading of some instructions and at one point reported itself deadlocked.”])

Penal Code § 1138 states: “After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed

on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, **the information required must be given** in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.” (Emphasis added.)

By statute, trial courts are required, on request of a deliberating jury, to instruct “on any point of law arising in the case.” (Pen. Code, § 1138.) The meaning of “mutual combat” was clearly a “point of law arising in the case,” and one on which the jury explicitly sought guidance. The trial court erred by leaving the jury to suppose that “mutual combat” involved no particular legal requirement, but should be understood and applied in an ordinary, lay sense.

People v. Ross (2007) 155 Cal.App.4th 1033, 1047.)

In People v. Williams (1971) 22 Cal.App.3d 34, three psychiatrists testified. During deliberations, the jury requested that testimony of one of the psychiatrists be reread. The court stated this indicated the closeness of the case and then applied a cumulative error analysis:

Any one of the defects, as a sole irregularity in the face of a strong prosecution case, would probably not be considered prejudicial, but the totality of all the matters to be discussed, in combination, in light of the demonstrably close case herein, does reach, we feel, the level of harmful prejudice.

(Id. at 38-40.)

Jury questions on law:

Unfortunately, the jury ran aground on the question of when appellant had to acquire knowledge of his companion’s criminal purpose in order to be guilty of aiding and abetting. *They specifically requested additional instruction* as to whether, if appellant did not attain knowledge of what, criminally, was afoot until the moment his companion returned to the auto, he could be found guilty of aiding and abetting, i.e., as a principal rather than as an accessory. The trial judge’s answer to this question was in the affirmative. Very shortly thereafter, the jury returned a verdict finding appellant guilty as charged.

Thus it appears that the jury was seriously considering the defense that appellant lacked knowledge of the crime prior to the moment of departure from the scene thereof. It further appears that the trial court's advice as to this one point was quite decisive.

(People v. Markus (1978) 82 Cal.App.3d 477, 480.)

When a jury indicates its confusion and needs further instruction, the failure to give proper additional instructions is usually reversible error. (Sesler v. Ghumman (1990) 219 Cal.App.3d 218, 227.)

3. JURY CONVICTS SOON AFTER REHEARING ERRONEOUSLY RECEIVED EVIDENCE.

It is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (See Cal. Const., art. VI, § 13; People v. Watson (1956) 46 Cal.2d 818, 836.) Used as substantive evidence, the erroneously admitted evidence amounted to a confession. During its deliberations, at its request, the jury heard the evidence again; soon thereafter the guilty verdict was returned. The only other evidence incriminating defendant was the store manager's identification . . . [which was] based solely on defendant's stature and voice. Moreover, none of the other five witnesses viewing the lineup was able to identify defendant.

(People v. Williams (1976) 16 Cal.3d 663, 669.)

4. PREVIOUS HUNG JURIES.

Previous hung juries provide a fertile field for prejudice factors. The best example is when erroneous evidence is received in the second case (from which the conviction resulted) which was not introduced in the first.

We find the likelihood that defendant would have achieved a more favorable result in the absence of the errors to be more than "merely a reasonable chance," and considerably more than an "abstract possibility." *We begin with the fact that the jury in the first trial was unable to reach a verdict, and that its last communication before deadlocking was a question about self-defense.*

(People v. Ross (2007) 155 Cal.App.4th 1033, 1055.)

It is particularly significant that at the first trial, when the jury was instructed on self-defense, the jurors were unable to reach a verdict on count 1. At the second trial, no instruction on self-defense was given, and the jurors returned a guilty verdict on count 1. That difference between the two trials makes it likely that the instructional error was prejudicial here.

(People v. Lee (2005) 131 Cal.App.4th 1413, 1430.)

The final question is whether this prejudicial error requires reversal. People v. Watson (1956) 46 Cal.2d 818, 836, compels reversal where the appellate court, after a thorough review of the record, is of the opinion that a result more favorable to defendant would have been reached in the absence of the error. In the instant case, *defendant's first trial, without the prejudicial error which occurred at this second trial, had ended in a hung jury*. We could thus avoid reversible error only if steadfast identification by one witness (Mitchell) be held sufficient for the jury to reach its guilty verdict; however, her identification of defendant did not convince the jury the first time. Here, in the second trial, the problem was compounded by prejudicial testimony which could have confused the issues and misled the jury. We believe, under the circumstances, that conviction resulted from prejudicial and, hence, reversible error.

