A PRIMER ON PREJUDICIAL ERROR: THE APPLICABLE TESTS AND HOW TO SATISFY THEM

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INTRODUCTION

As is recognized by any experienced appellate practitioner, the prime difficulty for an appellant is not to demonstrate error. Rather, the most difficult hurdle is to establish that the error compels reversal. The purpose of this article is to assist defense counsel in persuading an appellate court that either precedent or the equities of a particular case require that a remedy be given to the defendant.

This article has a dual focus. First, an attempt has been made to set forth the applicable standards of prejudice as they exist today. Second, and more importantly, the article also contains some thoughts as to how these standards may be satisfied. With respect to this second aspect of the article, I have also included a discussion suggesting how "routine" state law error may be successfully categorized as federal constitutional error. Given the reluctance of most California state courts to find reversible error, it is, of course, incumbent upon defense counsel to raise and exhaust any federal issue which will allow for the filing of a federal petition for writ of habeas corpus.

Finally, the reader who desires additional discussion may wish to review Charles Sevilla's excellent 1981 article entitled "A Pool of Prejudice: Prejudicial, Reversible And Harmless Errors on Appeal." The article can be found in the 1982 edition of the State Public Defender's Criminal Appellate Practice Manual. Although the article is dated, it contains an

authoritative section on case specific factors which may be used to show prejudice in a particular appeal. Indeed, I have relied on Mr. Sevilla's analysis in my own section on this topic.

I. ERRORS THAT ARE REVERSIBLE PER SE.

Although the California Supreme Court has generally taken its lead from the United States Supreme Court, it has not categorically done so with respect to the question of what errors require reversal per se. Thus, for the moment, California law is somewhat more helpful than federal law. In the sections which follow, the distinctions between the two courts' approaches will be defined.

A. The Federal Rule

In the landmark case of *Rose v. Clark* (1986) 478 U.S. 570, the court announced that virtually all constitutional errors are subject to harmless error analysis. (*Id.*, at pp. 576-578.) The sole exception to this rule are those errors which are termed "structural" in nature. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) In order to qualify as a "structural" error, a constitutional deprivation must affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Ibid.*)

In its most recent discussion concerning "structural error," the court suggested that some errors must necessarily be deemed reversible per se in light of the "difficulty of assessing the effect of the error. [Citations.]" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4.) This category of cases includes the denial of a public trial and racial

discrimination in the selection of a grand jury. (*Ibid*.) The court also noted the *sui generis* circumstance of the denial of the right to self representation which requires reversal per se since harmless error analysis is irrelevant in the sense that the exercise of the right "usually increases the likelihood of a trial outcome unfavorable to the defendant . . . ." (*Ibid.*)

For the moment, the list of "structural errors" includes: (1) the total deprivation of the right to counsel at trial; (2) a proceeding held before a biased judge; (3) the exclusion of prospective jurors on racial grounds; (4) the denial of the defendant's right to self representation; (5) the denial of a public trial; (6) a directed verdict in favor of the state; (7) the deprivation of a jury trial where guaranteed by law; (8) an improper instruction which dilutes the standard of proof beyond a reasonable doubt; (9) the involuntary medicating of the defendant at trial; (10) a defense lawyer's failure to file a notice of appeal upon the defendant's timely request; and (11) the deprivation of the right to counsel of choice. (*United States v. Gonzalez-Lopez*, supra, 548 U.S. 140, 149; *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 486; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Riggins v. Nevada* (1992) 504 U.S. 127, 137-138; *Fulminante, supra*, 499 U.S. at pp. 309-310; *Rose, supra*, 478 U.S. at pp. 577-578.)

Aside from the contents of the foregoing list, it is critical to note that defense counsel should not hesitate to make good faith arguments for expansion of the list. So long as the error is one which impacts on the "framework" of the legal process, a "structural" error may be reasonably found. Thus, the lower federal courts have identified several additional

"structural" errors: (1) state invasion of the attorney-client relationship (*Shillinger v. Haworth* (10th Cir. 1995) 70 F.3d 1132, 1141-1142); (2) the judge's absence from trial (*Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1119); (3) defense counsel's coercion of defendant to waive a jury trial (*Frazer v. United States* (9th Cir. 1994) 18 F.3d 778, 785); (4) exclusion of material defense evidence (*Dey v. Scully* (E.D.N.Y. 1997) 952 F.Supp. 957, 974-976); (5) allowing the jury to hear audiotapes during deliberations when the tapes had not been admitted into evidence (*United States v. Noushfar* (9th Cir. 1996) 78 F.3d 1442, 1444-1446, modified at 140 F.3d 1244); (6) allowing the jury to be tainted by biased remarks delivered by a prospective juror during voir dire (*Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630, 633-634); (7) presence of a biased juror (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973, fn. 2); (8) the prosecutor's breach of a plea bargain (*Dunn v. Colleran* (3rd Cir. 2001) 247 F.3d 450, 461-462); and (9) an ex post facto violation (*Williams v. Roe* (9th Cir. 2005) 421 F.3d 883, 888). Aside from the cited cases, a helpful discussion and additional cases on "structural error" can be found at 2 Hertz and Liebman, Federal Habeas Corpus Practice and Procedure (5th ed. 2005) chapter 31.3, pp. 1517-1531.)

