ZEN AND THE ART OF ISSUE SPOTTING

by William M. Robinson

&

A SUGGESTED APPROACH FOR FINDING ISSUES IN SELECTED SUBJECT AREAS

by Dallas Sacher

(from the 2004 SDAP Seminar)

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I.

ZEN AND THE ART OF ISSUE SPOTTING[1]

Introduction

Michael Millman said it well 23 years ago: "I read records and come up with assignments of error, but it is not at all clear to me that I know how to do it – or that I can communicate what I do to anyone else."[2]

In preparing this outline, I was assisted by some of the best practitioners of issue spotting I know: George Schraer, Mark Greenberg, Kyle Gee, Kat Kozik, Alan Siraco, Julie Schumer, Courtney Shevelson, Lori Klein, Dennis Riordan, and Stephen Greenberg. Lacking the resources to get this group together in one room or on a conference call, I sent out an e-mail asking for responses to some very general questions about the mental mind-set or "gestalt" of issue spotting. Much of what follows borrows from the very thoughtful and nuanced comments of this outstanding, very experienced group of appellate lawyers.[3]

The responses received from this group suggest that a host of seemingly diverse mental approaches, habits, and practices inform the practice of issue spotting. I will try to summarize them in some sort of analytical order. The goal is to give you, as a criminal appellate practitioner, some ideas about different approaches to issue spotting that work for others.

Many of the approaches and suggestions here will appear familiar. Some will seem fairly mechanical, others more abstract. Issue spotting is an art. Of course, there are many ways of making fine art, and wise folk since Socrates have understood that you

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[1]OK, I admit it, I know next to nothing about Zen, and just wanted a catchy title.

[2]Millman, "Training Memo: Looking for Issues in Appeal," State Public Defender's Appellate Practice Manual, 1981, p. 201. With the author's permission, I will borrow here and there from this very useful "early" work on this subject.

[3]When quoting from the e-mail responses, I have taken it upon myself to act as editor only to elucidate the meaning of the comments or to correct the very few obvious typos that come with the e-mail mode of communication.

can't always rely on an artist being able to explain how he or she does it. So, use what seems useful, consider what might seem new or unusual, and hopefully emerge with some new energy about issue spotting, the critical genesis-point of appellate practice.

A. **Mental Set**

We can start with some important precepts about issue spotting suggested by Michael Millman. Take your time. Be curious. Allow yourself to be intrigued by a possible issue, outraged by an obvious unfairness, and troubled about something that seems just plain wrong.

Some years ago, when I was a graduate student in political theory, I had a great teacher, John Schaar. A fellow student once asked Schaar how he approached the reading of a particular great work of political philosophy. "With ardor and shyness," he responded. I like that approach, though I'd alter it for our more mundane purposes to "ardor and humility." You need to be *ardent* about your search for arguable and winnable issues, for you are the embodiment of the diligent conscientious advocate to which our clients are entitled under our constitutional system. But you also need to be *humble* about your own state of knowledge about possible issues and arguments, no matter how experienced and practiced you are in this field of law.

Every one of us can probably tell a story about a potential issue which was initially examined and passed over – because of bad facts, a failure to preserve the issue at trial, or some seemingly immovable contrary case law authority – but which ultimately, after further research, consultation with colleagues, and/or creative issue development, turned into a winning claim for the client. Be curious about matters which you may not quite understand, whether it is a particular procedural issue which comes up in a case, or a point of law that is unfamiliar to you. Filling in the gaps may lead you to a great issue, either in the present case or in another one somewhere down the road.

B. **Mantras of Issue Spotting**.

OK, here I go again, misusing Eastern metaphysics.[4] But I couldn't miss the fact that most of the respondents to my issue spotting e-mail had a key concept, or prime directive, that was described as a frequently helpful pathway to finding winning issues. These approaches seem to divide up into four different general approaches.

1. **If It Stinks, Go For It! If it Don't Sit Well, Get Up and Do Something About It!**

Julie Schumer described a "bad feeling" litmus test which helps lead her toward spotting meritorious issues.

> Most of my winners have been because something felt "wrong" in the case, though I could not necessarily at first articulate it and pigeon-hole it into an arguable issue as we know them. There is a good deal of instinct involved. Once I have the psychic feeling, I then try to translate that into some kind of legal argument with a liberal dose of due process.

Dennis Riordan gives this concept a catchy name. After describing the more typical appellate approach of starting with what we know about legal errors and reviewing a transcript carefully to find them, he describes how the converse approach of "moving from the record to the law" is equally important.

> We identify every piece of evidence, or argument, or instruction that hurt our client under the "Sitwell" doctrine: it if doesn't sit well, it must be wrong. We then research the issue to see if the law could possible provide an arguable claim that, until this point, we had no idea existed.

I have always thought of this approach as a kind of "stink" test. If something really smells bad, if it outrages you with its unfairness, presume there's an issue there and then go and find it. Don't be daunted the lack of clear authority, or even by what looks like contrary authority.

A good example of this is the recent *Westfall* case, where I assisted panel attorney Gerald Clausen. This felony drunk driving case featured a pretty good version of the familiar defense of, "Was he *driving* drunk or just passed out after drinking while sitting

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[4] Don't worry. I will not be announcing a *jihad* against certain appellate justices.

in his truck?" When, after a half day of deliberations, the jury told the judge they didn't think they could reach a verdict, he advised them to "mull it over tonight." There was no objection to this comment. The next day, after returning, the jury pretty quickly reached a verdict.

The judge's comments to the jury really stunk. But I couldn't easily figure out the legal basis for attacking it. This was not a case where the jurors were advised to violate the admonition against discussing the case with others outside of deliberations, but only to "mull it over"on their own. And there was no objection. But it still stunk. So, I went to the case law, to all the CALJIC instructions, and to FORECITE, and ultimately found some helpful language – but no clear case law – about the jury's duty to "keep an open mind" during deliberations and to not form opinions about the case except in the context of deliberations. The absence of an objection could be overcome if we could show that this was an improper judicial instruction which told the jurors to violate the defendant's constitutional right to an impartial jury. On these scant suggestions, Gerry Clausen did a lot more research and put together a strong argument attacking the judge's "mull it over" directive. To our very pleasant surprise, the argument recently led to a full (unfortunately unpublished) reversal in the case.

2. Going for the Jugular[5] – Attacking the Prosecution's Weak Point and Focusing on the Impingement of the Defense's Strong Points.

Many of the respondents to my informal survey described an alternative mind set which they believed to be critical to good issue spotting. This approach focuses not on what smells bad from the case, but on the strengths and weaknesses of the prosecution and defense cases. We all know that appeals are won or lost based on the strength of the

[5]I recognize that the great legal scholar Pooh Bear identified this creature as a "Jagular," but could not figure out how to include this in the present essay.

prejudice arguments as much, if not more, than on the merits of the claim of trial court error. This second approach permits you to zoom in on the issues where the strongest prejudice arguments will be found, then locate the errors which will make such prejudice arguments fly.

George Schraer describes a method he uses which he got from Jeannie Sternberg.[6] The first thing George does is figure out what it was the prosecution *absolutely needed to prove* to win the case. What was the tough part for them? Once you've sorted this out, you work backwards from this, figuring out what evidence, arguments and sometimes deceitful practices it took for the prosecutor to get to where he or she had to go. This then leads you to the areas where you can successfully attack the conviction. In effect, you're starting your issue spotting out by first identifying where the strongest *prejudice* argument will be found, even before you find or identify the issue.

George reminds us that if you are on to something that feels promising with regard to this type of issue, don't be discouraged or intimidated by what appears to be adverse authority, and don't be frozen into inaction because there is no clear authority on the issue, or indirectly unfavorable authority. Think it through: What do I need to make this into a winning argument? Sometimes you must argue that a court of appeal case is wrongly decided, but usually there are better ways of arguing that you're right. Keep looking for favorable authority, even if it's not exactly on the same point, but only a related topic, and look for ways of putting together two holdings on unrelated subjects to make up a unified argument for your case.

As an example, George cited a recent case where he won on the merits of the issue (but lost on harmless error analysis), *People* v. *Henderson* (2003) 110 Cal.App.4th 737. The issue there involved a novel combination of hitherto unrelated subjects: the defense's entitlement to instructions on third party culpability, and the generally prosecution-friendly practice of instructing the jury on "flight" as showing "consciousness of guilt."

[6]Unlike my other respondents, George did not e-mail me, but called on the phone. The comments that follow are from my notes of our conversation, which I have since destroyed pursuant to standard procedure.

In George's case, there was evidence that the potentially culpable third party fled after the crime. George persuaded the appellate court that in these circumstances there was a sua sponte duty to instruct on flight as demonstrating consciousness of guilt on the part of the third party.

George reminds us that artful *packaging* of issues is very important. When there isn't authority directly on point, weave between cases which are helpful to construct a fluid argument. If that doesn't work, then grab the court's interest by suggesting that it's an issue of first impression. In other words, do whatever you can to make the issue appear more appealing and interesting to the reviewing court. This will lead you to obtain more reversals, or at least more published opinions.[7]

Mark Greenberg has a global approach to issue spotting that is a complementary converse to the approach suggested by George Schraer. Once Mark is thoroughly acquainted with the facts of the case, and with the defense theory of the case in terms of guilt, degree of culpability, alibi, affirmative defense, etc., "then *anything* that somehow interferes with the effective presentation of the defense theory of the case is a potential issue." This is especially true, Mark reminds us, for jury instruction issues, where it's often "open season" even without an objection. But it also holds for evidentiary issues or pretrial motions, even when not too ably presented or preserved by trial counsel.

