STANDARDS OF REVIEW AND PREJUDICE AND HOW TO SATISFY THEM

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STANDARDS OF REVIEW AND PREJUDICE AND HOW TO SATISFY THEM.

By: Jonathan Grossman and Dallas Sacher

INTRODUCTION

The standard of review is the court's guidepost for deciding a case. If the court is performing its job correctly, its first question in examining an appellant's opening brief is whether counsel has faithfully recited the governing standard. The omission to cite the standard will cast a dark shadow over the remainder of the brief. The citation of an incorrect standard will equally harm appellant's cause.

It is imperative that counsel state the standard of review at the beginning of every issue in the brief. If the standard is unsettled and subject to argument, counsel should, of course, advocate for the standard that is most favorable for the client. In so doing, counsel should be careful to proffer only plausible arguments. There is no quicker route to a loss of credibility than a misguided effort to fudge or misstate the standard of review. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021 [writ counsel was chastised for failing to "take note of the substantial evidence standard of appellate review."].)

In the pages that follow, the various standards of review will be recited along with some suggestions as to how counsel can best satisfy the standards.

While the appellant is unlikely to prevail under the most difficult standards, it is often possible to make a compelling argument under the unique facts of a particular case. By paying fidelity to the proper standard, counsel can provide the client with a fighting chance.

I.

THE STARTING PRINCIPLE: BE FAITHFUL TO THE GOVERNING STANDARD OF REVIEW IN ORDER TO AVOID A POSSIBLE PROCEDURAL DEFAULT.

It is a fundamental precept of appellate practice that an argument must be supported by "citation of authority." (California Rules of Court, rule 8.204(a)(1)(B).) The failure to properly set forth the standard of review or tailor one's argument to show that there was error under the standard can result in procedural default. (*People v. Foss* (2007) 155 Cal.App.4th 113, 126; see also *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102; *Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1387-1388.)

In order to avoid any possibility of trouble, counsel should follow a simple practice. The standard of review should be carefully and precisely stated at the beginning of each issue. In this way, the court will have no doubt that counsel intends to make a good faith effort to fully and fairly satisfy the applicable standard.

II.

IF POSSIBLE, COUNSEL SHOULD ADVOCATE FOR A FAVORABLE STANDARD OF REVIEW.

The standard of review "is the compass that guides the appellate court to its decision." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.) The standard "defines and limits the course the court follows in arriving at its destination." (*Ibid*.) For this reason, counsel must necessarily advocate for the most beneficial standard that is reasonably available. Since the defendant is almost certain to lose under "deferential standards of substantial evidence or abuse of discretion," counsel should look for plausible ways to posit a more helpful standard such as de novo review. (*Id*. at p. 1019.)

People v. Jackson, supra, 128 Cal.App.4th 1009 provides a useful example for making a successful argument regarding the standard of review. The appeal arose from the celebrated child molestation case against singer Michael Jackson. While the case was at the pretrial stage, the trial court sealed certain court records in order to protect Mr. Jackson's right to a fair trial. NBC took an appeal challenging the order. Citing the then existing rules of court regarding the trial court's authority to seal records, defense counsel argued for the abuse of discretion standard of review. For its part, NBC argued for de novo review on the theory that such review was appropriate given the First Amendment issues at stake. The court agreed with NBC in

light of U.S. Supreme Court authority that requires independent review before First Amendment rights may be repressed. (*Id*. at pp. 1020-1021.)

In re George T. (2004) 33 Cal.4th 620 provides another useful example where counsel was able to secure application of the independent standard of review. *George T*. involved a juvenile who was charged with issuing a criminal threat based on his dissemination of a poem to a fellow minor. Although the Attorney General argued that the deferential substantial evidence test should be applied, the court concluded that independent review was required since the charges against the juvenile had a tendency to chill his First Amendment right to free expression. (*Id*. at pp. 630-634.)

The lesson to be drawn from *Jackson and George T.* is a simple one. The degree of protection is greatest when a nexus to the Constitution can be found. Since many of the issues available to criminal defendants have a constitutional basis, counsel should rely on the Constitution as a basis for securing application of the favorable de novo standard of review.

III.

INDEPENDENT OR DE NOVO REVIEW.

The most favorable standard of review is that of independent or de novo review. All things being equal, that is the standard which provides the most hope for a criminal defendant. This is so since the standard means what it says: The appellate court is to engage in its own "'original appraisal'" of the

issue without deference to the trial court. (*In re George T.,* supra, 33 Cal.4th 620, 634.)

Pure questions of law are reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.) Thus, questions of statutory construction are reviewed de novo. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529.) Instructional issues are also subject to de novo review. (*People v. Griffin* (2004) 33 Cal.4th 536, 593, disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.)

Constitutional issues are generally reviewed independently. (*People v. Cromer*, supra, 24 Cal.4th 889, 894.) This is true even if the issue appears to have a factual component. For example, whether a witness is unavailable under Evidence Code section 240, which would permit certain hearsay evidence to be admitted, is reviewed independently because it implicates the defendant's Sixth Amendment right to confrontation. (*Id.* at pp. 897-903.) Similarly, a trial court's determination regarding whether a hearsay statement has the required indicia of reliability for a declaration against interest is subject to independent review on appeal. (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1217-1218, relying on *Lilly v. Virginia* (1999) 527 U.S. 116, 137.) The independent standard of review has been applied to other claims that implicate the defendant's constitutional rights. (See, e.g., *People v. Seijas* (2005) 36 Cal.4th 291, 304 [whether a government witness properly

invoked the right against self-incrimination at trial and thereby allowed for admission of his prior testimony over Confrontation Clause objection]; *People v. Kennedy* (2005) 36 Cal.4th 595, 609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459 [whether a pretrial identification procedure was unduly suggestive].)