1. <u>The failure to instruct on the defendant's theory of the case is reversible per se.</u>

In *United States v. Escobar De Bright* (9th Cir. 1984) 742 F.2d 1196, the defendant was charged with the conspiracy to sell drugs. Although there was substantial evidence that the defendant had conspired with a government agent, the trial court refused to instruct the jury on the defendant's theory that a conspiracy conviction cannot be found where the only

co-conspirator is a government agent. After finding that the instruction should have been given, the Court of Appeals held that the error was reversible per se:

> "The right to have the jury instructed as to the defendant's theory of the case is one of those rights `so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal." (*Escobar De Bright*, *supra*, 742 F.2d at pp. 1201-1202.)

Importantly, the analysis in *Escobar De Bright* is entirely consistent with that which has been subsequently posited by the Supreme Court. The court has indicated that per se reversal is required when an error "vitiates all the jury's findings." (*Sullivan v. Louisiana, supra*, 508 U.S. 275, 281, emphasis in original.) Or, stated otherwise, per se reversal is compelled when the consequences of an error "are necessarily unquantifiable." (*Id*., at p. 282; accord, *Neder v. United States* (1999) 527 U.S. 1, 10-11.) Since it is impossible to know whether a jury would have accepted a defense which it never had occasion to consider, the conclusion is inescapable that the effect of the instructional omission is "necessarily unquantifiable." (See *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741 [structural error found where the defense was precluded from presenting its "theory of the case;"] *United States v. Sarno* (9th Cir. 1995) 73 F.3d 1470, 1485 ["failure to instruct a jury upon a legally and factually cognizable defense is not subject to harmless error analysis.

[Citations."].)

In short, the Sixth Amendment commands that the defendant has the right to have the jury fully consider his theory of the case. When that right is abridged, per se reversal is required.

B. The California rule.

Historically, *People v. Modesto* (1963) 59 Cal.2d 722 is the most important case on the subject of prejudice. In *Modesto*, the court held that a defendant has a state constitutional right to have the jury determine every material issue presented by the evidence. (*Id.*, at p. 730.) Given this constitutional right, subsequent cases went on to apply a standard of per se reversal (with specified exceptions) when the trial court failed to instruct on a lesser included offense, an affirmative defense or an element of the crime. (See *People v. Croy* (1985) 41 Cal.3d 1, 12-13; *People v. Garcia* (1984) 36 Cal.3d 539, 550-558 and cases cited therein.) Importantly, the traditional rule is still good law in some respects, but not others.

Under current California law, the failure to instruct on a lesser included offense is mere state law error which does not implicate the federal Constitution. (*People v. Breverman* (1998) 19 Cal.4th 142, 149.) Although the failure to instruct on an element of the offense constitutes federal constitutional error, reversal is not required absent a showing of prejudice. (*People v. Flood* (1998) 18 Cal.4th 470, 475.) However, the California Supreme Court has not specifically renounced its former rule in two respects.

1. The failure to instruct on an affirmative defense is arguably reversible per se.

The longstanding rule is that the omission to instruct on an affirmative defense constitutes reversible error unless "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' [Citation.]" (*People v. Stewart* (1976) 16 Cal.3d 133, 141; accord, *People v. Lee* (1987) 43 Cal.3d 666, 675, fn. 1.) Notwithstanding the cited cases, the Supreme Court has inexplicably stated in a recent decision that it has "not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense. [Citation.]" (*People v. Salas* (2006) 37 Cal.4th 967, 984.) Given this conflict in the case law, it may still be fairly argued that per se reversal is required. Nonetheless, it is likely that the Supreme Court will adopt a lesser standard in the near future. (See *People v. Quach* (2004) 116 Cal.App.4th 294, 303 [error in self defense instruction required application of the federal standard found in *Chapman v. California* (1967) 386 U.S. 18].)

2. An error of law in the government's theory of the case may require per se reversal.

In *People v. Guiton* (1993) 4 Cal.4th 1116, the Supreme Court addressed the situation where the government relied on both proper and erroneous theories at trial. As to legally erroneous theories, the court held that reversal per se is required. (*Id.*, at pp. 1128-1129; accord, *People v. Morgan* (2007) 42 Cal.4th 593, 612-613.) However, as to factually inadequate theories, it remains the defendant's obligation to establish prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818.

In applying *Guiton*, it is essential to note that it is less than clear when an error is one

of fact or law. An example given in *Guiton* indicates that many errors can be reasonably categorized as sounding in law.

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

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

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

Regrettably, it is virtually certain that the *Guiton* standard will not last much longer. In *People v. Chun* (S157601, March 30, 2009) ____ Cal.4th ____ [09 D.A.R. 4745], the trial court erred by instructing on an erroneous theory of murder liability. The court acknowledged the *Guiton* standard. (*Id* at p. 4754.) However, the court indicated that *Guiton* need not be applied in every case. (*Ibid*.) Indeed, the court used a new test in *Chun*.