(People v. Brooks (1979) 88 Cal.App.3d 180, 188.)

There can be no doubt as to the sufficiency of the evidence to justify the verdict of voluntary manslaughter, but it cannot be said the evidence of guilt was so strong as to preclude a finding of innocence. It is significant that upon the former trial there was no evidence of defendant's statement that he was an ex-convict, and the jury disagreed.

The objectionable testimony was produced in order to strengthen the People's case by generating prejudice in the minds of the jurors. It is our opinion that its use for that purpose was not only serious misconduct but was fraught with such harm to defendant as to be irremediable. We would not be warranted in affirming the judgment unless we felt assured the court's admonition removed the obvious prejudice to the defense. In view of the entire record we cannot say that the admonition probably accomplished that purpose.

(People v. Ozuna (1963) 213 Cal.App.2d 338, 342.)

5. REFUSAL OF JURY TO CONVICT ON ALL COUNTS.

Additionally, we must point out that the jury hung on the attempted murder count. Thus, the jurors were unable to agree that defendant had the specific intent to kill. We cannot say, therefore, that the absence of Morgan's pivotal testimony was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) Perhaps the jurors, informed by what Morgan observed immediately following the shooting, would have also concluded the shooting was not volitional or that defendant was not conscious of what he was doing.

(People v. Treadway (2010) 182 Cal.App.4th 562, 571.)

While we do not speculate as to the jury's rationale, we simply acknowledge the fact that the jury's inability to reach a verdict on the two intentional discharge of a firearm enhancements indicates that the jury struggled with the issue of whether defendant discharged an intentionally drawn firearm accidentally. This underlines the necessity of the excusable homicide and brandishing instructions in this case. Thus, on retrial, if defendant again relies on a claim of accident in the course of self-defense, the trial court should instruct the jury on excusable homicide (CALCRIM No. 510) and brandishing, including that brandishing in self-defense is lawful (CALCRIM No. 983).

(People v. Villanueva (2008) 169 Cal.App.4th 41, 54.)

The conviction depends basically on weighing the evidence of the witness Cross against the evidence of the appellant. The fact that the jury came back in to have reread to it some of the testimony concerning the trousers from which the tracings were taken and refused to convict appellant of the second count emphasizes the closeness of the case to the jury. We are satisfied that in a close case of this nature the error discussed may well have tipped the scales in the balance and hence was in fact prejudicial. Judgment reversed for a new trial.

(People v. Washington (1958) 163 Cal.App.2d 833, 846.)

In view of the verdict's reflecting the jury's selective belief in the evidence [by acquitting appellant on two of three counts], we cannot conclude otherwise than that the admission of the [prior similar act]

Sandra and Charlotte evidence was prejudicial requiring reversal.

(People v. Epps (1981) 122 Cal.App.3d 691, 698; *see also* People v. Brown (1993) 17 Cal.App.4th 1389, 1398 [“jury apparently found [the case] to be a close case because they were only able to reach a verdict on one of the two counts.”]; People v. Sojka (2011) __ Cal.App.4th __ [“the fact of the jury’s inability to reach verdicts on four other charges and acquitting on one supports our [prejudice] conclusion”].)

6. STRONG UNIMPEACHED DEFENSE CASE.

The prosecution introduced persuasive evidence of guilt in this case. However, defense witnesses testified to defendant’s presence elsewhere than the scene of the crime at the time the crime was committed. These witnesses were unimpeached and their testimony was not rebutted except to point out that Mr. Murray had erred in his estimate of the time defendant had left the party. An admitted participant in the crime testified that his accomplice was one other than defendant and offered a physical description of his accomplice that raised the possibility of mistaken identity on the part of the prosecution witnesses.

The reference in this case to the prior conviction was peculiarly apt to be prejudicial. The jury was made aware that the defense witness Fredericks and defendant were both charged with committing the burglary of Phil’s Typewriter Shop. In attempting to impeach Fredericks, the prosecution directed attention to a prior joint conviction for a burglary the witness and defendant had committed. It is unlikely that the jury missed the arguably logical, but prejudicial, inference that the prior joint criminal activity of defendant and his witness was indicative of guilt in this case. Even with this improper information before it, however, the jury found it necessary to deliberate from noon of one day until midmorning of the next before returning a guilty verdict. In light of these facts it is reasonably probable that a result more favorable to defendant would have been reached had the improprieties not occurred.