It is important to note that some constitutional issues involve a two-step process whereby the appellate court must defer to a trial court's findings of fact where the evidence was in conflict. Fourth Amendment jurisprudence provides a good example.

With regard to contested factual issues, the appellate court applies "'the deferential substantial-evidence standard.'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.) However, the ultimate application of Fourth Amendment principles to the facts "' is subject to independent review.' [Citation.]" (*Ibid*.) Given this dual standard, the approach on appeal should be to focus on the *undisputed* facts in the record.

For example, in a case where the issue is whether there was a detention rather than a consensual encounter, there will often be conflicting factual accounts from the police and the defendant. However, there is usually a key fact on which all the witnesses agreed (i.e. the officer retained the defendant's driver's license or asked him to sit down). If there is case law holding that the fact in question was such as to show a detention, appellate counsel will be able

to argue that a pure issue of law is presented that warrants application of the independent review standard. (See *In re J.G.* (2014) 228 Cal.App.4th 402, 409-411 [detention found based on undisputed testimony that the police directed a minor to sit on the curb].)

Another example can be found in a recent and very interesting unpublished Sixth District case. In *People v. Bangham* (H038975, March 19, 2015) 2015 Cal.App.Unpub. Lexis 1947, the purported victim made hearsay statements to the police implicating the defendant in certain crimes. While in jail, the defendant encouraged the complainant to recant her accusations. He also made arrangements for the complainant to meet with a lawyer. Eventually, the lawyer severed his relationship with the complainant when he was not paid. At trial, the court appointed another lawyer to consult with the complainant. When the complainant refused to testify, the defendant argued that her statements to the police were inadmissible under the Confrontation Clause. The trial court overruled the objection under the forfeiture by wrongdoing principle due to the defendant's conduct in encouraging the complainant to recant.

On appeal, the issue was whether the defendant had "caused" the complainant not to testify. (See *Giles v. California* (2008) 554 U.S. 353, 359-361.) After finding that the material facts were undisputed, the majority of the Court of Appeal held that the issue of causation was subject to de novo review.

Applying that standard, the majority held that the defendant had not "caused" the complainant to remain silent since she had the benefit of the advice "of an independent, court-appointed attorney" before electing not to testify.

The dissenting justice viewed things differently. Citing the rule that causation is typically a question of fact (*People v. Roberts* (1992) 2 Cal.4th 271, 320, fn. 11), the dissenting justice applied the substantial evidence test to the question of causation. Predictably, the dissenting justice found that there was ample evidence to credit the trial court's finding that the complainant was pressured not to testify regardless of the independent legal advice that she received.

Bangham illustrates that the question of the proper standard of review is not always clear. Nonetheless, in a case involving a constitutional principle, *Bangham* demonstrates that counsel may well have a strong argument for application of the independent review standard.

IV.

THE ABUSE OF DISCRETION STANDARD.

A broad range of judicial decisions are reviewed for abuse of discretion. Evidentiary errors are generally reviewed for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) So are many sentencing errors. (See e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

It has often been said that a court acts within its discretion whenever there is an "'absence of arbitrary determination, capricious disposition or whimsical thinking.'" (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573.) As long as the court acts within the "bounds of reason," the court does not abuse its discretion. (*Ibid*.) However, the abuse of discretion standard is not a judicial "'rubber stamp.'" (*Wilson v. Volkswagen of America* (4th Cir. 1977) 561 F.2d 494, 505-506.)

The abuse of discretion standard is not an abstract test based on whether the trial court acted irrationally. Instead, the court's discretion is grounded in the policy and purpose of the statutes or laws being applied. "[T]rial court discretion is not unlimited. 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citations.]'" (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) "[J]udicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion. [Citations.]" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394.)

A good discussion of the practical limits of a court's discretion is contained in *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287: "The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law. [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred. . . . The pertinent question is whether the grounds given by the court . . . are consistent with the substantive law . . . and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under [the statute], read in light of the purposes and policy of the statute." (*Id.*, at pp. 1297-1298.)

There are several components to the abuse of discretion standard. "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a court's ruling under review. The trial court's findings of facts are reviewed for substantial evidence, its conclusions

of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

How did the court abuse its discretion? In arguing that the court abused its discretion, simply listing all of the evidence in favor of the client or ignoring the standard of review after the first few paragraphs of the argument is ineffective. Instead, it is necessary to show how the court failed to properly exercise its discretion. This usually requires an affirmative showing that the court made a legal error or misunderstood the facts in arriving at its decision. In a Sixth District case, for example, appellate counsel successfully argued the court abused its discretion in not dismissing a prior strike conviction because the court incorrectly assumed that the defendant had previously been warned that his 1999 conviction could be prospectively used as a strike. (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212-1213.) Depending on the circumstances of the case, it can be argued:

The court misunderstood the facts or there was insufficient evidence to support the facts it relied on. (See, e.g., *People v. Cortez* (1971) 6 Cal.3d 78, 85-86; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

The court misunderstood the law. "There is an abuse of discretion when the trial court's action 'transgresses the confines of the applicable principles of law.' [Citation.]" (*Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th

850, 862.) Thus, "an abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard [citations]." (*People v. Knoller* (2007) 41 Cal.4th 139, 156; see also *People v. Downey* (2000) 82 Cal.App.4th 899, 912.)