The court held that instruction on an erroneous legal theory can be deemed harmless "'only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.' [Citation.]" (*Chun*, supra, 09 D.A.R. at p. 4757.) In employing this new standard, the court noted that it was not "holding that this is the only way to find error harmless . . . ." (*Ibid*.) Thus, it is likely that new methods will be invented for avoiding the reversal per se standard of *Guiton*.

The good news is that the test used in *Chun* is a highly favorable one for the defense. Fairly, applied, it will be difficult for the People to demonstrate that the jury's verdict unequivocally included the necessary findings on a proper legal theory. Nonetheless, we will have to await future litigation to see how the new test works out.

Finally, it is worth noting that the U.S. Supreme Court has recently renounced its former reliance on a standard of per se reversal where the jury has been instructed on an erroneous legal theory. (*Hedgpeth v. Pulido* (2008) 555 U.S. ____ [172 L.E.2d 388, 390-392].) Thus, an error in instructing on an erroneous legal theory is subject to the *Chapman* standard in federal court. (*Ibid*.)

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

In the seminal case of *Chapman v. California,* supra, 386 U.S. 18, the U.S. Supreme

Court announced that a finding of federal constitutional error requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.*, at p. 24.) In order to understand what this test truly means, it is highly instructive to review the facts in *Chapman*.

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

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

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

For her part, Ms. Chapman gave a statement to the police. In so doing, she lied and

claimed that she was in San Francisco at the time of the killing. The falsity of this account was proved by the fact that Ms. Chapman had registered at a Woodland motel shortly after Mr. Adcox' demise.

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

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

Without doubt, the foregoing recitation of the *Chapman* facts and holding leads to an inescapable conclusion: The Supreme Court intended that it would be very difficult for the government to show that a federal constitutional error was harmless. As is readily apparent, the government had a very strong case in *Chapman* including a confession, evidence of the opportunity to commit the crime, highly incriminating forensic evidence and consciousness of guilt evidence. Nonetheless, the strength of this evidence was not sufficient to avoid reversal.

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

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

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

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

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

As the foregoing quotation reveals, the mere existence of strong government evidence does not ipso facto lead to a conclusion of harmless error. To the contrary, if the government has committed a fundamental constitutional error bearing a substantial impact (such as the

Griffin error in *Chapman*), reversal is compelled. This is so since it is the government's burden to show that the guilty verdict "was surely unattributable to the error." (*Sullivan, supra*, 508 U.S. at p. 279; accord, *People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

People v. Fletcher (1996) 13 Cal.4th 451 is an example of the proper application of the *Chapman* test. In *Fletcher,* the government presented a strong case that Mr. Moard accompanied Mr. Fletcher when he killed a woman whose car was stopped on a freeway entrance ramp late at night. On appeal, Mr. Moard argued that his right to confrontation had been violated by admission of Mr. Fletcher's extrajudicial statement in which he indicated that he and a "friend" had intended to rob the victim. After finding that the statement was improperly admitted against Mr. Moard, the Supreme Court found prejudice since there was quite simply a paucity of evidence to establish that Mr. Moard had the requisite mental state to assist Mr. Fletcher in his criminal scheme. (*Id.* at p. 470.)

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

It should not be overlooked that all errors are not created equal. Some errors (such as the admission of a defendant's confession) are so devastating that reversal is virtually

always required. (See *Arizona v. Fulminate, supra*, 499 U.S. 279, 295-302 [erroneous admission of defendant's confession required reversal even though a second confession was properly admitted].) Thus, even when the evidence against a defendant is strong, a particular error may still require reversal in light of its power to influence the jury. (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 892 ["[r]eview for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also `"the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact."' [Citation.]."].)

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

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

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

A. Counsel Should Carefully Review The Case Authority On Point In Order To Take Advantage Of Any Mode Of Analysis Which Is Peculiar To The Particular Issue In The Case.

Occasionally, the U.S. Supreme Court will place a special gloss on the application of the *Chapman* test. Three examples come to mind.

In *Neder v. United States*, supra, 527 U.S. 1, the court held that the *Chapman* standard is to be applied when the trial court has erred by failing to instruct on an element of the offense. However, the court specified a very demanding standard which the government must meet before the omission can be deemed harmless. The court held that the error can be deemed harmless only when the record contains "overwhelming" and "uncontroverted" evidence regarding the element. (*Id*. at pp. 17-18.) Conversely, the error is prejudicial if "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . ." (*Id*. at p. 19.)

The significance of the cited language is profound. So long as the record shows some evidentiary basis for a finding in the defendant's favor, reversal is required. In a proper case, a skillful use of *Neder* should lead to reversal.

Another example of a more expansive application of the *Chapman* test is an error involving a jury instruction which contains a mandatory presumption. While this error allows for harmless error review, affirmance is permitted only when the record shows that "the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." (*Yates v. Evatt* (1991) 500 U.S. 391,

404.) In the usual case, it will be very difficult for the government to satisfy this test.