(People v. Rolon (1967) 66 Cal.2d 690, 694.)

7. CLOSE AND DIFFICULT CREDIBILITY DETERMINATION.

In this case, the trial court committed serious evidentiary errors. The jury

was confronted with an extremely close question as to whether appellant was the man responsible for the crimes charged. The evidence raised strong doubts as to the reliability of the eyewitness identifications. In allowing the prosecutor to introduce evidence portraying appellant as a Chicano gang member predisposed to commit violent crimes and as a heroin addict desperate to obtain money to support his habit, the trial court ensured that the jury would reach a verdict based on improper evidence.

(People v. Cardenas (1982) 31 Cal.3d 897, 914; *See also* People v. Anderson (1978) 20 Cal.3d 647, 651 [the court noted that the jury took several days to deliberate].) People v. Allen (1978) 77 Cal.App.3d 924, 935, looked to the close contest of credibility between the defense and prosecution cases and stated:

This court found reversible error when the defendant was called an ‘ex-convict’ in People v. Ozuna (1963) 213 Cal.App.2d 338, 342, and when a witness stated that defendant “did time” in San Quentin in People v. Figueredo (1955) 130 Cal.App.2d 498, 505-506.

“The finding of exceptional circumstances depends upon the facts in each case. ‘An improper reference to a prior conviction may be grounds for reversal in itself [citations] but is nonprejudicial in the light of a record which points convincingly to guilt’” (People v. Rolon (1967) 66 Cal.2d 690, 693.)

An examination of the record reveals an extremely close case in which the jury had to make its fact determination based upon the credibility of the appellant and his witnesses and of the credibility of the prosecution's witnesses. In the light of these facts, it is reasonably probable that a result more favorable to appellant would have been reached had the prejudicial information of appellant's parole status not been divulged to the jury.

B. Once a Close Case is Established Consider the Following Examples of Pivotal Factors Establishing Prejudicial Error:

- 1. PROSECUTOR USED ERRONEOUSLY ADMITTED EVIDENCE TO PERSUADE JURY DURING FINAL ARGUMENT.**

Identity of the perpetrator was the central issue in appellant's trial. Johnson and Spencer, the victim, were the only witnesses to testify as to identity. Therefore, Johnson's credibility was critical. Recognizing this, the prosecutor exploited the erroneously admitted prior convictions during final arguments to discredit Johnson as a witness. . . . Even though there was no indication that Johnson had perjured himself, the jury may have been persuaded that Johnson was such an unsavory character due to his prior convictions that his testimony should be disregarded.

(People v. Woodard (1979) 23 Cal.3d 329, 341.)

2. ERROR DIRECTLY RELATED TO WEAKNESSES IN THE PROSECUTION CASE.

In People v. Roberts (1967) 256 Cal.App.2d 488, the "close case" test was applied requiring reversal for what might otherwise be considered nonprejudicial error. In that case a requested instruction relating reasonable doubt to identification was refused. The conviction of Roberts rested entirely on his identification by police officers. The lighting conditions under which he had been observed engaging in illegal activities had been only "fair." His arrest had been deferred. There was no corroboration. The court concluded that under those circumstances the failure of the trial court to give the requested instruction was prejudicial error and required reversal.

3. CASE BASED ON CONFLICTING CIRCUMSTANTIAL EVIDENCE.

The facts, however, must be considered in some detail because it is apparent from the circumstantial nature of the evidence and the conflicting inferences which may be drawn therefrom, that a very close case is presented, and, therefore, any error committed by the trial court which materially affected the substantial rights of defendant and might have resulted in a miscarriage of justice, must be deemed prejudicial and ground for reversal.

(People v. Weatherford (1945) 27 Cal.2d 401, 403 [emphasis added; jury misconduct

case].)