The court misunderstood the scope of its discretion. (*People v. Lara* (2001) 86 Cal.App.4th 139, 165-166; *City of Sacramento v. Drew*, supra, 207 Cal.App.3d 1287, 1297- 1298; see *People v. Belmontes* (1983) 34 Cal. 3d 335, 348, fn. 8.)

The court failed to follow the proper procedure for exercising its discretion. " '[W]hen a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction. . . .' [Citations.]" (*Los Angeles County Dept. of Children and Family Services v. Superior Court* (2005) 126 Cal.App.4th 144, 152.)

The record affirmatively shows the court was unaware of its discretion. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1188-1189.)

The court failed to exercise its discretion. (See, e.g., *People v. Duran* (1976) 16 Cal.3d 282, 290-293; *People v. Penoli* (1996) 46 Cal.App.4th 298, 302.)

Can the independent standard of review apply? Another approach is to redefine the issue so that the independent or de novo standard applies.

Here are some examples:

If the claim of error derives from the court's interpretation of a statute, the interpretation of the statute should be reviewed de novo. For instance, the abuse of discretion standard applies to review of a ruling on the admissibility of evidence. (*People v. Guerra*, supra, 37 Cal.4th 1067, 1140.) "To the extent the trial court's ruling depends on the proper interpretation of the Evidence Code, however, it presents a question of law [and] . . . . review is de novo. [Citation.]" (*People v. Walker* (2006) 139 Cal.App.4th 782, 795; see also *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, 611.)

Where there are no factual disputes or where the facts are presented in documentary evidence, independent review might be appropriate. (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 529 [although removal of potential jurors is normally reviewed for abuse of discretion, independent review is used when the decision was based solely on questionnaires]; *People v. Maury* (2003) 30 Cal.4th 342, 404 [independent review of whether a confession was voluntary when the interrogation was tape recorded]; *People v. ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144 [independent review of a finding counsel had a conflict of interest when there were no disputed facts].)

When a category of issues is normally reviewed for abuse of discretion, certain questions within the category might be reviewed independently. For

instance, evidentiary rulings are normally reviewed for abuse of discretion, but whether evidence violates the defendant's right to confrontation is reviewed de novo. (See, e.g., *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174.) While sentencing issues are generally reviewed for abuse of discretion (see, e.g., *People v. Sandoval*, supra, 41 Cal.4th 825, 847), whether the court imposed an illegal sentence is reviewed independently because there is no discretion to sentence illegally. (*People v. Hill* (2004) 119 Cal.App.4th 85, 89).

While denial of a new trial motion or mistrial motion is normally reviewed for abuse of discretion (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986; *People v. Delgado* (1993) 5 Cal.4th 312, 328), the underlying error might be reviewed independently. For example, if the defendant moves for a new trial based on instructional error, the appellate claim should be solely that instructional error occurred. In this way, the standard of review will be de novo. (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838 [de novo standard applied to instructional error claim].)

A similar approach should be undertaken with respect to evidentiary or prosecutorial misconduct errors that occur at trial. If a witness or the prosecutor blurts out inadmissible and prejudicial comments, the appellate challenge should not be to the denial of the defendant's mistrial motion. Instead, the argument should be that an error of law occurred when the

comment was made. (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935 [judgment reversed without discussion of standard of review where witness let slip that the defendant was on parole].)

Returning to evidentiary error, there is some flexibility in the case law. The courts have said that a trial court's evidentiary rulings are subject to review for abuse of discretion. However, for the most part, this assertion is illogical since most evidentiary issues actually present pure questions of logic (i.e. issues of law). An example can be found in the precedent involving Evidence Code section 403.

Pursuant to section 403, the trial court acts as the gatekeeper in determining whether evidence has a sufficient foundation to go to the jury. Although the Supreme Court has said that a court is vested with discretion under section 403, trial judges are admonished to exclude evidence "only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.' [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) By definition, the court will abuse its discretion under this test if it excludes evidence that has any plausible foundation. Presumably, appellants will frequently prevail on this issue regardless of the supposed abuse of discretion standard.

As a final point, Presiding Justice Rushing has perceptively argued that the abuse of discretion standard has been misapplied in situations where pure questions of law are at issue. (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1222-1225 (conc. opn. of Rushing, P.J.).) In Presiding Justice Rushing's view, a court has no discretion to exercise when it is applying a rule of law to evidentiary questions based on undisputed facts. (*Ibid*.) In a proper case, this argument might be advanced for a client's benefit. (See also *People v. Tran* (2013) 215 Cal.App.4th 1207, 1217-1218 [Presiding Justice Rushing suggests that there are "gradations" to abuse of discretion review depending upon the legal principles at issue].)

Is there something unique about the case that warrants disregard of the abuse of discretion standard? On occasion, counsel may be able to advocate for reversal because the unique record does not rationally allow for application of the abuse of discretion standard. A recent case illustrates this possibility.