A final example of an expanded application of the *Chapman* standard is found in a Confrontation Clause context. In *Coy v. Iowa* (1988) 487 U.S 1012, the trial court erred by placing a large screen between testifying witnesses and the defendant. In measuring the prejudice flowing from this error, the court held that the witnesses' testimony had to be disregarded.

> "An assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." (*Coy,* supra, 487 U.S. at pp. 1021-1022.)

The foregoing examples are not intended to be exhaustive. Rather, the point is that creative appellate counsel can sometimes obtain stricter forms of harmless error review depending upon the nature of the error at issue. Counsel should be ever sensitive to this possibility.

III. ALTHOUGH AEDPA DOES NOT TECHNICALLY CREATE A STANDARD OF PREJUDICE, A DEFENDANT MUST ESTABLISH CERTAIN CONDITIONS PRECEDENT IN ORDER TO OBTAIN FEDERAL HABEAS RELIEF.

Effective April 24, 1996, a new federal statute (AEDPA) set forth strict criteria which a defendant must satisfy in order to obtain federal habeas relief. In relevant part, 28 U.S.C. section 2254(d)(1) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . ."

In *Williams v. Taylor* (2000) 529 U.S. 362, the Supreme Court construed section 2254(d)(1) in the context of a claim of ineffective assistance of trial counsel. As synopsized by the Ninth Circuit, *Williams* holds that:

> "A state court's decision can be 'contrary to' federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts 'materially indistinguishable' from those in a controlling case, but nonetheless reaches a different result. [Citation.] A state court's decision can involve an 'unreasonable application' of federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. [Citation.] However, the court recognized that these categories could overlap, and that, even for purposes of precise definition, it could sometimes be difficult to determine whether a decision, for example, unreasonably extended a rule to a new context or simply contradicted controlling authority. [Citation.] Similarly, it seems apparent that in some cases it may be difficult to distinguish between, on the one hand, a state court decision that is contrary to clearly established federal law by virtue of its

> reaching a different result upon materially indistinguishable facts, and, on the other, a particularly unreasonable application of clearly established federal law. Thus, as we have said previously, the two concepts overlap and it will be necessary in some cases to test a petitioner's allegations against both standards. [Citation.]" (*Van Tran v. Lindsey* (9th Cir. 2000) 212 F.3d 1143, 1150, fn. omitted.)

Given the rather broad parameters of the *Williams* rule, an inventive defense attorney should have little trouble creating an argument which satisfies one of the section 2254(d)(1) tests. Although the possible arguments are limitless, three examples from existing case law will be illustrative.

In *Williams v. Taylor, supra*, 529 U.S. 362, the defendant challenged his death penalty judgment on the grounds that he was deprived of the effective assistance of counsel when his trial lawyer failed to adduce significant mitigating evidence at the penalty phase of his trial. The Virginia Supreme Court rejected the defendant's claim on two grounds: (1) it held that U.S. Supreme Court precedent did not allow for reversal based on a ""mere outcome determination"" standard; and (2) the omitted evidence was not sufficiently important such that it would have changed the result at trial. (*Id*., at pp. 371-372.)

The U.S. Supreme Court found that relief was warranted under section 2254(d)(1) for two reasons. First, *Strickland v. Washington* (1984) 466 U.S. 668 requires reversal if effective assistance of counsel would have made a difference. Thus, the Virginia Supreme Court's analysis was "contrary to" controlling precedent. (*Williams, supra*, 529 U.S. at p. 397.) Second, the state court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence . . . ." (*Ibid*.)

In *Panetti v. Quarterman* (2007) 551 U.S. ____ [168 L.E.2d 662], the defendant raised the Eighth Amendment claim that he could not be executed since he was insane. The state court failed to obey the dictates of *Ford v. Wainwright* (1986) 477 U.S. 399 insofar as the defendant was not given a fair opportunity to litigate the factual issue of his sanity or lack thereof. The Supreme Court found that the state court had erred by unreasonably applying the "controlling standard in *Ford*." (*Id*. at p. 682.) In reaching this conclusion, the court stated two fundamental principles.

First, the court held that although AEDPA usually requires deference to the state court judgment, no deference was due on the record before it. This was so because the state court's factual findings were based on an unreasonable application of *Ford*. (*Panetti*, supra, 168 L.E.2d at pp. 682-683.)

Second, the court emphasized that AEDPA allows for relief even if the case at bar does not present facts which are identical to a Supreme Court precedent. Rather, AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.' [Citation.] The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. [Citation.]" (*Panetti*, supra, 168 L.E.2d at p. 682.)

In *LaJoie v. Thompson* (9th Cir. 2000) 217 F.3d 663, the court found an unreasonable application of settled federal law. There, a defendant was convicted of sexually assaulting

a child. At trial, the defense had sought to adduce evidence that the complainant had previously suffered sexual abuse. This evidence was offered to provide an alternative source for the complainant's knowledge of sexual matters and his injuries. Under state law, the defense was required to give fifteen days notice of its intent to use the evidence. The trial court excluded the evidence since the defendant had failed to give the requisite notice.