4. **DEFENDANT IS THE ONLY EYEWITNESS TO A KILLING HE COMMITTED UNDER ARGUABLY JUSTIFIABLE CIRCUMSTANCES. ERRORS AFFECTING DEFENSE PREJUDICIAL.**

We have found it necessary to discuss a good many of the instructions given and some of those refused, and our conclusion is that the errors were such as to require a reversal. It is the cumulative effect of numerous errors which forces this conclusion, and we reiterate that we are considering the probable effect of such errors upon the jury's determination of guilt in a case where guilt was not firmly established. We consider it not improbable that a conviction would not have occurred but for the errors to be hereafter discussed. We find appropriate to our discussion the statement of the Supreme Court in People v. Newcomer (1897) 118 Cal. 263, at 267: "Under these circumstances, if the appellant was justified in killing the deceased, as he might have been, he was in the embarrassing position of one who justly kills another when there is no other witness to the homicide, when he has to admit the homicide and depend greatly upon his own testimony to justify it. In such a case it is evident that a jury will have difficulty in determining the real facts; and in such a case it is apparent that the instructions of the court are very important - particularly when, as in the case at bar, the court instructs at great length. Under such circumstances, any instruction tending to lead the jury from the real issues in question is material, and if erroneous is reversible error."

(People v. Hatchett (1944) 63 Cal.App.2d 144, 152 [emphasis added].)

5. **INABILITY OF REVIEWING COURT TO SAY JURY CONVICTED SOLELY ON ADMISSIBLE EVIDENCE.**

When, as in this instance, a reviewing court is unable to determine from the record whether a jury convicted on admissible evidence or rejected

that evidence and convicted on inadmissible evidence improperly received, it must find the error to have been prejudicial. Under a different factual situation, but where the principle was equally applicable, this court said: “However reprehensible the conduct of an accused, he is entitled to have its legal consequences determined from competent evidence by a jury properly instructed. Here, we cannot fairly say that, had the improper evidence improperly used not been before the jury, unadvised of its impropriety, the verdict and sentence would have been the same.”

(People v. Orcalles (1948) 32 Cal.2d 562, 573.)

“When, as here, reliance on the improperly received evidence was aided by improper instructions, there should be no question of the prejudicial nature of the dual error (People v. McCaughan 49 Cal.2d 409, 416).” (People v. Robinson (1964) 61 Cal.2d 373, 406.)

6. DEFENDANT FORCED TO TAKE STAND TO REFUTE ILLEGALLY OBTAINED CONFESSION.

In light of the overwhelming damage thereby inflicted by the prosecution, we must surely acknowledge at least a “reasonable possibility” that the defendant took the stand in part because a confession which he erroneously believed admissible had completely demolished his prospects for a favorable verdict. In recognizing such a possibility here, we do no more than heed the admonition of Justice Cardozo: “The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.” (De Cicco v. Schweizer (1917) 221 N.Y. 431, 438 [117 N.E. 807].)

We conclude that the record in this case fails to dispel beyond a reasonable doubt the possibility that the defendant took the stand in an attempt to mitigate the explosive impact of a confession which had left his case in ruin.”

(People v. Spencer (1967) 66 Cal.2d 158, 169.)

7. FACT THAT EXCLUDED EVIDENCE WOULD CORROBORATE THE DEFENDANT'S TESTIMONY.

“The appellant was entitled to prove by disinterested witnesses, if he could, that the deceased made the statement attributed to him. It might be that the jury would hesitate to accept the uncorroborated evidence of the defendant in a case, when, if his testimony were supported by the evidence of a disinterested witness, they might take an entirely different attitude toward it [citations].” (People v. Davis (1965) 63 Cal.2d 648, 656-657.)

8. DAMAGING INFLUENCE OF JUDGE'S AND DISTRICT ATTORNEY'S WORDS IN ADMITTING PHYSICAL EVIDENCE.

The gun and jacket did not go to the jury carrying only their own evidentiary value. *The orders admitting them and overruling the objections made on the ground of lack of foundation and immateriality told the jurors that the judge believed that the gun and jacket had something to do with the case.* In this case the argument of the prosecutor, apart from its intrinsic value, carried to the jury the impression that a legally trained public servant had a belief in the evidentiary value of the exhibits.

It may be that the gun and jacket had no substantial impact upon any juror, but in light of what has been said here we are not sure beyond a reasonable doubt. Perhaps without the exhibits one of the jurors would have doubted, and the defendant was entitled to the benefit of the doubt, although to us and the other judges who have studied the case the doubt would have been reasonable.