> Once you have the potential issue, then you just play with it until you get it into presentable form. Sometimes it will fit an already defined niche, sometimes you will have to work it out by analogy to another defined issue, and sometimes you'll just have to push the envelope.

Mark requires "at least logical coherence" for an issue for which there is no authority or where there is contrary authority which can be criticized or distinguished.

Courtney Shevelson gives another version of this same approach, focused on a careful review of the prosecutor's arguments to the jury.

> Closing arguments frequently highlight how what looked like a ho-hum evidentiary ruling against the defense actually went to something that the

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[7]It also helps to be George Schraer.

> trial litigants thought was quite important. The arguments of counsel can also reveal that a jury instruction as given and as used by the DA in argument did not adequately cover the law that was actually applicable in the peculiar circumstances of the case. So, when I hunt through the arguments for DA exploitation of errors that I have already decided to argue, I try to keep my eyes open for ways in which points of controversy which I initially thought were no big deal might actually have made a difference in the case. It's kind of a process of trying to find prejudice in the DA's argument and then working backwards to see if you can attach the prejudice to some arguably erroneous evidentiary ruling or instructional omission.

Which brings us back to the theme of this part of the discussion: prejudice is everything, or almost everything, for most appellate issues. Find the weak thread, then trace it back to the spot where you can pull it to unravel the conviction.

3. **Jury Instructions and the "Stealth Juror"**.[8]

Stephen Greenberg has another very creative issue spotting approach which, like the preceding ones, focuses on strong prejudice arguments as the key to locating winning issues.

> In reviewing jury instructions, I see myself not as a defense attorney, but as a "stealth" juror at the trial. By "stealth," I mean secretly working for the prosecution and in favor of conviction. My goal as stealth juror is to find what is essentially a *shortcut* to conviction, one I can sell to my fellow jurors so we can more easily find the defendant guilty and head home. If I spot such a shortcut – whether within a single instruction or across several in combination – then I also need to be able to convince my fellow jurors that my interpretation of the instructions is *reasonable*.[9] If I've gotten that far, I can switch back to my role as criminal defense advocate and try to develop an argument that this "reasonable" shortcut using the instructions

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[8]Stephen discussed a version of this approach at SDAP's May, 1998 seminar.

[9]Which addresses the prerequisite to a claim of jury instruction error, i.e., the requirement that there be a "reasonable likelihood that th e jury has applied the challenged instruction in a way that violates the contstitution. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 72.)

given represents an instance of fundamental instructional error.

In addition to the *Estelle* v. *McGuire* rule discussed in the footnote, Stephen notes two other "guiding principles" which make this approach fruitful: that the concern of a reviewing court is what a jury of laypersons may have understood the court to have meant with its instructions (*People* v. *Crossland* (1960) 182 Cal.App.2d 113, 119); and that jurors are not law students with an independent motive for legal study, but, "at best . . . well-meaning temporary visitors attempting to comprehend a foreign language." (*People* v. *Thompkins* (1987) 195 Cal.App.3d 244, 251.)

Stephen suggests that principles of *statutory construction* are useful guides when undertaking a "reasonable" interpretation of the meaning of jury instructions, since "both are supposed to be based on principles of common sense." As an example of this, Stephen describes how he used legal maxim "expressio unius est exclusio alterius" (i.e., that a specific legislative grant of power implies that no other power passes) to demonstrate instructional error. In one of his cases, the court instructed on "motive" as probative of guilt without ever telling the jury that evidence of motive alone was insufficient to establish guilt. A number of other instructions given to the jury included the principle that particular facts, while probative of guilt, could not alone establish it. (See, e.g., *People* v. *Dewberry* (1959) 51 Cal.2d 548, 557 [instruction as to effect of reasonable doubt between first and second degree murder, and between involuntary manslaughter and justifiable homicide, but not as between murder and manslaughter, left jury with clearly erroneous implication that the rule did not apply to latter situation]; and *People* v. *Salas* (1976) 58 Cal.App.3d 460, 478 [when generally applicable instruction is specifically stated with respect to one aspect of the charge and not repeated with respect to another, the inconsistency may be prejudicial error].)

The "stealth juror" or "shortcut to conviction" approach is one which I have also found very helpful, even without the great title for it. In particular, I have used this approach whenever a judge makes an ad lib response to questions from a deliberating jury. In a case involving a series of sex crimes against two unconscious victims, where

my client and two other men were alleged perpetrators, the deliberating jury asked whether aiding and abetting instructions “pertain to the specific act (charge) or to the entire series of events?” The judge’s responses, which emphasized that the instructions applied to “an offense or offens<u>es</u> . . .” was inadequate, I argued, because it failed to comprehend the reasonably plain meaning of the jury’s question, which asked, in effect, “If the defendant’s words or actions somehow contributed to criminal conduct by his accomplices, does his conduct make him guilty only as to the act he intended to facilitate or commit, “the specific charge,” or culpable for “the entire series of events,” i.e., all the crimes committed against the victims. From this, I argued, that what the jury really wanted to know about was derivative liability for unintended criminal acts under the “natural and probable consequences” doctrine. (*People* v. *Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) Thus, I contended, the court’s response to the jurors erred by failing to inform them of this principle, and misleadingly suggested to them that any conduct by defendant intended to facilitate any of the charged crime made him culpable for all of them as an aider and abettor, giving them a very convenient shortcut to conviction on all charges.

Of course, the virtue of this type of argument, focused on a jury’s query to the judge and a misleading or erroneous response, is that the prejudice prong is basically a slam dunk, since “there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury’s inquiry during deliberations.” (*People* v. *Thompkins*, *supra*, 195 Cal.App.3d at pp. 252-253.)

4. **But then Again . . . . Keeping All the Balls in the Air.**

Another part of Julie Schumer’s comments suggest another important rule about issue spotting, argumentation, and the finding of winning issues. This rule can well be expressed in New York parlance as, “Ya never know *where* it’s gonna come from.” Julie reminds us not to prejudge an issue because you think it’s weak or has no meaningful chance of winning, noting two reversals she recently obtained on issues she felt were not that good involving wrongful admission of prior bad acts.

They weren’t so bad as not to raise them but they were clearly not winners

> in my estimation based on how we know the courts function today plus a huge reservoir of past experience with the same issue. Yet for reasons that remain obscure to me, I won on both issues.

In other words, the obligation to raise all arguable issues is more than just an empty exercise of the client's due process right to effective counsel on appeal, or a mechanism for preserving issues for federal habeas review. It can lead to reversals and helpful remedies for your client.

This reminded me of my one and only unpublished reversal in a murder case some years back. The best issue, I thought, had to do with the court's failure to define the term "unconscious" for the jury, in a case with a very strong unconsciousness defense that had lots of evidence and expert opinion to support it. Unfortunately, the issue looked pretty hopeless in light of *People* v. *Clark* (1993) 5 Cal.4th 950, which rather disingenuously held that instructions given to the jury in that case (and in my case) were sufficient to define "unconscious" for the jury. There were two other issues in the case, misinstruction on intoxication evidence, and misdescription of the lesser crime of involuntary manslaughter based on unconsciousness as requiring general criminal intent (when it really is based on a negligence standard). But these two issues looked like garden variety claims which appellate courts typically slither over or find harmless. Still, I briefed all three issues, doing my best to focus the prejudice arguments on the strength of the unconsciousness defense in the case. To my great surprise, the court of appeal reversed my client's murder conviction based on the latter two issues. I was astonished. In fact, I didn't even orally argue the case. It was noteworthy that the court, in a footnote, after acknowledging that there was not clear authority for the requirement of an instruction defining unconsciousness, ordered the trial court on retrial to give the missing instruction defining unconsciousness.

There's three lessons from that case. The first harkens back to the discussion above about Mark Greenberg's approach of focusing on the defense theory of the case, then working backwards from there to find every arguable issue which relates to the

impairment of that defense. The second lesson is that there really is a good reason to carefully and rigorously brief all the arguable issues, even those that don't burn a hole in the gut or don't seem to you to go to the heart of the case. And the third is that when you've got an issue that is powerful and compelling, and goes to the heart of defense case, but which seems hemmed in by adverse authority, try to find a way to raise it anyway. I have always felt that the compelling issue on which I *could not* win in state court because of *Clark* actually led to the favorable result on the other issues.

And remember, "Ya never know where it's gonna come from." Alan Siraco put this amusingly in his e-mail response. "Sometimes I feel like Don Knotts in the Reluctant Astronaut. My failures are well-executed, but my successes are rather bumbling." Keep plugging, don't let the "well-executed failures" bother you too much (I have certainly had my share of late), and make sure to put all those balls in the air and not drop too many.

C. **Be Prepared, Knowledgeable, or at Least Well Connected.**

Effective issue spotting requires a reservoir of knowledge and experience regarding where issues, new and old, can be found. Dallas's part of this presentation endeavors to give you an outline of where and how to look for substantive issues. My contribution here is to suggest that spotting and developing winning issues requires you to know what you *do* know, and know what you *don't* know, remembering, of course, that this was precisely what Socrates defined as "wisdom."

Every effective appellate advocate has a different way of storing and retrieving his or her issue spotting lore. Some, like Dallas or Brad O'Connell, keep it all in their gray lobes, and seem able to call up the name and cite of the key case at the drop of a question. Others, like my colleague Jonathan Grossman, meticulously organize issues and key cases in computer files and/or index cards. My own haphazard storage and recall system is harder to describe. I mostly use my own twenty-year stock of old briefs and five years worth of assistance memos, which I constantly mine for issues and cases that sound familiar when I run across them. My own internal wiring makes it hard for me to remember names of useful case law (let alone the cites), and I frequently find myself

remembering that I did brief a similar issue once, but unable to recall the name of the case in which I did it.[10] Computers make this process easier, allowing me to do word searches for key phrases or case names, both from my own materials and from legal research sources.