The Ninth Circuit found that *Michigan v. Lucas* (1991) 500 U.S. 145 was the controlling federal precedent. Under *Lucas*, a trial court may not employ a per se standard for excluding evidence of prior sex acts involving a complainant. Rather, a case by case standard is constitutionally required. In finding that section 2254(d)(1) was satisfied, the Ninth Circuit held that *Lucas* required a remedy since "LaJoie's Sixth Amendment rights were violated, because the sanction of preclusion of this evidence in this case was 'arbitrary and disproportionate' to the purposes of the 15-day notice requirement." (*LaJoie, supra*, 217 F.3d at p. 673.)

In the course of its discussion, the *LaJoie* court made the important point that its own precedents were "'persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also . . . [could] determine what law is "clearly established."' [Citations.]" (*LaJoie, supra*, 217 F.3d at p. 669, fn. 6.) Thus, in an appropriate case, counsel should not hesitate to look to lower federal court authority in determining the nature of the controlling Supreme Court rule.

The foregoing authorities demonstrate that there is a fair amount of play in the

AEDPA standard. Defense counsel should not hesitate to take a case to federal court following an unsuccessful state appeal.

IV. ON A FEDERAL PETITION FOR WRIT OF HABEAS CORPUS, THE DEFENDANT MUST USUALLY SATISFY THE BRECHT STANDARD IN ORDER TO OBTAIN RELIEF.

At one time, the *Chapman* standard applied in section 2254 proceedings. This is no longer true.

In its seminal decision in *Brecht v. Abrahamson* (1993) 507 U.S. 619, the Supreme Court announced that a habeas petitioner may obtain relief only upon a showing that the error "`had substantial and injurious effect or influence in determining the jury's verdict.' [Citation.]" (*Id.*, at p. 623.) Insofar as the *Brecht* test is "less stringent" than the *Chapman* standard. (*Brecht, supra*, 507 U.S. at p. 643 (conc. opn. of Stevens, J.), counsel should seek to avoid its application in a proper case.

In *Brecht*, the court expressly recognized that a finding of structural error is permissible on federal habeas corpus. (*Brecht*, supra, 507 U.S. 619, 629-630.) Thus, if possible, counsel should categorize the claim at issue as falling within the confines of structural error. (See *Mach v. Stewart,* supra, 137 F.3d 630, 632; *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 667.)

Insofar as the *Brecht* test will be applied in the vast majority of cases, it must be emphasized that the government bears the burden of persuading the court that any error was harmless. (*Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993, 1016; *Fry v. Pliler* (2007) 551 U.S.

____ [168 L.E.2d 16, 24] (conc. opn. of Stevens, J.) [*Brecht* standard "imposes a significant burden of persuasion on the State."].) If the court has a "grave doubt" about the harmlessness of the error (i.e. if the case is evenly balanced or in "virtual equipoise"), the court must find reversible error. (*O'Neal v. McAninch* (1995) 513 U.S. 432, 434-435.)

In applying the *Brecht* test, defense counsel should focus on the important interest at stake: "an error of constitutional dimension - the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person. [Citation.]" (*O'Neal v. McAninch, supra*, 513 U.S. at p. 442.) Thus, "[t]he habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place." (*Brecht v. Abrahamson, supra*, 507 U.S. 619, 642, fn. omitted (conc. opn. of Stevens, J.).) Rather, as is the case with *Chapman* review, the court must closely focus on the critical question of whether the error impermissibly influenced the jury. (*Id.*, at pp. 642-643.)

The *Brecht* test does not focus on the weight of the evidence. Rather, *Brecht* poses the inquiry of the "effect the error had or reasonably may be taken to have had upon the jury's decision." (*Kotteakos v. United States* (1946) 328 U.S. 750, 764; see also *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1039 ["In the case before us, we must determine, not whether there was substantial evidence to convict Hanna, but whether Instruction 9 had a substantial influence on the conviction."].)

As has already been argued elsewhere in this article, defense counsel must compel the court to examine the impact of the error regardless of the strength of the government's case.

In this way, prosecutors can be made to pay the appropriate penalty for violating a defendant's constitutional rights. (For a thorough resume of cases dealing with a showing of prejudice on federal habeas, see 2 Hertz and Liebman, Federal Habeas Corpus Practice and Procedure, supra, chapter 31, pp. 1503-1562.)

V. THE SPECIAL TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

Since this point is often overlooked, it is critical to note that the U.S. Supreme Court has developed a harmless error test for ineffective assistance of counsel which is of a hybrid nature. While this test is not as favorable as the *Chapman* standard, it is certainly more helpful to the defense than is generally recognized.

In *Strickland v. Washington*, supra, 466 U.S. 668, the Supreme Court held that an error made by defense counsel will require reversal when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.*, at p. 694.) Importantly, this test is not outcome-determinative and does not require the defendant to show "that counsel's deficient conduct more likely than not altered the outcome in the case." (*Id.*, at p. 693.) Rather, the defense need only show that counsel's errors were "sufficient to undermine confidence in the outcome" of the trial. (*Id.*, at p. 694.)