(Dean v. Hocker (9th Cir. 1969) 409 F.2d 319, 322 [This case is interesting also for its interpretation of the Chapman standard (“the dumbest juror” rule): “To summarize a constitutional error in the admission of evidence is harmless under Fahy and Chapman only if it can be said that there is no reasonable possibility that illegally admitted evidence did not overcome in the mind of the dullest juror a doubt which that mind might have conceived to be reasonable.” (Dean, at 321.)]

Just the admission of prosecution evidence can require reversal if it “strikes directly at the heart of the defense.” (People v. Ireland (1968) 70 Cal.2d 522, 532.)

9. FACTORS IN ASSESSING PREJUDICE FOR PROSECUTION MISCONDUCT AND EVIDENTIARY ERROR.

a. For Griffin error, the courts look to see: 1) if the evidence against defendant is less than overwhelming, and 2) if the improper comment touched “a live nerve in the [appellant's] defense,” (People v. Modesto (1967) 66 Cal.2d at 714.)

b. In sex cases, at least where credibility is an issue, prosecution misconduct is deemed especially damaging. (People v. Wagner (1975) 13 Cal.3d 612, 621; People v. Johnson (1981) 121 Cal.App.3d 94, 105; People v. Murillo (1987) 191 Cal.App.3d 328.)

c. Courts will deem the district attorney’s erroneous use of evidence as important as the prosecutor deemed it at trial: “Indeed, we have seen how important these statements were to the People’s case, and ‘There is no reason why we should treat this evidence as any less “crucial” than the prosecutor - and so presumably the jury - treated it.’” (People v. Cruz (1964) 61 Cal.2d 861, 868; People v. Powell (1967) 67 Cal.2d 32, 57.) See also People v. Glass (1910) 158 Cal. 650, 659:

Quite apposite in this connection is the following language of the circuit court of the United States in Miller v. Territory of Oklahoma, 149 Fed. 330. “The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should sometimes be placed, instead of imputing the reversal of convictions by the appellate courts to what is properly termed ‘mere technicalities.’ The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that

it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.”

Also, in a case in which evidence was introduced for a limited purpose, look to see if the prosecutor improperly argued the evidence for a broader purpose. In People v. Fletcher (1996) 13 Cal.4th 451, the pretrial statement of Fletcher was only admissible as to his guilt and not as to the guilt of codefendant Moord. Nevertheless, the prosecutor argued that Fletcher’s statement related to the intent of both defendants. The Supreme Court found this important when concluding the error in admitting the evidence as to Moord was prejudicial, stating: “As Moord argues in his brief to this court, this argument ‘demonstrates that not even the prosecutor – a trained attorney with sufficient experience to be assigned to homicide cases – could limit the statement to Fletcher and ignore it when arguing [Moord’s] guilt. If the legally trained prosecutor was unable to limit the statement to Fletcher, we safely can infer that this was true of the lay jurors as well.’ Therefore, we agree with the Court of Appeal that the error prejudiced Moord.” (Id. at 471.)

d. Prosecution expressions of personal beliefs deemed highly prejudicial:

“The effect of such remarks is to lead the jury to believe that the district attorney, a sworn officer of the court, has information which the defendant insists on withholding; or that they may consider matters which could not properly be introduced in evidence (Witkin, Cal. Criminal Procedure (1963) § 450, pp. 453-454. See also People v. Mendoza (1974) 37 Cal.App.3d 717, 726; People v. Williams (1971) 22

Cal.App.3d 34, 48-49; People v. Hale (1947) 82 Cal.App.2d 827, 833)” (People v. Johnson (1981) 121 Cal.App.3d 94, 103.)

e. In assessing prosecution misconduct note the admonition of the California Supreme Court in People v. Hamilton (1963) 60 Cal.2d 105, 120-121, condemning prosecutors and trial judges who might try a case with an “eye to the saving grace of the section [art. VI, § 13].”