The key is knowing yourself, understanding your strengths and weaknesses as an appellate advocate, and learning to use your textual, electronic, and human resources efficaciously to round out your efforts.

By all accounts, the assistance of one's colleagues is invaluable to this part of issue spotting. When you run across something that smells wrong, seems unfair, or goes to the heart of the case against or for your client, but can't quite figure out how to package it into a winnable appellate issue, it's time to run it by a knowledgeable and issue-sensitive colleague. For me these days, that means a walk down the hall. For most panel lawyers, it takes a bit more effort – making a phone call, sending an e-mail, or setting a time to go across town (or into town) to talk in person with a fellow practitioner. Of course, we at SDAP are happy to try to play this role for you in both Assisted and Independent cases. The best course, though, is to cultivate dialogue with friends and colleagues who balance off your strengths. Some people have encyclopedic minds, and can remember cases by volume number when you mention an issue. Others are strong at intuitive thinking or linking disparate ideas into a single and unique analytical twist; and there are a few who have balanced strengths in both these areas. Know what you're good at, and where you need input from others; share your wisdom and talent with others, and reap the benefit of that sharing.

Alan Siraco makes a fine point about this.

> Making a living at what we do, under the economic pressures of AIDOAC and Guidelines requires quick assessments. I often feel I have not had the time to do all the research I want on a spotted issue. So, effective issue

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[10] As Christopher Robin said, "I try to remember, and then when I do remember, I forget."

spotting, including briefing those issues spotted, requires a certain feel for what's valid. Most of us also do this in a relatively isolated setting. Brainstorming with respected colleagues is an invaluable resource, especially in cases which seem to reveal no issues or an issue about which I am uncertain.

D. **Reading the Record the Right Way.**

The Gestalt of Issue Spotting also has its nuts and bolts component: record review. A number of my e-mail respondents focused in on this part of the appellate advocacy process in general, and on their own methods of issue spotting in particular, as integral to the process of spotting issues.

Here again, it is clearly important to figure out what works best for you. Some appellate advocates adopt an approach towards record review which emphasizes reading the record through from start to finish, "like a screenplay" (Alan Siraco), or "a badly constructed mystery novel" (Kyle Gee). Others, like Courtney Shevelson and me, will begin with a focus on key parts of the record – closing arguments of counsel, jury instructions, pretrial motions, etc. – as a way of getting revved up for the issue spotting to follow. Kat Kozik strongly recommends getting copies of police reports and trial opening statements as adjunct material to help find potential appeal and habeas issues. Lori Klein recommends "listening to every audiotape and viewing every videotape that the jury sees" in connection with record review.

The central idea that unites all these suggestions is the concept that record review is the starting point for finding issues, and requires the adoption of one's own developed practices for thoroughly combing through a record while keeping fired up about the case and attentive to finding potential issues. We didn't write the bad novel that is presented to us in the form of the appellate record. But it's our job to turn it into a thrilling (or, at least, readable) story about *what went wrong* in the story of our client's conviction.

Everyone has different approaches to record review. Kyle Gee and I have distinctive ways of working through an appellate record. Hopefully, a description of

these two contrasting approaches, and how they relate to the art of issue spotting, will be helpful to your own efforts.

1. Kyle Gee's Approach: Read the Bad Novel Straight Through and Get Organized!

Kyle likes to start with a complete "blank slate" about the case. He begins with the clerk's transcript (CT) review, carefully going over the CT contents with the exception of the preliminary hearing and jury instructions. From this he develops a careful chronology and writes a draft Statement of the Case, even before he has begun reading the reporter's transcript (RT), because he finds that this draft of the Case Statement helps him get the scope of the case clear in his mind. Kyle does a very cursory skim of the RT at this point, but only to locate any required record augmentations, which he likes to get out of the way before beginning the RT review in earnest.

For Kyle, it is essential to have large blocks of time for getting into the review of the RT.

> I read all of the RT chronologically, creating a RT summary containing references to both the evidence and the potential issues. The exception to the "chronological" rule is that I never begin my review of the trial transcript by reading the DA's opening statement (if there is one). Otherwise I read the trial in the order that events occurred. Unlike some people, I never read the arguments first. I prefer to see what I think the evidence shows, and what instructions the evidence supports, before I see what the attorneys felt about the evidence. It is only during my review of the Reporter's Transcript of the instructions that I also go through the instructions as they appear in the CT. [I also have CALJIC there to double-check for deviations].

Kyle describes his procedure for moving from record review to issue locating after he has completed his record review and constructed a detailed document on the computer containing his summary of the record.

> After I have my RT summary, I do a lot of playing with that file. Except in very short cases, I will split the RT summary into two files, which

> I call "RT-SF" [Statement of Facts] and "RT-ISS" [Issues], even though these tend to overlap to some extent. I then plow through "RT-ISS," creating headings for each individual issue and sub-issue, and creating a topical index of the issues and sub-issues.
>
> I then "carve away" from "RT-ISS" everything that I believe not to be a valid issue, dumping those parts into an "ISS-OUT" file. As I do research, other issues get dumped into the "ISS-OUT" file (this file is useful later for the "unbriefed issues" portion of the comp. claim). This is not always a one-way street. Sometimes issues move from the "ISS-OUT" file back into the "RT-ISS" file.
>
> Somewhere along the way – it varies from case to case when this occurs – I tackle the draft of the Statement of the Facts, knowing that identifying the potential issues helps focus the factual summary, and that the drafting of the factual summary tends to focus, eliminate, or even reveal an issue.
>
> I usually then return to the issues and arguments, not returning to the SF until the arguments are largely complete. The last part is usually the re-writing of the prejudice arguments.
>
> This is the way I like these things to go, and this is the way they often go. However, there are 100 variations on all of this, depending on the case, its complexity, time pressure from the court, and – of course – the compensation guidelines.

Kyle Gee's approach, as you can see, is very organized, and relies heavily on creating computer files in which he separates the two key parts of brief writing -- the fact summary and issue development. For Kyle, this makes the creative process work best.

> I can only stay interested and focused during the RT review if I read it like a badly constructed mystery novel. If I read the ending first (the arguments), I tend to become careless in reading the record.
>
> I like to start the record review with a blank piece of mental paper. I feed the information into the grinder and let it settle into a back mental compartment for a while. Record review (and drafting the SC) is the information input phase. Doodling on the screen with RT-ISS and ISS-OUT is just a way of moving everything to the front of my mind for a while. Somehow it works for me.

2. The Robinson Approach: Selective Skimming, Deep Review, Diving at Issues When You Find Them.

My approach is more haphazard than Kyle's, and summarizing it may do nobody any good. Yet, "somehow it works for me."[11] Here, in outline form, is how I do it.

a. Before Doing a Thorough Reading: Peruse Selectively.

I have always done this. It gets me fired up, and takes care of some practical details (augmentations, credit issues) early on in the game.

Preliminarily, I note that it's common to come across apparently meritorious issues in the introductory review of the record. I have learned not to go too far with these quickly spotted issues. I make a note of them, dig up an old brief or read a case to familiarize myself with the issue, then move on.

My preliminary review starts with the Clerk's Transcript. I first go to the back of the book to look at the Abstract of Judgment, if there's a prison sentence, or the minute order if there is not. Many times there are obvious sentencing errors or potential adverse consequences which can be spotted, and it's good to know about these as soon as possible. Also, it's staggering how many times one finds obvious credit errors, which can be corrected by a letter to the court while you are completing record review, augmentation, or work on other cases.

Next I'll peek at the appeal notice. Every once in a while, trial counsel will comply with his or her statutory duty under Penal Code section 1240.1 and list the potential issues. Sometimes – OK, rarely – those will be your winning issues.

I skim through any and all motions in the CT – pretrial 1538.5 and *Miranda* motions, in limine or other trial motions (e.g., for a mistrial, or for or against admission of evidence), post-trial motions (new trial, plea withdrawal, *Romero*, etc.). Skimming these

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[11]The one point on which Kyle and I agreed in our e-mail exchange was that the prerequisite to developing effective issue spotting technique is "figuring out who you are and what works for you."

can tell you a lot about the case and possible issues, and also give you a good "heads up" about the quality (or lack thereof) of the representation by counsel.

Lastly, I skim through the jury instructions. The idea here is to just get the lay of the land, saving the necessary thorough review for after you've carefully reviewed the RT of the trial. Keep an eye out for home-made DA instructions, always a source of error and appellate issues, and any obvious instructional red flags, such as refusal of defense requested instructions or hot button instructional error issues.

I skim selective parts of the RT. I read over the sentencing transcript, fishing for obvious issues. In jury tried cases, I skim through closing arguments, to get a good glimpse of "what really mattered" to the prosecution and the defense in the case, having found that this facilitates issue spotting. If there's a denial of a suppression motion, skim through the RT of the motion to see what happened there and how it adds to the potential merits of the issue, or whether it reveals a potential IAC claim regarding presentation of the motion.

In short record and guilty plea cases, I will frequently skim through the whole record without taking detailed notes. This can be done quickly and allows me to flag obvious issues (e.g., *Walker* error as to the restitution fines) or give me a sense that the case is probably a *Wende*.

As noted above, I typically start identifying and looking into potential issues during the early record perusal. I list possible issues, do some quick research, as needed, to inform myself about the possible issue (e.g., find out if some court has already decided your clever issue adversely), but try not to get too attached to the list yet, because it's very tentative until I've done a thorough record review.

b. **Thorough Record Review – Now Get Serious**.