Although the *Strickland* standard was not intended to be a precise one, the Fourth District has issued an opinion which defines the standard in a concrete manner. "In statistical terms, we believe *Strickland* requires a significant but something-less-than-50 percent likelihood of a more favorable verdict." (*People v. Howard* (1987) 190 Cal.App.3d

41, 48.) As *Howard* recognizes, a defendant need only show a "significant" doubt that he was given a fair trial. Since this doubt need not rise to the level of probability, this is a favorable test when it is fairly applied. (See *Williams v. Taylor, supra*, 529 U.S. 362, 405-406; [*Strickland* standard is satisfied by a showing of proof which is less than a preponderance of the evidence.].)

As a final point, it should not be overlooked that a claim of per se reversal may be made when defense "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, . . ." (*United States v. Cronic* (1984) 466 U.S. 648, 659.) If the trial attorney did little or nothing on the client's behalf, appellate counsel should argue for per se reversal. (See *Javor v. United States* (9th Cir. 1984) 724 F.2d 831, 833-835 [per se reversal was required when defense counsel slept through substantial portions of the trial; see also *Frazer v. United States, supra*, 18 F.3d 778, 785 [collecting cases where *Cronic* was applied]; but see *Bell v. Cone* (2002) 535 U.S. 685, 697-698 [the failure to present mitigating evidence at the sentencing phase of a capital trial and the waiver of closing argument with respect to penalty did not implicate the *Cronic* rule].)

VI. WHENEVER POSSIBLE, DEFENSE COUNSEL SHOULD CATEGORIZE A TRIAL ERROR AS BEING ONE OF FEDERAL CONSTITUTIONAL STATURE.

A claim of federal constitutional error obtains a much more favorable standard for harmless error analysis than does a claim of state error. Moreover, if a federal claim fails on a state appeal, it may be taken to federal court whereas a state error may not. Given these

realities, one of the primary duties of defense counsel is to raise a claim of error under the federal Constitution if it is at all possible to do so. Although this article is not intended to thoroughly exhaust the subject, a few examples will be shown as to how routine state law error can be transformed into a federal constitutional claim.

As a preliminary point, it should be noted that trial attorneys often fail to specify that their objections are being made under the federal Constitution. As a result, the appellate court will find that any objection under the federal Constitution has been forfeited. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1254, fn. 6 [admission of extrajudicial statement was reviewed only under the *Watson* standard since a "federal constitutional right of confrontation" objection was not made at trial]; but see *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [federal due process argument may be made for the first time on appeal when the alleged consequence of overruling an Evidence Code section 352 objection was to deny the defendant a fair trial].)

Given the appellate courts' inclination to find forfeiture, it is incumbent upon appellate counsel to raise a claim of ineffective assistance of trial counsel when an adequate federal objection was not made at trial. In this way, a federal claim can be preserved when it would otherwise be lost.

As a final procedural point, it is important to note that a claim may not be raised in federal court unless it was <u>expressly</u> raised in state court as a federal claim. (*Duncan v. Henry* (1995) 513 U.S. 364, 366; accord, *Baldwin v. Reese* (2004) 541 U.S. 27, 29.) Thus,

defense counsel should be sure to specifically cite to both the federal Constitution and federal cases on a state appeal. Absent such citations, a federal court will refuse to entertain the case. (*Duncan*, supra, 513 U.S. at pp. 364-366 [Supreme Court held that federal relief was not available since the defendant relied solely on the *Watson* standard on his California appeal]; *Baldwin*, supra, 541 U.S. at pp. 31-34 [federal claim of ineffective assistance of counsel was forfeited since federal Constitution was not cited in petition for review in Oregon Supreme Court].)

Turning to the substantive law, it is manifest that evidentiary error provides the most fertile area for transforming generic state error into a federal constitutional claim. In this regard, the constitutional foundation is found in either the Sixth Amendment's compulsory process and confrontation clauses or the Fourteenth Amendment's due process clause. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Under these provisions, a state court commits federal constitutional error when it excludes highly relevant and necessary defense evidence. (*Ibid.*, see also *Rock v. Arkansas* (1987) 483 U.S. 44, 53-56.) Importantly, a federal claim may be made even if no error was made under state law.

Chambers v. Mississippi (1973) 410 U.S. 284 illustrates this principle. There, the defendant sought to admit a confession made by a third party. Under state law, the confession was inadmissible under the hearsay rule. Notwithstanding this well established state rule, the Supreme Court held that exclusion of the confession constituted a violation of the due process clause.

> "The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Chambers, supra*, 410 U.S. at p. 302.)

Chambers establishes a clear rule. So long as the defendant can demonstrate that he cannot receive a fair trial absent the admission of important evidence, the federal Constitution is implicated. This is so regardless of the exact form which the evidence takes. (*Rock v. Arkansas, supra*, 483 U.S. 44, 56-62 [exclusion of defendant's hypnotically enhanced testimony was violative of her constitutional right to testify]; *Crane v. Kentucky*, 476 U.S. 683, 687-692 [exclusion of evidence regarding the circumstances surrounding the defendant's confession violated his right to confront the witnesses against him].)