The harmless error doctrine is responsible for much of the ineffectiveness of appellate review in controlling misconduct by prosecutors:

Under this doctrine, courts have affirmed convictions at the same time that they said, ‘This outrageous conduct on the part of the Government attorney was unethical, highly reprehensible, and merits unqualified condemnation.’ Too often, moreover, the courts’ application of the harmless error doctrine has been mechanical, resting on makeweight arguments or no arguments at all rather than on a careful evaluation of the circumstances of the trial. Courts have, for example, cited long deliberations by the jury as showing that the verdict must have been based on the evidence and not on the prosecutor’s improper remarks. Exactly the same circumstance has, however, seemed to demonstrate the opposite point when the courts wished to reverse; then the length of the deliberations has indicated that the case was a close one, so that the prosecutor’s statements might have tipped the balance”

(Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges (1971) 50 Tex. L.R. 629, 658-659.)

10. **FACTORS IN ASSESSING INSTRUCTIONAL ERRORS.**

a. If the error is one of judicial comment or instruction, note that “words of instruction of the trial judge are more likely to effect prejudice than words of argument of the prosecutor” (People v. Morse (1964) 60 Cal.2d 631, 650), and that “jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. [Citation].” (People v. Lee (1979) 92 Cal.App.3d 707, 715-716.)

b. Rules to follow in assessing prejudice in instructional error are

nicely summarized in LeMons v. Regents (1978) 21 Cal.3d 869: “As a general rule, it is improper to give an instruction which lacks support in the evidence, even if the instruction correctly states the law.” (Id. at 875.) “The next question presented is whether or not this error was prejudicial. (See Cal. Const., art. VI, § 13.) Prejudice appears ‘where it seems probable that the jury’s verdict may have been based on the erroneous instruction . . .’ [citations.] Whether ‘the probable effect of the instruction has been to mislead the jury . . . depends on all the circumstances of the case, including the evidence and the other instructions given.’ [Citations.] “While there is no precise formula for measuring the effect of an erroneous instruction [citation], a number of factors are considered in measuring prejudice: 1) the degree of conflict in the evidence on critical issues [citations]; 2) whether respondent’s argument to the jury may have contributed to the instruction’s misleading effect [citation]; 3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; 4) the closeness of the jury’s verdict [citation]; and 5) the effect of other instructions in remedying the error [citations].” (Id. at 875-876.) “. . . if the jury regarded the two instructions as inconsistent, it cannot be assumed that the jury ignored the improper instruction and based its verdict solely on the correct one.” (Id. at 878.) “. . . where two instructions are inconsistent, the more specific charge controls the general charge.” (Ibid.)

c. Prejudice is Not Always Cured by Cautionary Instructions

People v. Naverrette (2010) 181 Cal.App.4th 828 (police officer’s blurting out prejudicial statement not cured by cautionary instruction); People v. Gomez (1957) 152 Cal.App.2d 139 (trial court’s striking of evidence of the defendant’s juvenile prior conviction and instruction that the jury disregard it did not escape reversible error). *See also* Berger v. U.S. (1935) 295 U.S. 78, 85, “It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial

action as was taken.”

In People v. Valliere (1899) 127 Cal.65, 66-67, after an interjection of personal knowledge by the prosecutor, the court said: “the [DA’s] examination was inexcusable, and the statements contained in the closing address were an *outrage upon justice*, which ought not to be allowed to pass. The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts so procured aside.” (Italics added.) (See also People v. Holt (1984) 37 Cal.3d 436, 458 (“While the jury was instructed at the conclusion of the guilt phase that the subject of penalty or punishment was not to be discussed and must not affect the verdict the instruction did not negate the improper reference to punishment by the prosecutor.”))

“To say that the deputy district attorney’s comment to the jury at the outset of his opening statement that what he was about to tell them was not evidence but only what he intended to prove; and the court’s instruction to the jury that any statement of counsel concerning the facts must not be regarded as evidence, cured the effect of overstatements and misstatements of the evidence by the prosecuting attorney, is to completely ignore their practical and lasting effect on a jury, and the inability of laymen to completely reject and erase from their minds damaging statements they have heard.” (People v. Carr (1958) 163 Cal.App.2d 568, 575-576; see also People v. Coleman (1985) 38 Cal.3d 65, 93; People v. Guerrero (1976) 16 Cal.3d 719, 730; People v. Antick (1975) 15 Cal.3d 79, 98; People v. Pitts (1990) 223 Cal.App.3d 606, 837; People v. Dellinger (1984) 163 Cal.App.3d 284, 299-300; People v. Bracamonte (1981) 119 Cal.App.3d 644, 650; People v. Gibson (1976) 56 Cal.App.3d 119, 130; People v. Roof (1963) 216 Cal.App.2d 222, 225; People v. Buchtel (1963) 221 Cal.App.2d 397, 403 (excellent references on this point.)