A detailed review of the record and very careful notes are the key to good issue spotting, as well as to being able to write effective statements of the facts and procedural summaries. (Although this is a different subject than the present one, it is often

recognized that clear and effective statements are key to strong and successful appellate work.)

i. **The CT**.

Obviously, there's parts of the CT which don't require going through with a fine toothed comb. Here's some suggestions as to what requires your careful and detailed attention:

— Read the Information carefully; then look at the jury instructions and the statutory language involved. You would be surprised how often this leads to potential winning issues. Get very curious when your client is charged with a crime you've never heard of or dealt with.

— Reviewing pretrial minutes is one of the dullest parts of our work, and skimming is usually good enough. But keep your eyes open for unusual proceedings, motions, *Marsdens*, denied continuance requests, etc. There may be potential issues (for what was done or not done), and bases for augmentation of the record.

— Trial minutes used to be all hand-written, and were sometimes a great challenge to decipher. They are usually typed these days. I strongly recommend reading these with care. Although it can be a dull slog, the trial minutes give you an outline of what happened and are bristling with important information about the case. Minutes can flag in limine issues, 402 hearings, evidentiary issues during trial, instructional disagreements, misconduct issues, deliberations problems, etc.

— If I have skimmed the jury instructions already, I pass over them during the more detailed CT review, saving a more careful review for the time after I have completed the RT of the trial. Take a careful look at any and all notes from the jury and responses by the trial court. It's good to have the potential issues concerning this flagged for you before reading the RT.

— I always read over the probation report (skipping the "offense summary" portion), because I have learned by experience that when there are errors in sentencing, restitution fines, victim restitution, or credits, they often begin with the probation officer's

report.

ii. **RT Review**.

Once I'm at this point, I like approach record review about the same way as Kyle Gee: try, insofar as possible, to read the trial RT through from beginning to end. Of course, this is rarely possible. The next best thing is to make sure you have big blocks of time each day, or nearly each day, to get through the record.

I can't say enough about how important it is to take careful, detailed RT notes. I used to take these by hand, until I got to where I couldn't read my own writing any more. Then I started writing my notes in a computer file. Lacking the necessary third hand, this turned out to be a much bigger chore, but produced a far more useful set of notes which was much neater, better organized, and far more easily searchable.

My notes now use the column format, with page numbers on the narrow left column, and substantive notes on the right. For me, note taking serves three purposes. First, it *imprints* in my mind the key details of the trial, such that I can recall most key facts without looking at my notes. Second, the notes create the basis for the Statement of Facts which I will later write using the RT notes. And third, the notes are the place where I start to flag any and all potential issues.

In taking notes, keep in mind that you may really need them six months later, when you return to this case to write the AOB after a much-delayed augmentation and several extensions based on your overwhelming work load. Your notes make it possible for you not to have to reread much of the record in order to write your statements of the case and facts and prejudice arguments.

iii. **Jury Instructions**.

Much has been said on this subject already, but it can never be enough. Go through all the key instructions, comparing the RT version with the CT version, and both with CALJIC and any applicable statute. Use all the issue spotting tools discussed above, and remember that some ridiculously high percentage of winning issues come from jury

instructions.

c. **When to Draft the Fact Summary**.

This is one area where I differ in my approach from Kyle Gee. I resist the impulse to begin a draft the Statement of Facts until after I have a solid handle on the issues I plan to raise on appeal, and a good sense of which issues have the strongest chance of success. (Of course, that often means it's months after record review; but then my detailed notes bail out my flagging memory.)

For me, the Fact Statement and, to a lesser extent, the Statement of the Case, should not just support your substantive arguments, but actually make the arguments for you whenever possible. As an example, imagine you have a murder case where the focus of the defense case as presented at trial was alibi and identification. Imagine further that after you have reviewed the record and done some research, you determine that this defense was incredibly weak, depending on pretty hopeless credibility contests, but that there was, at the same time, a rather poor case presented by the prosecution for first degree murder, with a number of strong arguable issues concerning the failure to give required instructions on lesser degrees or crimes, or confusing instructions on elements of crimes or lessers. Your Fact summary should, of course, discuss the identification and alibi testimony; but if you are doing little or nothing with that defense in terms of issues presented, you want the emphases of your Fact summary to be on the weakness of the proof that the crime was premeditated, felony murder, or what have you. You want the reader to finish the Statement of Facts thinking, *that was a pretty weak first degree murder case!* Of course, until you have identified the issues and assessed their strength, you won't know this, and a Fact statement drafted before this would have to be substantially reworked.

d. **Flagging and Developing the Issues.**

When and how do I flag issues during record review? It's a bit quirky. I suppose that I utilize a "stew" composed of many of the practices described by my e-mail

contributors above. If, during review of the RT or CT, anything appears of interest in the trial – a bad evidentiary ruling, a bit of obvious ineptitude by counsel in not objecting to damaging evidence, etc. – I put little asterisks [**] next to the notes about what happened. This allows me to later search for the asterisks to relocate the possible issues and assemble a list of flagged subjects for further inquiry. My review of jury instructions will produce *lots* of little asterisks and potential issues. Most of these disappear before the AOB is filed, but sometimes the kookiest whims can turn into the best issues.

In the old days, I'd take my annotated handwritten record notes with asterisks and head over to the local law library. Nowadays, I mix research and issue development in with record review. If an issue seems interesting or promising from the RT, I'll dig right in and check it out, using Lexis, my personal brief and assist memo bank, LaFave, Witkin, FORECITE, or whatever resource works best to get me some kind of handle on the possible issue. I will also talk over the possible issue with a colleague. Frequently, I will put the results of this preliminary research into the RT notes, then return to that part of my notes as I develop the issue further. Of course, issues will drop away during this process, and new ones will show up.[12]

When I'm done with record review, and the preliminary research I've done with it, I generally print out my record review summary, then go through it page by page, making a long list of all potential issues, copying and pasting whatever notes I've already taken and tidying this up a bit. Issues will drop off at this point, or be followed by the parenthetical note "(WEAK)".

Lately I have taken to creating separate Word Perfect files for each issue, both to organize the issue into a coherent, sequential argument, and to accumulate and sort my

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[12]Julie Schumer's approach is similar. "What I do is think about the case for a while, then get out my notes and start with page 1, reviewing the whole thing again. I have FORECITE at the ready, plus other articles, seminar handouts, etc. that I think may have something pertinent. I try to keep abreast of any new issues that might be percolating around, such as with jury instructions, etc. If I have an idea I think might be a bit oddball, I call a colleague and get their opinion.

research. I do a lot of cutting and pasting from key cases found on Lexis, portions of which often end up being quoted or paraphrased in the arguments in the AOB.

Brief writing, of course, is a related but separate topic, which I won't try to cover here. But there is one last subject about AOB issue spotting which must be mentioned here.

E. **Keeping the Issue Spotting Magic Alive after You've Filed the AOB**.

After writing an AOB, I end up feeling as exhausted as Zeus after Athena burst out of his brain fully formed. The last thing you want to do, at least until you get the AG's brief, is work on new issues in the case. Yet experience has shown that it is common for great issues to reveal themselves to you after the AOB is filed.

Thus, the "ardor and humility" of issue spotting, the spirit of curiosity and zealous effort for the client, must continue post-AOB. When you see a case in the advance sheets which makes you think, "My God! Why didn't I raise that in the Smith case?" go for it! Do thorough research. And don't ever be afraid to ask leave to file a supplemental brief because you, well, missed it first time through. I have done it many times, and have yet to have a motion denied, or be notified by the State Bar that the Court of Appeal has reported me for my ineptitude ab initio. In any case, even if appellate judges and clerks think I'm a lightweight for this, so be it. The point is to get the relief my client is entitled to, or to raise and preserve an possible winning federal habeas claim.

Alan Siraco provides two great example of how this can work in practice.

> War story: Years ago, in an assisted criminal case, I suffered a published loss. I got a call from Mark Harvis at the LA Public Defender, who in reading the advance sheet, noticed that my client was arrested for possession of Valium without a prescription. He told me he had won demurrers on the argument that this was not illegal in California, though it was a federal offense. So, I took this issue, unspotted by trial counsel, assisting project staff and myself, and parleyed it into a reversal through a petition for rehearing and habeas petition.
>
> Moral: take nothing for granted; check the elements of every offense

> and the language of every jury instruction, and don't assume issue spotting is done once the AOB is filed.
>
> Another war story. In a dependency case, there was a potential issue regarding my client erroneously being denied "presumed" father status. Trial counsel felt she had set it up well, but I thought the facts weren't there. My project buddy convinced me that a thin thread existed, enough to pass through the frivolous filter. So, I reluctantly briefed it – to a panel that had recently rejected the same claim, and which previous rejection had been taken up the California Supreme Court by that time. We lost, but for different reasons. A petition for rehearing addressing those different reasons resulted in a 180 degree switch and a reversal for my client.
>
> Moral: sometimes, it's not so much the spotting of the issue as tenaciously hanging onto it.

Of course, it's generally best to raise post-AOB issues in a supplemental brief, to forestall the problem of procedural default from presenting issues for the first time in a reply brief or rehearing petition. However, when it's too late for a supplemental brief, don't quit; find a way to raise the issue somehow via rehearing, a motion to recall the remittitur, or even a pro per habeas you prepare for your client alleging appellate IAC.

F. **Habeas Issue Spotting -- Expanding the Horizon**.

In many senses, the spotting of potential habeas issues tends to fit into the "stink" test formula discussed above, but on a wider playing field. In a habeas, for example, an unexplained failure to object to damaging and improper evidence or instructions creates fertile grounds for an arguable issue.