A case handled by SDAP Executive Director Michael Kresser further illustrates the usefulness of the foregoing authorities. In *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, the defendant was charged with molesting a friend's daughter. In order to impeach the daughter's testimony, the defendant sought to introduce her prior false claim that her mother had molested her. Although it found that the trial court had erred by excluding the evidence, the Sixth District declared the error to be harmless under Evidence Code section 354. (*People v. Franklin* (1994) 25 Cal.App.4th 328, 336-337.) Importantly, the court failed to address the defense contention that the error rose to the level of a federal constitutional violation. Thankfully, the Ninth Circuit did not ignore the claim. Instead, finding that

"[e]xclusion of the evidence deprived Franklin `of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful testing"' [citations]," the court reversed the judgment. (*Franklin*, 122 F.3d at p. 1273.)

As *Franklin* shows, a diligent effort can sometimes yield a dramatic victory. In *Franklin*, a claim of evidentiary error was carefully federalized in state court. For reasons unknown, the state court failed to acknowledge the federal nature of the error. Nonetheless, the Ninth Circuit later granted relief. While most of our clients will not be as lucky as Mr. Franklin, appellate counsel should still use the case as an inspirational model.

Although the law is much less certain in this area, it is also possible to argue that the erroneous admission of irrelevant and prejudicial evidence may constitute a federal due process violation. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 68-70; *People v. Partida*, supra, 37 Cal.4th 428, 439.) A case from the Ninth Circuit provides an example of this type of error.

In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the defendant was charged with murdering his mother who had died after her throat was slit. The forensic evidence showed that almost any kind of knife could have inflicted the fatal wound. At trial, the government presented evidence that the defendant: (1) had owned a Gerber knife in the past (but not at the time of the crime); (2) was a knife aficionado; (3) wore a knife in the past; and (4) scratched "Death is his" on his closet door with a knife. After finding that this evidence was completely irrelevant, the Ninth Circuit reversed the defendant's conviction.

> "His was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are. Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the district court awarded him." (*McKinney v. Rees, supra,*, 993 F.2d at p. 1386, fn. omitted, emphasis in original.)

As *McKinney* makes clear, a defendant may be deprived of due process when the government seeks to shore up a weak case with a dose of highly prejudicial evidence. In an appropriate case, *McKinney* can serve as persuasive authority in support of a claim of federal error.

Another example of turning state error into a federal contention may be found in the area of prosecutorial misconduct (or the more sanitized term "prosecutorial error"). (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Two possible theories exist.

First, as the U.S. Supreme Court has indicated, a prosecutor's misconduct may be so egregious that it rises to the level of a due process violation. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Thus, in any case where the prosecutor engages in substantial misconduct, a federal claim should be advanced. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841 ["`" [a] prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct `so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" [Citations.]."].)

Aside from a global due process claim, some types of prosecutorial misconduct may violate specific constitutional rights. For example, if the prosecutor refers to facts outside

the record, he is effectively acting as an unsworn witness who has not been subjected to cross-examination. (*People v. Bolton* (1979) 23 Cal.3d 208, 214-215, fn. 4.) Under these circumstances, a Sixth Amendment violation is shown. (*Ibid.*; accord *People v. Johnson* (1981) 121 Cal.App.3d 94, 104.)

Finally, there is authority for the proposition that cumulative prejudice flowing from mere state error can result in a federal due process claim. For example, this can occur "where the violation of a state's evidentiary rule has resulted in the denial of fundamental fairness, thereby violating due process, . . ." (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; see also *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6.) When the record shows that substantial error infected the proceedings, counsel should not hesitate to argue that the defendant was denied a fair trial under the federal due process clause.

As the foregoing survey demonstrates, garden variety state error can often be the basis for a viable federal contention. Defense counsel should strive to be as creative as is reasonably possible in order to develop and preserve federal constitutional claims.

VII. UNDER PEOPLE V. WATSON, SUPRA, 46 CAL.2D 818, REVERSAL IS WARRANTED FOR ANY ERROR WHICH UNDERMINES CONFIDENCE IN THE RESULT OF THE TRIAL COURT PROCEEDINGS.

Under Article VI, section 13 of the California Constitution, a judgment may not be reversed on appeal absent a showing that an error resulted "in a miscarriage of justice." As interpreted by the California Supreme Court, this provision means that a reversal may not be awarded absent a showing "that it is reasonably probable that a result more favorable to

the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d 818, 836.) Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.) Prejudice must be found under *Watson* whenever the defendant can "'undermine confidence'" in the result achieved at trial. (*Ibid*.) In applying this standard, a few points should be kept in mind.

First, the *Watson* test applies to errors arising under the state Constitution as well as statutory law. (*People v. Cahill* (1993) 5 Cal.4th 478, 493.) However, the California Supreme Court has cautioned that some errors arising under the state Constitution remain reversible per se. (*Ibid.*) These errors include the denial of counsel, the denial of conflict free counsel, the denial of a jury trial and improper discrimination in the selection of the jury. (*Ibid.*) Moreover, even if *Watson* review is permitted for a state constitutional violation, a California court is still bound to apply the *Chapman* test if the same error also arises under the federal Constitution. (*Id.*, at pp. 509-510.)