d. Factors in Assessing Omitted Cautionary Instructions

In People v. Lopez (1975) 47 Cal.App.3d 8, 14, the court set forth several factors to be employed in making a determination of whether the failure to give a cautionary instruction is prejudicial: 1) whether the evidence concerning the alleged statement is conflicting; 2) whether the oral admissions are reported by witnesses who are friendly to the accused, or by witnesses who may be biased against him; and 3) whether the oral admission has a “vital bearing” upon a substantive issue the jury is required to resolve in reaching its ultimate decision.

e. Repetition of Certain Instructions May be Error by Giving Undue Emphasis to Isolated Statements of Law

“Repetitions of this character are not necessary and should be avoided as far as possible The trial judge should take care to give to the jury, once in clear language, every principle of law applicable to the particular case. When he has done this, he is not required to repeat any of them, Such continual repetition tends to give undue emphasis to the particular point to which they may relate and operates to confuse the jury in their consideration of the evidence.” (People v. Kelley (1980) 113 Cal.App.3d 1005, 1013-1014; see also People v. Bickerstaff (1920) 46 Cal.App. 764, 775.)

f. Instructions telling the jury to disregard any instructions which apply to a state of facts which do not exist, do not eliminate errors in other instructions.

In People v. Saddler (1979) 24 Cal.3d 671, 684, the court said: “While such an instruction does not render an otherwise improper instruction proper, it may be considered in assessing the prejudicial effect of an improper instruction.”

Indeed, a correcting instruction may not cure the error of an incorrect instruction. (See People v. Gloria (1975) 47 Cal.App.3d 1, 7: “Implicit in the giving of instructions is the notion factual questions to which the instructions relate are

presented to the jury for determination. Yet no evidence in the record supports the giving of the instruction as it appears before us. The erroneous giving of the factually unsupported instruction is not cured by giving a later instruction that the jury will disregard any instruction which applies to a state of facts which it determines does not exist. This latter instruction but highlights the implication the jury must make a factual determination concerning the bribery or intimidation of witnesses and the destruction of evidence. At the least the instruction is confusing. At worst it suggests serious wrongdoing on the part of [the defendant].) “Prejudice from an erroneous instruction in a criminal case is not cured by the giving of a correcting instruction on the same subject where the two instructions are contradictory or so inconsistent as to confuse the jury and to make it impossible for the reviewing court to know which of the two instructions they actually followed.” (People v. Rhoden (1972) 6 Cal.3d 519, 520.)

g. The Timing of the Instruction May Help Determine Its Prejudice.

“Given the very brief lapse of time between the erroneous additional instruction and the return of a guilty verdict, we cannot say that the error was harmless. Therefore, a reversal is required (People v. Watson (1956) 46 Cal.2d 818, 835-836).” (People v. Marcus (1978) 82 Cal.App.3d 477, 482.)

11. ERROR IN ADMITTING SIMILAR ACT EVIDENCE IS OFTEN PREJUDICIAL.

The prejudicial effect of bad act evidence is that it produces an over-strong tendency to believe the defendant is guilty of the charge merely because he is a likely person to do such acts. (People v. Holt (1984) 37 Cal.3d 436, 450-451.) In one of the leading cases, People v. Thompson (1980) 27 Cal.3d 303, 332-333, the court does a superb analysis of error in admitting other crimes evidence. Courts have long held evidence of past misconduct can only be admitted with great caution because of the

enormous potential for undue prejudice to the defendant. As stated in People v. Ewoldt (1994) 7 Cal.4th 380, 404, “[e]vidence of uncharged offenses is so prejudicial that its admission requires extremely careful analysis.” Such evidence “is to be received with extreme caution, and all doubts about its connection to the crime charged must be resolved in the accused's favor.” (People v. Alcala (1984) 36 Cal.3d 604, 631.)