And, as Kat Kozik reminds us, the possibility of a habeas claim gives rise to new ways of spotting issues. While you are confined on direct appeal to issues that can be found through careful review of the record, Kat's issue spotting suggestions show how these limits change for habeas cases.

> (1) Get and review as many materials about the case as you can, including opening statements for any possible reason, and the police report, because you might be delightfully surprised at what you find. Never underestimate the possibility that trial counsel failed to investigate

something really obvious and/or the DA suppressed favorable info. One of our roles is to uncover obvious mistakes. The more obvious, the easier to get relief.

Here's an example of how review of an opening statement led to a winner in one of my earliest cases. The client complained bitterly about IAC for failure to call defense witnesses and for many other things. In an augment motion, I threw in that I wanted the defense attorney's opening statement because of numerous IAC allegations by the client – a very general request. The opening statement was added to the record (perhaps because it was one of several items requested and I had articulated better cause for getting the others). I was delightfully surprised to discover that defense counsel promised in his opening to produce witnesses he never called at trial, and found case law holding that such a "broken promise" to the jury is a special type of IAC because of the terrible impression it creates. (I wasn't expecting/suspecting this when making the augment request – the client had just complained about the failure to present the witnesses, not the broken promise angle.) We presented a writ alleging IAC for failure to present the defense witnesses and IAC for failing to do so after promising to. The client ultimately won in federal court on the second claim. The court said it wouldn't have second-guessed the failure to present the witnesses if the omission were judged on a clean slate, but that the broken promise to the jury was inexcusable. I felt that getting the opening statement and discovering the broken promise in it was a stroke of luck at the time. But now I know to look for this issue.

Another example involving a Police Report shows the extent of some defense attorneys' failure to investigate! My client was prosecuted for selling drugs to a buyer in front of a drug house. The buyer was arrested near the scene and wound up testifying against my client (ID'ing him as the seller) in exchange for immunity. The client complained about IAC for many reasons, so I got the police report to assess his complaints. His complaints didn't pan out. But the police report contained a wonderful surprise that was the basis for some very strong IAC/*Brady* issues: it said that the buyer's blood was drawn at the police station after his arrest and was sent to the drug lab (he probably looked high to the arresting officers). This was news to me – not mentioned by the client, not in evidence at trial.

> Trial counsel didn't bother to find out the results of the lab test. The DA didn't disclose them to the defense. The lab sent me the results: positive for drugs. It would have been nice if the jury had known this in order to assess the witness's ability to ID my client.
>
> 2) Ask "what if" questions and hypothesize answers favorable to the client, then see if you can discover the favorable information with some investigation. Sometimes, what you ultimately find is useful for a purpose other than the one that originally motivated the investigation.
>
> I had a shooting case where the house where the shooting occurred had been boarded up at the time of trial and abandoned. No one knew why. My client kept saying the place was a drug house and the people who lived there had beefs with lots of folks who could have been the shooters. The defense elicited that the house was a filthy dilapidated pit, but got denials from the DA witnesses about any connection to drugs. I wondered if the government might have shut the place down as a drug house, hence the boarded up windows. I made a public records requests. Turned out that the police department and city inspectors condemned the building as a nuisance/blight because of its dilapidated condition/garbage/pests and forced the occupants to move. There was no hard evidence of it being a drug house. End of story? No! The police department is an "arm" of the prosecution team. It's shutting down the building and forcing the occupants to move six months before my client's trial undermined the DA's claim that the prosecution exercised due diligence in going to the condemned house two weeks before trial and expecting to find a witness still living there. The trial court found due diligence and let the witness's prelim testimony be read to the jury. I filed a writ raising IAC/Brady error for the info not coming out at the due diligence hearing.

Kat's "what if" approach is crucial for good habeas issue spotting, as can be seen by looking at the subject of expert testimony. Have you ever read over a record and asked yourself why in the world defense counsel failed to get an expert to testify as to some key aspect of the case? It happens to me all the time. This aspect of the "something stinks" test can be turned into a winning issue. For example, in a case with weak eyewitness identification evidence, where a number of recognized factors suggest possible

misidentification, the failure to call an eyewitness identification expert to testify as allowed under *People* v. *McDonald* (1984) 37 Cal.3d 351 can often amount to IAC.

Or, as happened to me a few years back, a defense expert may testify in a case, but leave you wondering why counsel didn't pursue what looked like an obvious area for inquiry with the expert. In my case, the charges involved sex with unconscious teenage victims; there was evidence of physical injuries to the victims consistent with sex on an unconscious person, but also strong evidence of PCP use by the victims. The defense was that the victims weren't unconscious and had consensual sex. The expert, Dr. Stephen Pittel, was used to prove that the victims couldn't have instantly passed out as they claimed based on a dose of PCP in their mixed drinks. However, Dr. Pittel was never asked if the victim's injuries to their anal and vaginal area could have been consistent with consensual sex while under the influence of PCP, a drug which both reduces inhibitions and causes a person under its influence to basically feel no pain. When I spoke with Dr. Pittel, he advised me that this subject had never been covered with defense counsel, and had strong substantive merit, but that he was, in fact, unaware of the victims' injuries. So, I had a habeas. (Which I lost in the Sixth District, but may win in federal court.)

Habeas issue spotting gives you a chance to think like a good trial lawyer, and figure out what defenses should have been explored and developed, but weren't.

Careful record review also can lead to finding winning habeas issues. Lori Klein notes that she "listens to every audiotape and view every videotape that the jury sees," and gives an example of how careful record review of an audio tape led her to a winning habeas issue.

> Listening to and viewing tapes does several things: (1) it brings the "cold" transcript to life, often in unexpected ways; (2) it alerts me to issues that I might not have noticed had I not looked at/listened to that evidence; and (3) it generally increases my sensitivity to the whole flow of a case, so that I am more likely to pick up something that "smells bad."
>
> Furthermore, I do this whether I am familiar with the language on

> the tape or not. This resulted in a huge pay-off in Sunny Nguyen's appeal – I listened to the taped police interrogation, including the part at the beginning that was (in part) in Vietnamese. During my review, I noticed that there were two distinct voices on the tape, and I could sense that this part of the tape was not as "inaudible" as the reporters had said. This ultimately led (with some luck) to the reversal of the convictions against him.

Well, it was only part luck. Lori scoured around and found a Vietnamese speaking radio broadcaster from Southern California who was able to both enhance the tape and translate it into English for her. It turned out that the "inaudible" portion was clear enough to be translated, and involved very favorable defense evidence. So, a hunch from listening to an original tape recording in a language which Lori could not understand at all led to a winning issue.

Habeas, of course, is a vast subject. However, I hope the above suggestions will help you to come up with winning issues in this critical area of appellate work.

CONCLUSION

I hope this somewhat haphazard tour through the Gestalt of issue spotting. If it has given you some useful tips. If it will help to energize your efforts for our clients in this crucial part of our work as criminal appellate advocates, then it was worth the effort.

II.

A SUGGESTED APPROACH FOR FINDING ISSUES IN SELECTED SUBJECT AREAS

There is no magic potion which will enable an appellate lawyer to spot issues. However, there are certain basic attributes which are shared by the best appellate attorneys.

First, a skilled appellate lawyer is necessarily a knowledgeable lawyer. In order to be a competent practitioner, a lawyer must read the new published opinions as soon as they are issued. This can be done by subscribing to a daily legal newspaper or by reviewing the opinions on the AOC's website (www.courtinfo.ca.gov). The true professional will review the new opinions a second time when they are published in the advance sheet. In this way, a point that was missed on the first reading will be noted on the second perusal of the opinion.

Second, a skilled lawyer never assumes the infallibility of his own knowledge. The criminal law is an incredible laboratory of experimentation in which statutory schemes are ever changing. Thus, a lawyer must always reexamine the relevant statutes in a case since they may have been amended since the lawyer last read them.

Third, the best lawyers are those who constantly reassess their own understanding of the law. Although a lawyer may believe that he fully understands the governing principle in a particular area of the law, it may be necessary to change one's understanding in order to advance a new issue.

Fourth, and most importantly, an appellate lawyer must have the capacity to view the law as a horizontal mosaic rather than as a vertical structure. The fabric of the law fits together in pieces just like a jigsaw puzzle. While the uninformed may believe that the law can be organized in a Roman numeral outline, it cannot. The concrete thinker will fail as an appellate lawyer. It is only by viewing the law as a whole that issues can be spotted. An example of this approach is as follows.

Under California law, the crime of theft can be committed in any number of ways (e.g. larceny by trick, embezzlement, false pretenses, etc.). Each of the methods has different elements. However, the rule has evolved that an error in instructing the jury on the wrong

form of theft does not require reversal if there is sufficient evidence to support the conviction on any theory. (See *People v. Counts* (1995) 31 Cal.App.4th 785, 791-794 and cases cited therein.) Reference to other legal principles reveals a logical flaw in this conclusion.

Under the Fifth Amendment, a judgment may not be upheld unless the jury has made a finding that "'every element of the crime'" is supported by proof beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) In this context, there must be a congruence between the offense alleged in the charging document and the jury's verdict. (*Ibid.*)

In assessing the nature of the charge, "the relevant inquiry is not one of form, but of effect . . . ." (*Apprendi, supra*, 530 U.S. at p. 494.) A "State cannot through mere characterization change the nature of the conduct actually targeted." (*Id.*, at p. 493, fn. 18.) "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense." (*Id.*, at p. 483, fn. 10.)

Given the principles stated by the Supreme Court, it is manifest that the California rule is unconstitutional. If the People charge the wrong offense and the jury is instructed on the wrong offense, the federal Constitution demands that a remedy be provided to the defendant.