In *People v. Perez* (2015) 233 Cal.App.4th 736, the defendant moved to withdraw his guilty plea on the grounds that his lawyer had erroneously advised him that his conviction was not likely to result in his deportation. In support of the motion, the defendant presented undisputed declarations from himself and his sister. The trial court denied the motion without stating any reasons. After acknowledging that abuse of discretion was the standard of

review, the Court of Appeal concluded that it could not uphold the trial court's judgment since there was "no reasonable basis" for the court's ruling. (*Id*. at p. 742.) Insofar as the defendant's undisputed factual showing was legally sufficient to justify the relief requested, the trial court necessarily erred unless it rendered silent factual findings against the defendant. Since the Court of Appeal was left to the "wildest speculation" as to what the trial court had reasoned, the judgment was reversed for further proceedings. (*Id*. at pp. 742-743.)

Obviously, *Perez* is an unusual case. Nonetheless, the case demonstrates that there is some flexibility in the application of the abuse of discretion standard when the defense has made a compelling record. In light of *Perez,* counsel should not hesitate to cleverly apply the abuse of discretion standard in an appropriate case.

V.

THE SUBSTANTIAL EVIDENCE STANDARD.

The substantial evidence test generally applies to any finding of fact, including whether there is substantial evidence to support a conviction. (*People v. Cromer*, supra, 24 Cal.4th 889, 893-894.) The court must ask, "after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*Jackson v. Virginia* (1979)

443 U.S. 307, 319, emphasis in original; see also *People v. Johnson* (1980) 26 Cal.3d 557, 576 ["California decisions state an identical standard"].)

"[A]ppellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it ' "are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed waived." [Citations.] ' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246, emphasis in original.)

Inherently incredible evidence. Of course, the appellate court does not reweigh the evidence or credibility of the witnesses. (*People v. Poggi* (1988) 45 Cal.3d 306, 325-326.) It has been said that "'[t]he trier of the facts may not believe impossibilities.' [Citation.]" (*Lucas v. Southern Pacific Co.* (1971) 19 Cal.App.3d 124, 136.) But such evidence must be physically impossible or its falsity apparent without resort to inference. (See, e.g., *People v. Friend* (2009) 47 Cal.4th 1, 40-41, 43-44 [substantial evidence found where witnesses gave prior inconsistent statements and received food and lodging from the prosecutor]; *People v. Hovarter* (2008) 44 Cal.4th 983, 995-1001 [testimony of evasive informer with long criminal history was not inherently incredible or demonstrably false]; *People v. Hernandez* (2003) 30 Cal.4th 835, 859-861, disapproved on other grounds in *People v. Riccardi*, supra, 54 Cal.4th 758, 824, fn. 32 [witness not inherently incredible when times given were impossible to achieve because he could have been mistaken

about the times and the jury knew he was a drug addict, liar, thief, and informer]; *People v. Ennis* (2010) 190 Cal.App.4th 721, 728-732 [substantial evidence found even though the complainants' testimony regarding molestation was "full of contradictions, inconsistencies and implausibilities..."].)

Circumstantial evidence. One might think that if there is a rational inference of innocence from circumstantial evidence, there is by definition reasonable doubt and a conviction cannot stand. California courts, however, disagree: "'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793; accord, *People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

Issues where the defendant had the burden of proof. There are some trial court issues where the defendant bears the burden of proof. On appeal, the standard of reviews remains the same: whether there was substantial evidence to support the trial court's decision. For example, the defendant must prove at a trial pursuant to Penal Code section 1368 that he is incompetent. If he appeals the finding of competence, the test is whether there is substantial evidence of his competence. (Note: a recurring mistake by appellate counsel

is to argue there was substantial evidence to support the appellant's position, which is, of course, wrong.) In one case, there was insufficient evidence to find defendant competent when only uncontradicted evidence of incompetence was presented. (*People v. Samuel* (1981) 29 Cal.3d 489, 497-498; contra, *People v. Marks* (2003) 31 Cal.4th 197, 218-221; see also *People v. Sword* (1994) 29 Cal.App.4th 614, 629.)

Some courts have imposed a more onerous test for substantial evidence when the appellant had the burden of proof: "whether appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 571; accord, *In re I.W.* (2010) 180 Cal.App.4th 1517, 1528; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.) Note that *De Mota* predates *Jackson v. Virginia*, supra, 443 U.S. 307 and *People v. Johnson*, supra, 26 Cal.3d 557.

Attacking the substantial evidence test. In limited circumstances, it may be possible to get around the presumption that the trier of fact made all reasonable inferences in favor of the judgment. As described in *People v. Manning* (1973) 33 Cal.App.3d 586 at pages 602 to 603:

> "Some of the recognized exceptions to the presumption of implied findings to support the ruling that appear relevant to the case at bar are as follows:
>
> "1. *Uncontested Facts*. . . . In such cases, the appellate courts have said the trial court 'resolved no conflicts in the

> evidence since there were none, nor was it required to draw any inferences. Its determination was made strictly as a matter of law, and not of fact or of mixed law and fact. We [may] disagree with its legal conclusion, . . .' [Citation]" . . .
>
> "2. *Facts or Inferences Resolved in Favor of the Losing Party*. Even when the facts are in dispute the trial court may indicate that although it finds the facts or certain facts in favor of one of the parties, it still must rule against that party. The most common instances are ones in which the court indicates that it credits certain testimony, very often that of peace officers. In such cases the appellate court cannot presume that the facts were resolved against the People or that, contrary to its own indication, it disbelieved the testimony. [Citations.]
>
> "3. *Exclusive Reliance Upon an Erroneous Rule or Theory*. As still another variation to the exceptions to the presumption of supportive implied findings, a trial court's determination will not be sustained under the general rule where it appears that its decision was based upon an erroneous legal theory absent which it is unlikely that it would have reached the conclusion it did. [Citations.]"