In a case involving two prior uncharged offenses, the Tenth Circuit stated the pragmatic truism that once such evidence is introduced “the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.” (U.S. v. Burkhart (10th Cir. 1972) (*en banc*) 458 F.2d 201, 204, *accord* State v. Lucero (1992) 114 N.M. 489, 494 [840 P.2d 1255, 1260] and authorities cited.) Another court observed, “when jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can.” (U.S. v. Johnson (6th Cir. 1994) 27 F.3d 1186, 1193.) Moreover, “regardless of the stated purpose of such evidence, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered – to convict the defendant because he or she is a bad person.” (State v. Sullivan (Iowa 2004) 679 N.W.2d 19, 30, internal quotation marks and citation omitted.)

Empirical evidence confirms the enormous impact of evidence of uncharged crimes on a jury. As one court noted, “empirical studies confirm the fact that juries treat bad-acts evidence as highly probative.” (State v. Henderson (Iowa 2005) 696 N.W.2d 5, 14.) Treatises on evidence summarizing these empirical studies confirm this observation. (1 John W. Strong, McCormick on Evidence (5th ed. 1999) §190, at p. 659 fn.5 [citing study that determined “when a defendant’s criminal record is known

and the prosecution's case has contradictions, the defendant's chances of acquittal are 38% compared to 68% otherwise"]; Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition* (1990) 51 Ohio St. L.J. 575, 581-582 ["The available psychological studies indicate that once they have characterized the accused's general character, the jurors are likely to attach great weight to that characterization in determining whether the accused acted 'in character' on the occasion of the charged offense. . . . Thus, having concluded that the accused is disposed to criminal misconduct, the jurors may ascribe great significance to that conclusion in deciding whether the accused committed the charged crime." (Footnotes omitted)].)

12 . Prejudice not cured by the "curative instruction."

In People v. Valliere (1899) 127 Cal.65, 66-67, after an interjection of personal knowledge by the prosecutor, the court said: "the [DA's] examination was inexcusable, and the statements contained in the closing address were an *outrage upon justice*, which ought not to be allowed to pass. The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts so procured aside." (Italics added.)

In People v. Brophy (1954) 122 Cal.App.2d 638, defense counsel argued the prosecution had not produced a bullet which should have been at the scene. This was true -- no bullet had been introduced. However, during final argument, the prosecutor produced a bullet. The defense objected and the trial court told the jury to ignore the bullet. In reversing the conviction, the appellate court noted the prosecutor's comments were "so highly prejudicial that no admonition of the trial judge to disregard it could erase from the minds of the jurors the undoubted electric effect" of

the bullet's production. *See also* People v. Holt (1984) 37 Cal.3d 436, 458 (“While the jury was instructed at the conclusion of the guilt phase that the subject of penalty or punishment was not to be discussed and must not affect the verdict the instruction did not negate the improper reference to punishment by the prosecutor.”)

People v. Wells (1893) 100 Cal. 459 (an oldie but goody; reversing even though the objections to the content laden improper questions were sustained); Donnelly v. DeChristoforo (1974) 416 U.S. 637, 644 [“some *occurrences* at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect”].)

Other helpful cases are People v. Naverrette (2010) 181 Cal.App.4th 828 (police officer’s blurring out prejudicial statement not cured by cautionary instruction); People v. Gomez (1957) 152 Cal.App.2d 139 (trial court’s striking of evidence of the defendant’s juvenile prior conviction and instruction that the jury disregard it did not escape reversible error). *See also* Berger v. U.S. (1935) 295 U.S. 78, 85, “It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.”

13. Harmless Error Cases Pending in California Supreme Court

Is harmless error analysis appropriate when the trial court omits multiple elements from a jury instruction on special circumstance murder, and if so, was the error harmless in this case? (People v. Mil, unpub. opn., *rev. granted* 9/29/10, (S184665/F056605).)

Is the trial court’s failure to give a standard reasonable doubt instruction (CALJIC No. 2.90) reversible per se or is such failure subject to harmless error review? If so, should harmless error be assessed under People v. Watson (1956) 46 Cal.2d 818, or Chapman v. California (1967) 386 U.S. 18? (People v. Aranda (2010) 188 Cal.App.4th 1490, *rev. granted* 1/26/11 (S188204/D055701).)

CONCLUSION

The approach to prejudicial error outlined in this paper is by no means exhaustive or definitive. The only “absolutes” are that the issue of prejudice must be addressed in every appeal and that it be written as persuasively as possible drawing upon the facts and the legal theories under which it was tried. We hope this paper helps in that worthy endeavor.