In the sections which follow, an attempt will be made to illustrate the application of the foregoing principles. In offering this approach, there is no suggestion that this is the only or even the best approach. Rather, the knowledgeable and skillful appellate advocate must use any and all means to ferret out arguable issues.

Finally, it should be noted that this article covers only a few of the myriad subject areas in criminal law. The topics have been chosen since they are important ones and because they best exemplify the authors' approach in finding issues. An authoritative list of possible criminal appellate issues can be found in the 2000 Appellate College materials which are available on the ADI website (www.adi-sandiego.com). (O'Connell, Issue Spotting and Evaluation: General Tips and Annotated Checklist.)

A. **Do Not Ever Assume That The Trial Court Had Fundamental Jurisdiction Over The Case.**

It is a prime principle of California jurisprudence that a defendant cannot be convicted if the trial court lacked fundamental jurisdiction over the case. (*People v. Chadd* (1981) 28 Cal.3d 739, 757.) In general terms, a lack of fundamental jurisdiction connotes the court's "entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citation.]" (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) Importantly, errors arising from a lack of fundamental jurisdiction can be raised at any time without the benefit of an objection in the trial court. (*People v. Williams* (1999) 21 Cal.4th 335, 339-340.)

Given this reality, appellate counsel should never presume that the trial court possessed fundamental jurisdiction over the cause. While the following examples are not intended to be exhaustive, they should serve to demonstrate that a hidden question of fundamental jurisdiction may exist even though no objection was made in the trial court.

Article I, section 14 of the California Constitution provides that a felony "shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." Given this provision, the parties may not confer jurisdiction on the court by stipulating that a complaint may serve as the information. (*People v. Smith* (1986) 187 Cal.App.3d 1222, 1224-1225; but see *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1132.) Thus, in any felony case where neither an information nor an indictment was filed, a jurisdictional challenge is available on appeal.

As the Supreme Court has recently reaffirmed, the bar of the statute of limitations may be raised at any time even though there was no objection in the trial court. (*People v. Williams, supra*, 21 Cal.4th 335, 339-340.) This is true even if the defendant entered a guilty plea. (*Id*., at p. 340.) However, this rule is limited to those situations where the charging document "on its face, indicates the offense is time-barred." (*Id*., at p. 344.) If the charging document "either shows the offense was committed within the time period or contains tolling allegations," a jurisdictional claim will not lie and the defendant will have to resort to a claim of ineffective assistance of counsel if the statute of limitations issue was not raised in the trial court. (*Id*., at pp. 344-345.)

Another common jurisdictional issue arises from the application of Penal Code section 1368. On many occasions, the trial court will suspend the proceedings while an inquiry is conducted as to whether the defendant is competent to assist in his own defense. (Penal Code section 1368, subd. (c).) Unless and until the suspension order is lifted, the trial court has no jurisdiction to try the defendant. (*People v. Marks* (1988) 45 Cal.3d 1335, 1340-1344.) In this situation, reversal is required even if the defendant was convicted at an error free trial. (*Ibid*.)

A final example of a jurisdictional claim involves the situation where a trial court conducts proceedings on remand before the remittitur is issued by the Court of Appeal. Any such proceedings are null and void. (*People v. Perez* (1979) 23 Cal.3d 545, 554; *People v. Sonoqui* (1934) 1 Cal.2d 364, 366-367.)

The foregoing survey of the law yields a simple truth. Appellate counsel should never assume that the trial court had fundamental jurisdiction over the case. To the contrary, counsel should always take a few minutes to investigate whether the court had jurisdiction.

B. **Challenges to The Sufficiency of the Evidence.**

In the usual case, there will be little doubt that the government successfully proved the elements of the crime for which the defendant was convicted. However, in a number of cases, it will be possible to challenge the sufficiency of the evidence by carefully comparing the evidence in the record as against the elements found in the relevant statute. In conducting such an examination, there are at least four techniques that might be employed: (1) the evidence does not satisfy the policy underlying the statute; (2) the evidence does not satisfy the true meaning of the statute; (3) in certain circumstances, the prosecutor simply charged the wrong crime; and (4) in some cases, the testimony of an accomplice is not adequately corroborated. Examples of each category are as follows.

An element of aggravated kidnapping is that "the movement of the victim is beyond that merely incidental to the commission of, . . . the intended underlying offense." (Penal Code section 209, subd. (b)(2).) The applicable underlying offenses are robbery and serious sexual crimes such as rape. In recent cases, the Courts of Appeal have held that movements

of as little as 9 and 29 feet were not incidental to the defendants' plans to commit robbery or rape. (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169-170; *People v. Salazar* (1995) 33 Cal.App.4th 341, 347.) These holdings are flatly inconsistent with the policy justification for imposing severe punishment for an aggravated kidnapping.

Given the extreme punishment for aggravated kidnapping, the Supreme Court has indicated that the "incidental movement" element must be examined with the common sense notion that some movement of the victim is necessary in order to accomplish a rape or robbery. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1136-1138.) Thus, de minimis movements such as 9 and 29 feet cannot satisfy section 209, subd. (b)(2) unless the movement was for a purpose unrelated to the commission of the crime. Fortunately, one appellate court has recognized this principle.

In *People v. Hoard* (2002) 103 Cal.App.4th 599, the defendant robbed two employees of a jewelry store and asported them 50 feet into an office where they were tied up. In reversing the defendant's conviction for aggravated kidnapping, the court reasoned that the "movement of the two women served only to facilitate the crime with no other apparent purpose." (*Id.,* at p. 607, fn. omitted.)

As *Hoard* reveals, an element of a crime must always be measured with an eye towards the policy underlying the crime. The justification for imposing a life sentence for aggravated kidnapping is not satisfied when a defendant has moved a victim a few feet in order to commit a garden variety robbery.

Speaking of robbery, an even better example of the use of policy in raising a sufficiency of the evidence challenge can be found by examining Penal Code section 213, subd. (a)(1)(A).) In relevant part, the provision provides for enhanced punishment when a residential robbery has been committed "in concert with two or more other persons, ..." (Section 213, subd. (a)(1)(A).) In *People v. Bernard*, H024950, the defendant was punished under this statute when she and one other person entered the victim's home. Although the statute imposes additional punishment when at least three people commit the crime, the Court of Appeal held in its unpublished opinion that not all of the three participants must enter the

residence. This holding is belied by the purpose underlying the statute.

The provision in question was added in 1994. The legislative history establishes that the purpose of the law was to provide greater punishment for those who commit "home invasion" robberies. (Sen. Com. on Judiciary, Analysis of AB 779 (1993-1994 Reg. Sess.) p. 2 ["AB 779 is aimed at home and business invasions which are an aggravated kind of property theft and intimidation executed by groups of persons acting in concert who enter into people's homes to terrorize them."].) Obviously, a "home invasion" robbery has not occurred unless at least three thieves enter a house. The holding of the Court of Appeal in *Bernard* is clearly at odds with the purpose underlying section 213, subd. (a)(1)(A).

A second method of finding a sufficiency of the evidence issue is by examining the meaning of the relevant statutory language. Taken at face value, a defendant's conduct may appear to have satisfied a statute. However, a closer examination may reveal that an argument to the contrary can be made.

In re Ricky T. (2001) 87 Cal.App.4th 1132 illustrates this technique. There, the minor was charged with making a criminal threat under Penal Code section 422 when he threatened to "get" his teacher and "kick his ass." Under section 422, the utterance of a threat is punishable so long as it is made in an "unconditional, immediate, and specific . . . ." manner. At first blush, Ricky's threat seems to match up with the plain terms of section 422. However, his sufficiency of the evidence claim prevailed on appeal.

In its analysis, the Court of Appeal reasoned that the nature of a threat must be measured in "context" rather than solely on the basis of "the words spoken." (*Ricky T., supra*, 87 Cal.App.4th at p. 1137, fn. omitted.) Measured by this standard, Ricky's threat did not satisfy section 422 since the "surrounding circumstances" revealed that there was no real possibility of violence. (*Id.*, at pp. 1138-1139.) Thus, while Ricky made a threat, it was not one which fell within the meaning of section 422.

Another technique for examining the sufficiency of the evidence is to examine the record in order to determine if the government brought the proper charge against the defendant. In some cases, the defendant may be guilty, but not of the offense at issue. This

genre of error frequently arises with theft crimes. A pending Sixth District case provides an example.

In *People v. Harrison*, H026852, the defendant was employed at the Palo Alto city dump. His job was to collect the fees. According to the testimony of an undercover cop, Mr. Harrison took $40 from him without supplying a receipt or placing the money in the till. The government proceeded solely on a larceny theory. While there is certainly substantial evidence that a theft occurred, the crime of larceny did not transpire.

Under settled principles, an element of larceny is that property was taken from the "possession" of the victim. (2 Witkin and Epstein, California Criminal Law (3rd ed. 2000) Crimes Against Property, section 17, p. 38; 3 LaFave, Substantive Criminal Law (2nd ed. 2003) chapters 19.2(b) and 19.6(e)(1), pp. 66, 107.) In *Harrison*, the city was never in "possession" of the money tendered by the cop (i.e. the money was never placed in the city's till). Thus, while Mr. Harrison is probably guilty of embezzlement, he is not guilty of larceny. (*Ibid.)*

Finally, California law expressly provides that a conviction may not be obtained on the basis of accomplice testimony "unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; . . . ." (Penal Code section 1111.) An accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant . . . ." (*Ibid*.) Importantly, extrajudicial statements fall within the category of accomplice testimony. (*People v. Andrews* (1989) 49 Cal.3d 200, 214.)