Another approach is to change the issue from a factual one to a legal one. For example, in a claim of insufficient evidence, the issue can be whether the statute was properly construed to permit a conviction for the defendant's conduct. Issues of statutory construction are reviewed de novo. (*Pineda v. Williams-Sonoma Stores, Inc.*, supra, 51 Cal.4th 524, 529.)

Evidence of consciousness of guilt does not ipso facto constitute substantial evidence. In a number of cases, the prosecution will rely on consciousness of guilt evidence as circumstantial proof of the defendant's guilt. Absent more concrete evidence tying the defendant to the commission of the crime, such evidence may not be sufficient to sustain a conviction.

In *People v. Blakeslee* (1969) 2 Cal.App.3d 831, a young woman was convicted of murdering her mother. The prosecutor's case rested on three pieces of evidence: (1) the defendant was at the murder scene shortly before and after the killing occurred; (2) the defendant was upset with her mother about her possible remarriage and management of family funds; and (3) the defendant gave a false account to the police regarding her whereabouts at the time of the killing. The Court of Appeal reversed the conviction. The court concluded that the defendant's false story to the police was insufficient to affirm the conviction: "This evidence does not reasonably inspire confidence in defendant's guilt, and we think it insufficient to constitute proof beyond a reasonable doubt." (*Id*. at p. 840.)

In subsequent cases, the courts have routinely distinguished *Blakeslee* and limited it to its unique facts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181-1182; *People v. Snow* (2003) 30 Cal.4th 43, 67-68; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1030.) Nonetheless, the logical analysis in *Blakeslee* remains good law and should be advanced in an appropriate case.

Speculative inferences do not rise to the level of substantial evidence. Our Supreme Court has said that a reasonable inference of guilt may not be based on speculation. (*People v. Morris* (1988) 46 Cal.3d 1, 21; overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.) Instead, reasonable inferences must rest on evidence. (*Ibid*.) While the

distinction between speculation and evidence is often less than clear, *Morris* provides some guidance regarding the dividing line.

In *Morris*, the defendant killed a man in a public bathhouse at the beach. Three days later, the defendant used a credit card that had been in the decedent's possession. The defendant was convicted of capital murder based on the special circumstance of robbery. In order to qualify as a special circumstance, the murder had to have been committed "during the commission" of the robbery. Insofar as there was an absolute paucity of evidence regarding the circumstances surrounding the killing, the Supreme Court held that the special circumstance finding rested on nothing but speculation: "The record in the case at bench contains virtually no evidence that the murder was committed 'during' the commission of a robbery. The only witness to the incident merely observed shots being fired and saw the shooter run from the scene to a waiting car. The victim was apparently nude when shot and expired minutes later. On this sparse record, it is impossible to conclude that the shooting was one to advance an independent felonious purpose. [Citation.]" (*Id*. at p. 21.)

Morris is a somewhat surprising case since an objective analyst might conclude that the defendant's use of the purloined credit card established that his motive was to steal. Given this reality, *Morris* is a very useful authority since it demonstrates the Supreme Court's view that mere possibility does not

translate into substantial evidence. (See also *People v. Davis* (2013) 57 Cal.4th 353, 360 [citing *Morris* and reversing a conviction for the possession for sale of MDMA (i.e. Ecstasy) where the prosecutor failed to present any evidence that the drug contained methamphetamine notwithstanding the supposed "common knowledge" that MDMA contains amphetamine].)

VI.

INSTRUCTIONAL ERROR

A claim of instructional error is generally reviewed de novo. (*People v. Griffin*, supra, 33 Cal.4th 536, 593.) However, in certain instances, the substantial evidence test is imported into the analysis in the defendant's favor.

The trial court has a duty to instruct the jury on affirmative defenses and defense theories so long as the defenses and theories are supported by substantial evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 195; *People v. Wright* (1988) 45 Cal.3d 1126, 1137.) Any doubt as to the sufficiency of the evidence must be resolved in favor of the defendant. (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685.) Moreover, even if the evidence in support of the instruction is "incredible," the court must proceed on the hypothesis that it is entirely true. (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1143.)

People v. Lemus (1988) 203 Cal.App.3d 470 demonstrates the highly favorable application of the substantial evidence test in this context. There, the prosecutor presented witnesses who testified that the defendant had

engaged in an unprovoked knife assault on the victim. In contrast, the defendant testified that the victim had tried to stab him and had threatened to kill him. Thus, according to the defendant, he stabbed the victim in self defense. On these facts, the trial court refused to instruct on self defense. In so holding, the trial court apparently relied on the lack of independent proof that the victim possessed a knife. On appeal, the trial court's ruling was reversed:

> "We conclude there was evidence worthy of consideration by the jury that [defendant] was acting in self-defense. Regardless of how incredible that evidence may have appeared, it was error for the trial court to determine unilaterally that the jury not be allowed to weigh and assess the credibility of [defendant's] testimony . . ." (*Lemus, supra,* 203 Cal.App.3d at p. 478.)

As *Lemus* demonstrates, the courts are highly solicitous of the application of the substantial evidence test as it relates to the defendant's right to have the jury instructed on the defense theory of the case. Counsel should emphasize this point in any appeal involving the refusal to give a defense instruction.

VII.

SUI GENERIS STANDARDS

There are a number of legal issues for which *sui generis* standards apply. Some brief comments are in order with respect to these specific issues.

A. Ineffective Assistance of Counsel.

The defendant must make a two part showing in order to obtain relief: (1) counsel's performance fell below the objective standard of prevailing professional norms; and (2) the defendant was prejudiced by counsel's failing. (*Strickland v. Washington* (1984) 466 U.S. 668, 688-695.) With respect to the showing of prejudice, a defendant is entitled to relief if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.)

It is critical to note that the *Strickland* prejudice test is not "outcome-determinative" insofar as the defendant need not show that counsel's error "more likely than not" altered the result in the case. (*Strickland,* supra, 466 U.S. at p. 693.) Instead, prejudice is shown if there is "a significant but something-less-than 50 percent likelihood of a more favorable" result absent the error. (*People v. Howard* (1987) 190 Cal.App.3d 41, 48; see also *Williams v. Taylor* (2000) 529 U.S. 362, 405-406 [*Strickland* standard is satisfied by a showing less than a "preponderance of the evidence]."")

In attempting to show prejudice under *Strickland*, a useful analytical model is to compare the trial that actually occurred with the one that would have been conducted had counsel performed effectively. By establishing how

the model trial would have enhanced the opportunity for a better result, *Strickland* is satisfied. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 940 ["in order to determine whether counsel's errors prejudiced the outcome at the trial, 'it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently.' [Citation.]".].)

B. *Brady* Error.

Failure by the prosecution to disclose material favorable evidence is a violation of due process. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.)

The prejudice principles that apply under *Strickland* are equally applicable to a *Brady* claim. (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.) Thus, the defense need only show a "reasonable probability" of a better result and that showing need not be made by a preponderance of the evidence. (*Ibid*.)

C. False Evidence.

The knowing presentation of false evidence by the government constitutes a due process violation. (*Napue v. Illinois* (1959) 360 U.S. 264, 269; see also *Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897, 908 [false evidence claim made out if prosecutor should have known that testimony was false].) A conviction is set aside whenever there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." (*United States v. Agurs* (1976) 427 U.S. 97, 103, fn. omitted.) The reasonable likelihood test has generally been considered to be equivalent to the standard of prejudice found in *Chapman v. California* (1967) 386 U.S. 18. (*In re Jackson* (1992) 3 Cal.4th 578, 597-598, disapproved on other grounds in *In re Sassounian*, supra, 9 Cal.4th 535, 545.)

Notwithstanding the nominal application of the *Chapman* test, it should always be emphasized that the use of false evidence is a drastic error. Since the knowing presentation of false testimony strikes at the very fairness of the adjudicative process, the Ninth Circuit has declared that reversal is " ' " virtually automatic " ' " once it is established that false evidence was introduced. (*Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972, 978.)

D. Removal Of A Deliberating Juror.

When a deliberating juror is removed over defense objection for alleged misconduct, the test on appeal is whether misconduct was shown as a

"demonstrable reality." (*In re Shaputis* (2011) 53 Cal.4th 192, 210.) The "demonstrable reality" standard is *less deferential* than the substantial evidence standard, and requires a greater evidentiary showing." (*Ibid*, fn. omitted, emphasis in original.) "A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. . . . [¶] The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not reweigh the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' [Citation.]" (*Id*. at p. 210, fn. 7, emphasis in original.)

The dismissal of a holdout juror is a particularly juicy issue for appeal. Our Supreme Court has indicated that a trial court acts at its peril when it moves to discharge a juror based on other jurors' claim that the holdout juror is failing to properly deliberate. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) So long as the holdout juror is willing to communicate with the other jurors, dismissal is improper merely because the holdout juror "does not

deliberate well or relies upon faulty logic or analysis . . . ." (*Ibid*.) Disagreement with the majority jurors "does not constitute a refusal to deliberate and is not a ground for discharge." (*Ibid*.)

E. Parole Denials.

A parole denial by the Board of Parole Hearings or the Governor's reversal of a grant of parole is reviewed for "some evidence." (*In re Shaputis*, supra, 53 Cal.4th 192, 198.) Under this standard, "'[o]nly a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board or] the Governor. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of [the Board or] the Governor . . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision.' [Citations.] " (*In re Shaputis*, supra, 53 Cal.3d 192, 210.)

Notwithstanding the rather unfavorable nature of the "some evidence" test, the Courts of Appeal have engaged in a relatively close examination of

the stated reasons for denying parole. In particular, when the posited reason is that the prisoner lacks "insight" into the motivation for the crime, the courts have closely reviewed the record in order to ascertain whether the conclusion is truly supported by the facts. (*In re Young* (2015) 232 Cal.App.4th 1421, 1437-1443 and cases cited therein.) Given the careful scrutiny that the parole cases are given, appellate counsel should not hesitate to make vigorous arguments under the "some evidence" test.