Given these principles, appellate counsel should examine the record in order to determine if any of the government's witnesses were accomplices. If so, a meritorious sufficiency of the evidence issue may exist. (See *In re Gay* (1998) 19 Cal.4th 771, 792-793 [evidence that both the defendant and the perpetrator were light skinned was probably insufficient corroboration of the accomplice's testimony that the defendant committed the crimes].)

It is never a foregone conclusion that the judgment is supported by substantial evidence. By employing the techniques identified above, appellate counsel can often mount

fruitful challenges to the sufficiency of the evidence.

C. **Instructional Issues.**

A full length article on the subject of instructional error is available from SDAP. (Sacher, The Search for Instructional Error By The Appellate Advocate: A Suggested Approach (2004 ed).) A few salient points from that article are as follows.

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

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

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

Aside from carefully studying the standard CALJIC instructions from the standpoint of their general correctness, counsel should also be sensitive to how the instructions related to the specific facts of the case under review. It may well be that a generally proper instruction is misleading when it is employed in a certain factual context. Thus, counsel must always be attuned to the interplay of the instructions given and their relation to the specific facts of the case. (See *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446 ["[e]ven

an accurate statement of the law may be erroneous as an instruction if it is likely to mislead or misdirect a jury upon an issue vital to the defense . . .".].)

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

There are essentially four types of instructional error: (1) an instruction which is erroneous on its face; (2) a legally correct instruction which has no application to the case at bar; (3) the denial of an instruction requested by the defense; and (4) the trial court's error in failing to give a required instruction sua sponte. These areas will be briefly explored below.

With respect to category one, appellate counsel should carefully read each and every instruction which was given to the jury. In so doing, counsel should measure the language employed in the instruction against the substantive law found in California's statutes and the federal Constitution. Oftentimes, this examination will reveal that an instruction is legally erroneous.

For example, CALJIC No. 2.15 is an instruction of longstanding which advises the jury that the defendant's possession of recently stolen property is sufficient proof that he stole the property so long as there is "slight corroboration" of his guilt. Without doubt, use of the term "slight" renders the instruction constitutionally defective. This is so since the word "slight" impermissibly reduces the government's burden of proof beyond a reasonable doubt. (*United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500 [use of the term "slight evidence" in a conspiracy instruction constituted constitutional error]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281 [an instructional error which misadvises the jury regarding the reasonable doubt standard compels reversal per se].)

It is frequently the case that a trial court will give a legally correct instruction which simply does not apply to the case at bar. Thus, appellate counsel should carefully scrutinize the record in order to ensure that all of the instructions were actually applicable.

People v. Hannon (1977) 19 Cal.3d 588 illustrates this type of error. There, the

prosecutor sought to impeach a defense witness by showing that the defendant's lawyer had instructed him not to talk to the prosecutor's investigator. Based on this evidence, the trial court gave CALJIC No. 2.06 which advised the jury that it could find that the defendant had a consciousness of guilt since he attempted to suppress evidence. Although No. 2.06 is a standard instruction which is routinely used, the Supreme Court held that it was erroneously given since there was no evidence that the defendant had personally participated in silencing the witness. (*Id*., at pp. 599-600.)

The lesson to be drawn from *Hannon* is a simple one. Each and every jury instruction should be carefully examined in order to ascertain whether it has a basis in the record. By using this technique, a number of issues can be found.

Little need be said about the third category of instructional error. Obviously, appellate counsel must carefully review the record whenever the trial court has denied an instruction requested by the defense. (See generally *People v. Wright* (1988) 45 Cal.3d 1126, 1137 [defendant is entitled to an instruction which pinpoints "the crux of the defense" without engaging in an argumentative recitation of the evidence].)

The final category of instructional error involves those situations where the trial court has failed to honor its duty to give an instruction sua sponte. In order to spot issues in this area of the law, appellate counsel must become knowledgeable concerning the many instructions which must be given by the court sua sponte. (For a list of those instructions which must be given sua sponte, see Appendix A, CALJIC (Jan. 2004 ed.) pp. 1227-1234.)

In considering whether the trial court erred in failing to honor its sua sponte instructional duties, appellate counsel should give particular attention to whether the instructions contained any terms whose meaning would not have been readily apparent to the jurors. If so, a strong issue may exist.

In instructing the jury, the trial court has an obligation to define those terms which have a "'technical meaning peculiar to the law.' [Citations.]" (*People v. Kimbrel* (1981) 120 Cal.App.3d 869, 872.) When appellate counsel reviews the instructions given to the jury, it is important to look for words whose meaning might be less than obvious to a layperson. If

a technical term is employed in defining the elements of a crime or a defense, the failure to define the term may result in reversible error.

For example, Health and Safety Code section 11366 defines the rarely charged offense of opening or maintaining a place for the use or sale of narcotics. Since there was no CALJIC instruction for the offense, the trial court in *People v. Shoals* (1992) 8 Cal.App.4th 475 failed to define the meaning of "opening or maintaining a place." After finding that the term has a very specific meaning (i.e. the place must be continually used for the proscribed illegal purpose), the Court of Appeal held that the trial court had committed reversible error by failing to define the term for the jury. (*Id*., at pp. 489-491.)

The jury instructions often provide a veritable treasure trove of appellate issues. By using the techniques suggested above, defense counsel can hopefully spot some winning issues.

D. **Spotting and Developing a Claim of Ineffective Assistance of Trial Counsel: The Defendant is Entitled to Have His Case Litigated the Right Way in The Trial Court.**

Although the claim of ineffective assistance of trial counsel has often been derided as the product of appellate lawyers' imagination, the truth is that there are a significant number of cases where the defendant has not been afforded competent representation at trial. Indeed, in recent years, the federal courts have reversed numerous state convictions on the grounds of ineffective assistance of trial counsel. (See Hertz and Liebman, Federal Habeas Corpus Practice and Procedure (2003 Supplement) section 11.2c, pp. 92-99 [collecting cases].)

Given this reality, it is incumbent upon appellate counsel to carefully review each and every record in order to determine if the defendant has received the effective representation to which he was constitutionally entitled. In conducting this review, counsel should employ a simple rule.

After closely studying the manner in which the proceedings were actually conducted, appellate counsel should ask a simple question: How <u>should</u> the case have been conducted? While the Supreme Court has cautioned that the decisions of trial counsel are entitled to

deference, counsel's actions must still be measured by a standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 689-690.) If trial counsel acted irrationally, his tactical choices (if such they were) are not entitled to deference. (*Cave v. Singletary* (11th Cir. 1992) 971 F.2d 1513, 1518; *Eldridge v. Atkins* (8th Cir. 1981) 665 F.2d 228, 237, fn. 5 [trial counsel's performance was deficient since his purported strategy "not to use [witnesses] was not so much trial strategy as it was an accommodation to his own inadequate trial preparation"]; *People v. Frierson* (1979) 25 Cal.3d 142, 162-163 [a tactical decision made without the benefit of investigation is irrational].)

Unlike the typical appellate issue where counsel must first establish that there was an adequate objection made in the trial court, the claim of ineffective assistance of counsel has no such boundary. Thus, appellate counsel should carefully consider whether something went dramatically wrong in the trial court proceedings. If it did, the defendant is entitled to a remedy even though trial counsel did not make a sufficient objection or otherwise preserve the issue.

In the instance of a jury trial, appellate counsel should analyze each of the components of the case. Counsel should look at the government's case and inquire whether all of the prosecution evidence was admissible under the rules of evidence. If some of the evidence was subject to exclusion, defense counsel erred by failing to make the proper evidentiary objection. (*People v. Stratton* (1988) 205 Cal.App.3d 87, 93-97 [reversible error found where defense counsel failed to object under Evidence Code section 1101].)

On the opposite side of the coin, appellate counsel should determine whether there was probative evidence which would have supported the defense case but which defense counsel failed to present. Obviously, the failure to adduce exculpatory evidence or evidence which impeaches the government's case is a serious error. (*Avila v. Galaza* (9th Cir. 2002) 297 F.3d 911, 921-924 [reversible error found due to the failure to call exculpatory witnesses].)

Appellate counsel must also examine the jury instructions in detail. If there was a helpful instruction which would have been given had it been requested, a claim of error may

exist. (*Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, 1172-1174 [trial counsel erred by failing to obtain an instruction on the defense of diminished capacity]; *United States v. Myers* (7th Cir. 1990) 892 F.2d 642, 648-649 [ineffective assistance of counsel found due to the omission to request a limiting instruction].)

Key components of any trial are the opening and closing statements to the jury. With regard to opening statement, defense counsel may commit prejudicial error when he promises to present witnesses and then fails to do so. (*Harris v. Reed* (7th Cir. 1990) 894 F.2d 871, 879.) At the closing argument stage, defense counsel may prejudice the defendant's case when he fails to object to prosecutorial misconduct. (*Burns v. Gammon* (8th Cir. 2001) 260 F.3d 892, 897-898; *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 704.) In addition, defense counsel's own closing argument may be so deficient that it may require a remedy. (*People v. Diggs* (1986) 177 Cal.App.3d 958, 970-972.)

Finally, in arguing the issue of prejudice, appellate counsel should once again return to the central question: How should the case have been presented to the jury? If at all possible, it should be argued that trial counsel's errors made the government's weak case look stronger. (*Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954, 966, amended 311 F.3d 928 ["'[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' [Citation.]"].) At the same time, counsel should also argue that the defense case would have looked immeasurably stronger in the jury's eyes had trial counsel done his job correctly. (*Avila v. Galaza, supra*, 297 F.3d 911, 924 and cases cited therein.) Of course, counsel will also want to argue that prejudice is shown by the cumulative effect of all of trial counsel's errors. (*People v. Hill* (1998) 17 Cal.4th 800, 844; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893.)

There is a wonderfully objective quality to hindsight. Once an event has occurred (such as a jury trial), a fair minded observer can carefully deconstruct the proceedings to see if the event was conducted according to normative expectations (i.e. the Constitution and statutory law). When expectations were not fulfilled due to defense counsel's unreasonable errors, the defendant should not suffer. Indeed, our constitutional system requires that a

remedy be given. In order to ensure that the Sixth Amendment retains vitality, appellate counsel should not hesitate to advance a claim of ineffective assistance of counsel when the defendant was denied a fair trial through no fault of his own.

E. A Corollary Principle In the Investigation of a Claim of Ineffective Assistance of Counsel: Appellate Counsel is not Bound by the Theories which Defense Counsel Advanced Below.

In reviewing a record, appellate counsel will sometimes fall victim to the vice of unquestionably accepting the manner in which trial counsel litigated the case. This is a fundamental error. As was suggested above, appellate counsel must always approach the case as if he was going to try it for the first time. Appellate counsel need not accept the choices made by trial counsel. Two examples illustrate this approach.

In *Foster v. Lockhart* (8th Cir. 1993) 9 F.3d 722, the defense presented an alibi defense to a rape charge. Although he possessed evidence that defendant was impotent, defense counsel decided not to present the evidence on the theory that it was inconsistent with the alibi defense. Thinking outside the box, appellate counsel advanced a claim of ineffective assistance of counsel due to the omission to present the evidence of impotency. The Court of Appeals accepted the argument and declared that "[c]ontrary to the reasoning of Foster's attorney, an impotency defense would have reinforced Foster's alibi defense by showing it was even more unlikely Foster raped the victim." (*Id*., at p. 726.)

As *Foster* shows, appellate counsel need not be stuck with a trial attorney's view of the case. If trial counsel had an unduly crabbed understanding of the possible defenses, appellate counsel can obtain a remedy for the client. (See *Rios v. Rocha* (9th Cir. 2002) 299 F.3d 796, 807, fn. 18 [defense counsel erred by failing to present the complementary defenses of misidentification and unconsciousness].)

A second example of the principle under examination can be found in *People v. Escobar*, H026298. There, the defendant was charged with stealing a compressor from his employer. The prosecutor called the employer who testified that the defendant did not have permission to take the compressor. The defense theory of the case was that the employer had authorized the defendant to take the compressor. When the defense adduced the employer's

hearsay statement indicating that the defendant could take the compressor, the court construed the statement as being an "operative fact" and instructed the jury that the statement could not be considered for the truth of the matter asserted. However, defense counsel missed an obvious exception to the hearsay rule. The statement was admissible as a prior inconsistent statement. (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1144, fn. 10 [some statements may be admitted as both an operative fact and as a prior inconsistent statement].)

The lesson of the foregoing examples should be well learned. Appellate counsel need not confine his analysis of the case to the limitations imposed by trial counsel.

F. No Matter How the Issue is Categorized, the Prosecutor Should Never Get Away With Presenting An Erroneous Theory of Liability to the Jury.

In a surprising number of cases, the prosecutor will obtain a conviction by relying on an erroneous legal theory. Since the prosecutor will often raise a number of theories in a case, appellate counsel must be extremely attentive to every theory advanced in a particular case. By carefully scrutinizing the prosecutor's theories, counsel can often find reversible error.

In some cases, the prosecutor will obtain a jury instruction on the elements of the offense which is quite simply wrong. For example, the specific intent to kill is an element of attempted murder. (*People v. Lee* (1987) 43 Cal.3d 666, 670.) However, the trial judge often errs by instructing the jury that malice (i.e. intent to kill) may be implied from the circumstances of the case. Such an instruction constitutes clear error which can be raised without the benefit of an objection at trial. (Penal Code section 1259.)

A more difficult problem arises when an improper theory is found, not in the jury instructions, but in the prosecutor's closing argument. It is, of course, misconduct for a prosecutor to misstate the law during closing argument. (*People v. Hill, supra*, 17 Cal.4th 800, 829-830.) However, absent an objection, any claim of prosecutorial misconduct is waived. (*People v. Morales* (2001) 25 Cal.4th 34, 43-44.) In this situation, two possible claims are available.

First, a claim of ineffective assistance of counsel should be advanced. Such a claim is patently meritorious since defense counsel has an absolute duty to ensure that the

prosecutor's closing argument does not mislead the jury. (*Washington v. Hofbauer, supra*, 228 F.3d 689. 704.)

Second, it can also be argued that the trial court erred by failing to preclusively instruct the jury sua sponte that the improper theory was not to be considered. This argument finds support in *People v. Morales, supra*, 25 Cal.4th 34.

In *Morales*, the Supreme Court discussed its earlier decision in *People v. Green* (1980) 27 Cal.3d 1. In *Green*, the prosecutor argued to the jury that three separate movements of the victim might support the asportation element of kidnapping. In reversing, the *Green* court held that one of the three movements was insufficient as a matter of law to satisfy the asportation element. In categorizing this holding, *Morales* indicated that the *Green* trial court could have cured the problem by giving a "preclusive instruction" that the jury was not to rely on the improper theory. (*Morales, supra*, 25 Cal.4th at p. 43.)

In conceptual terms, the "preclusive instruction" discussed in *Morales* is the type of instruction which must be given sua sponte. This is so since the court must instruct sua sponte on the general principles of law which govern a case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Without doubt, the inapplicability of a theory of liability is a general principle.

Fundamental fairness requires that a defendant not be convicted on an improper legal theory. By employing the techniques suggested above, appellate counsel can guarantee that a remedy will be forthcoming when the prosecutor relies on an erroneous theory.

G. **Once it is Spotted, An Issue Should be Framed to Maximum Advantage.**

One of the advantages of being an appellate lawyer is that you get to frame an issue in the manner that you see fit. After all, it is your issue. However, it is also appellate counsel's obligation to frame the issue in the manner which is most favorable to the client. A concrete example of this principle is as follows.

At trial, a prosecution witness blurts out that the defendant is on parole. Defense counsel promptly objects and the evidence is stricken. The defense then unsuccessfully moves for a mistrial.

An inexperienced appellate lawyer might argue that the trial court erred in denying the mistrial motion. Such a claim would be a mistake. This is so since the abuse of discretion standard of review applies to the trial court's ruling denying a mistrial. (*People v. Gurule* (2002) 28 Cal.4th 557, 614.)

The correct legal argument is simply that the defendant was denied a fair trial since the jury heard prejudicial evidence. By framing the issue in this manner, the appellate court will most likely treat the claim as being a pure issue of law which requires de novo review. (See *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935 [judgment reversed even though the trial court struck the testimony that the defendant was on parole].)

Appellate counsel must be sufficiently knowledgeable to both spot an issue and frame it correctly. If an issue is not raised under the correct rubric, all of the hard work in spotting the issue will go for naught.

H. **A Word About Sentencing Issues.**

The California Supreme Court has declared that "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" may not be raised on appeal absent an objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) In light of *Scott,* many appellate lawyers have blindly assumed that the vast majority of sentencing issues can now be raised only by way of a claim of ineffective assistance of counsel. This assumption is not necessarily correct.

On its own terms, the *Scott* rule applies only to "discretionary" choices actually made by the trial court. (*Scott, supra*, 9 Cal.4th at pp. 353, 356.) Thus, if the trial court had an erroneous view of the law and failed to exercise its discretion, no objection is required. (*People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139 [waiver of sentencing error "only occurs when the alleged error involved an exercise of discretion."].)

Moreover, it is essential to note that a significant number of sentencing issues may be raised on appeal without an objection in the trial court. Since some of these issues are

frequently overlooked by appellate counsel, a few are briefly mentioned below.

Subject to certain exceptions, Penal Code section 654 provides that a defendant may not be punished for two or more crimes if he maintained only a single criminal intent. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) A section 654 claim can be raised without an objection in the trial court so long as the defendant did not enter a plea bargain for a specified sentence. (*Id*., at pp. 294-297.) Thus, whenever it may be plausibly contended that the defendant had only a single criminal purpose in committing multiple crimes, a section 654 argument should be advanced.

In reviewing the sentencing proceedings, appellate counsel must examine each and every detail of the sentence. For example, counsel should review the award of presentence credits in order to determine if it is factually or legally inaccurate. An error involving presentence credits can always be raised in the trial court even if an appeal is pending. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8; see Penal Code section 1237.1 [presentence credits issue must first be litigated in the trial court before an appeal can be taken].)

A commonly missed issue on appeal involves the sufficiency of the evidence to support an award of attorney's fees. Under Penal Code section 987.8, subd. (g)(2)(B), a defendant sentenced to state prison is presumed to be unable to pay attorney's fees. Thus, unless the record shows that a defendant had substantial assets prior to being committed to prison, appellate counsel can challenge the sufficiency of the evidence to support the award of attorney's fees. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 350-351.)

Similarly, appellate counsel should always carefully review the record in order to ensure that ancillary orders issued at the sentencing hearing are supported by substantial evidence. An example of this type of error is a Penal Code section 1202.1 order requiring the defendant to be tested for AIDS. (*People v. Butler* (2003) 31 Cal.4th 1119, 1127-1129 [section 1202.1 order was not supported by substantial evidence].)

In short, appellate counsel has the duty to raise those meritorious issues which are both large and small. While many sentencing issues may provide only a small remedy to the

defendant, a small remedy is better than no remedy.

CONCLUSION

There is no substitute for both substantive knowledge of the law and experience in spotting issues. However, there are methods by which strong appellate claims can be ferreted out by discerning lawyers. Above all, a flexible and creative mindset will allow appellate lawyers to see and clearly define issues. In this way, appellate due process for our clients will hopefully prevail.