F. Appellate Review Of Trial Court Habeas Rulings.

When an appellate court reviews a trial court's habeas ruling, the court gives "great weight" to factual findings based on the testimony of witnesses. (*In re Cudjo* (1999) 20 Cal.4th 673, 688.) Deference may not necessarily be given to factual findings based on documentary evidence. (*Ibid*.) The appellate court "independently reviews" the trial court's "resolution of legal issues and mixed questions of law and fact. [Citation.]" (*Id*. at pp. 687-688.)

VIII.

PROPERLY APPLIED, THE *CHAPMAN* STANDARD SHOULD LEAD TO MANY REVERSALS.

In the seminal case of *Chapman v. California,* supra, 386 U.S. 18, the U.S. Supreme Court announced that a finding of federal constitutional error requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.*

at p. 24.) In order to understand what this test truly means, it is highly instructive to review the facts in *Chapman*.

Although the facts were not fully recited by the U.S. Supreme Court, they can be found in the antecedent opinion of the California Supreme Court. (*People v. Teale* (1965) 63 Cal.2d 178.) At 2 a.m. on the morning of October 18, 1962, Ms. Chapman, Mr. Teale and Mr. Adcox were seen outside the bar where Mr. Adcox was employed as a bartender. Later that morning, Mr. Adcox's body was found in a remote area. He had been shot in the head three times. Mr. Adcox was killed with .22 caliber bullets and Ms. Chapman had purchased a .22 caliber weapon six days earlier. In close vicinity to the body, the police found a check which had been signed by Ms. Chapman.

The most important evidence against the defendants was of a forensic nature. According to the government's expert, blood found in the defendants' car was of Mr. Adcox's type. In addition, hairs matching those of Mr. Adcox were found in the car along with fibers from his shoes.

If this evidence was not enough, the government also presented an informant who testified to Mr. Teale's statements. Essentially, Mr. Teale told the informant that he and Ms. Chapman had robbed and killed Mr. Adcox.

For her part, Ms. Chapman gave a statement to the police. In so doing, she lied and claimed that she was in San Francisco at the time of the killing. The falsity of this account was proved by the fact that Ms. Chapman had

registered at a Woodland motel shortly after Mr. Adcox's demise.

At trial, neither defendant testified. In manifest violation of the federal Constitution, the prosecutor repeatedly argued to the jury that the silence of the defendants could be used against them. (*Griffin v. California* (1965) 380 U.S. 609, 615.) On this record, the Supreme Court found reversible error:

> "[A]bsent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions." (*Chapman, supra*, 386 U.S. at p. 26.)

The foregoing recitation of the *Chapman* facts and holding leads to an inescapable conclusion: The Supreme Court intended that it would be very difficult for the government to show that a federal constitutional error was harmless. The government had a very strong case in *Chapman* including a confession, evidence of the opportunity to commit the crime, highly incriminating forensic evidence and consciousness of guilt evidence. Nonetheless, the strength of this evidence was not sufficient to avoid reversal.

Having defined the *Chapman* test and its intended application, the sad truth is that the appellate courts of today are loathe to apply the *Chapman* standard as set forth by the Supreme Court. Although no appellate court has said so in a published opinion, any experienced appellate lawyer knows that today's actual test is the "he's good for it" standard. Under this test, the

appellate justices review the evidence and generally conclude that, regardless of any federal constitutional error, the defendant is guilty. Since the defendant is "good for it," any and all errors may be excused. Given this reality, three points are in order.

First, appellate defense lawyers should strongly protest this state of affairs. Our briefs and oral arguments should contain pointed references to the difficult burden that the government must bear under *Chapman*. Moreover, since most defendants have better factual cases than did the defendants in *Chapman*, counsel should compare and contrast the *Chapman* facts with those in the case before the court.

In making arguments under *Chapman*, counsel can find substantial support in a magnificent opinion authored by Justice Liu. In a close analysis of *Chapman*, Justice Liu made two key points. First, *Chapman* imposes the burden on the government to establish that "the error *did not* have adverse effects." (*People v. Jackson* (2014) 58 Cal.4th 724, 793 (conc. and dis. opn. of Liu, J.), emphasis in original.) Second, Justice Liu conceptualized the *Chapman* standard as allowing affirmance only when the court is "convinced the error was harmless to the *maximal level of certainty within the realm of reason,* a level that admits no reasonable doubt." (*Id*. at p. 792, emphasis in original.) Objectively applied, these principles will lead to many reversals.

Second, it must be emphasized that *Chapman* contemplates an inquiry into the impact which the particular error had on the instant jury. This is true regardless of the weight of the evidence.

> "[T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which `the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original.)

As the foregoing quotation reveals, the mere existence of strong government evidence does not *ipso facto* lead to a conclusion of harmless error. To the contrary, if the government has committed a fundamental constitutional error bearing a substantial impact (such as the *Griffin* error in *Chapman*), reversal is compelled. This is so since it is the government's burden to show that the guilty verdict "was surely unattributable to the error." (*Sullivan, supra*, 508 U.S. at p. 279; accord, *People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

People v. Fletcher (1996) 13 Cal.4th 451 is an example of the proper application of the *Chapman* test. In *Fletcher,* the government presented a strong case that Mr. Moard accompanied Mr. Fletcher when he killed a woman whose car was stopped on a freeway entrance ramp late at night. On appeal,

Mr. Moard argued that his right to confrontation had been violated by admission of Mr. Fletcher's extrajudicial statement in which he indicated that he and a "friend" had intended to rob the victim. After finding that the statement was improperly admitted against Mr. Moard, the Supreme Court found prejudice since there was a paucity of evidence to establish that Mr. Moard had the requisite mental state to assist Mr. Fletcher in his criminal scheme. (*Id.* at p. 470.)

The result in *Fletcher* is an important one. All too often, reversal is not found under *Chapman* on the grounds that the evidence was "overwhelming." In *Fletcher,* the court could have reverted to this mantra since it was certainly highly suspicious that Mr. Moard was out on a freeway ramp at 2:30 a.m. However, notwithstanding this rather suspicious circumstance, reversal was ordered. Given this application of the *Chapman* test, similar results should be required in a significant number of cases.

It should not be overlooked that all errors are not created equal. Some errors (such as the admission of a defendant's confession) are so devastating that reversal is virtually always required. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 295-302 [erroneous admission of defendant's confession required reversal even though a second confession was properly admitted].) Thus, even when the evidence against a defendant is strong, a particular error may still require reversal in light of its power to influence the jury. (*United*

States v. Harrison (9th Cir. 1994) 34 F.3d 886, 892 ["[r]eview for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also `"the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact."' [Citation.]."].)

Third, it is worth noting that the great Justice Harlan expressly refuted the "he's good for it" standard long before it came into vogue. In a case involving the unlawful seizure of a gun, Justice Harlan said:

> "Finally, if I were persuaded that the admission of the gun was `harmless error,' I would vote to affirm, and if I were persuaded that it was arguably harmless error, I would vote to remand the case for state consideration of the point. *But the question cannot be whether, in the view of this Court, the defendant actually committed the crimes charged, so that the error was `harmless' in the sense that petitioner got what he deserved*. The question is whether the error was such that it cannot be said that petitioner's guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result." (*Bumper v. North Carolina* (1968) 391 U.S. 543, 553 (conc. opn. of Harlan, J.), emphasis added.)

In short, the *Chapman* standard was devised to ensure that the government does not profit from its own violations of the Constitution. As counsel for the defendant, it is our duty to strongly advocate for the vitality of the *Chapman* test as it was truly meant to be.

IX.

THE *WATSON* STANDARD REQUIRES REVERSAL WHENEVER AN ERROR UNDERMINES CONFIDENCE IN THE RESULT REACHED IN THE TRIAL COURT.

The standard of *People v. Watson* (1956) 46 Cal.2d 818 applies to most errors arising solely under state law. Under Article VI, section 13 of the California Constitution, a judgment may not be reversed on appeal absent a showing that an error resulted "in a miscarriage of justice." As interpreted by the California Supreme Court, this provision means that a reversal may not be awarded absent a showing "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d 818, 836.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.) Prejudice must be found under *Watson* whenever the defendant can "'undermine confidence'" in the result achieved at trial. (*Ibid*.) In applying this standard, a few points should be kept in mind.

First, the *Watson* test applies to errors arising under the state Constitution as well as statutory law. (*People v. Cahill* (1993) 5 Cal.4th 478, 493.) However, the California Supreme Court has cautioned that some errors arising under the state Constitution remain reversible per se. (*Ibid.*) These

errors include the denial of counsel, the denial of conflict free counsel, the denial of a jury trial and improper discrimination in the selection of the jury. (*Ibid.*) Moreover, even if *Watson* review is permitted for a state constitutional violation, a California court is still bound to apply the *Chapman* test if the same error also arises under the federal Constitution. (*Id.*, at pp. 509-510.)

In applying the *Watson* test, an evenly balanced case is one which the defendant is entitled to win. (See cases cited in 6 Witkin and Epstein, California Criminal Law (4th ed. 2012) section 7, pp. 519-520.) Indeed, *Watson* makes this point crystal clear: "But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion `that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Watson, supra*, 46 Cal.2d at p. 837.)

As a corollary to the last point, some courts have employed a "divergence" from the *Watson* standard in a close case. (*People v. Hickman* (1981) 127 Cal.App.3d 365, 373.) Under this test, a close case mandates reversal whenever there is "`"`any substantial error tending to discredit the defense . . ."'" (*Ibid.*) In *Hickman*, reversal was ordered since the jury improperly learned of the defendant's status as an ex-con. (*Id*, at pp. 373-374.)

Although *Watson* itself does not make this point, experience teaches that an appellate court has a great deal of discretion in determining whether a

particular error requires reversal under the reasonable probability standard. It is therefore incumbent upon defense counsel to provide a detailed expose of all the circumstances in the record that undermine confidence in the judgement. (*College Hospital, Inc.*, supra, 8 Cal.4th 704, 715.)

CONCLUSION

It is the duty of appellate counsel to precisely state the applicable standard of review. Oftentimes, the nature of the standard will condemn a particular client to defeat. On other occasions, a skillful advocate can persuasively show how a miscarriage of justice can be avoided even under an unforgiving test. At the very least, counsel can serve both the court and the client by providing an accurate and intensive application of the correct standard of review.