In applying the *Watson* test, an evenly balanced case is one which the defendant is entitled to win. (See cases cited in 6 Witkin and Epstein, California Criminal Law (3rd ed. 2000) section 7, pp. 449-451.) Indeed, *Watson* makes this point crystal clear: "But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion `that it is reasonably probable that a result more favorable to

the appealing party would have been reached in the absence of the error.'" (*Watson, supra*, 46 Cal.2d at p. 837.)

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

Although *Watson* itself does not make this point, experience teaches that an appellate court has a great deal of discretion in determining whether a particular error requires reversal under the reasonable probability standard. As will be discussed in the next section, defense counsel should marshall as many signs of prejudice as is possible in a given case.

VIII. REGARDLESS OF THE APPLICABLE HARMLESS ERROR TEST, THERE ARE A NUMBER OF OBJECTIVE FACTORS WHICH MAY BE USED TO SHOW PREJUDICE IN A PARTICULAR CASE.

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

they are indicative of some of the factors which will enable a defendant to obtain a reversal.

In advancing a prejudice argument, the primary goal of defense counsel must be to dissect the evidentiary weaknesses in the government's case. If a government witness was granted immunity or was impeached in a substantial way, this point should be strongly discussed. Similarly, if there were inconsistencies in the government's case, this reality should be amply argued. Indeed, any and all weaknesses in the government's case must be carefully and precisely laid out for the reader.

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

It is important to note that some errors are better than others. For example, errors in the admission of the defendant's confession or evidence that the defendant was a gang member or a drug addict, are highly prejudicial regardless of the strength of the government's case. (*Arizona v. Fulminante*, supra, 499 U.S. 279 ["'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him'"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-907 [admission of gang evidence leads to "a substantial danger of undue prejudice;" admission of evidence of narcotics addiction is

"`catastrophic.'"].) Thus, appellate counsel should strive to find those case authorities which depict a particular error as being one which necessarily involves a high degree of prejudice.

Turning to the case specific factors which may serve to show prejudice, the most obvious indication of a close case is lengthy jury deliberations. (*People v. Cardenas, supra*, 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case]; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 [nine hours of deliberations "deemed protracted."].) While the Supreme Court has indicated that lengthy deliberations are not significant in a complex case (*People v. Cooper* (1991) 53 Cal.3d 771, 837), such deliberations in a short case can only mean that the jurors found some deficiency in the government's case. When the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana, supra*, 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the jury]; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852; overruled on an unrelated point in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [reversal ordered where the length of the jury deliberations exceeded the length of the evidentiary phase of the trial].)

Another indication of a close case involving the jury's behavior is where there has previously been a hung jury. Obviously, this fact demonstrates that the government's case is less than overwhelming. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188.) Moreover,

if a defendant is convicted on erroneously admitted evidence which was not presented to the

hung jury, the inference is virtually compelled that the evidentiary error is prejudicial. (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.)

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

Even if the jury eventually convicts the defendant, its requests for additional instructions or the readback of testimony may establish that the case was a close one. (*People v. Filson, supra*, 22 Cal.App.4th 1841, 1852 [request for additional instructions]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were close. [Citations.].]"; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for readback of critical testimony].) Moreover, if the jury hears an erroneous instruction or erroneously admitted testimony for a second time, it is manifest that the degree of prejudice to the defendant was only heightened. (*People v. Williams* (1976) 16 Cal.3d 663, 669 [reversal ordered where the jury requested a rereading of an erroneously admitted statement and then quickly returned a guilty verdict]; see also *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 [rereading of an erroneous instruction warrants reversal]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 249-252 [erroneous response to a deliberating jury's question requires reversal].)

Regardless of the behavior of the jury, reversible error is likely to be found when the trial court has effectively precluded the defendant from presenting his case. This is so since errors "`at a trial that deprive a litigant of the opportunity to present his version of the case . . . are . . . ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment.' [Citation.]" (*People v. Spearman* (1979) 25 Cal.3d 107, 119.) Thus, when the trial court excludes evidence bearing on the defendant's theory of the case, reversal is appropriate. (*People v. Filson*, *supra*, 22 Cal.App.4th 1841, 1852.) Moreover, "[t]he exclusion of the evidence bearing on the credibility of a prosecution witness where only the witness and defendant are percipient witnesses has been held to be prejudicial error. [Citations.]" (*People v. Randle* (1982) 130 Cal.App.3d 286, 293.)

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

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

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

As a final technique for showing prejudice, defense counsel should attempt to demonstrate in an appropriate case that a number of errors require reversal due to the cumulative prejudice which they caused. As our Supreme Court has said, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill, supra*, 17 Cal.4th 800, 844.) Even in a case with strong government evidence, reversal may be obtained when "the sheer number of . . . legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. [Citation.]" (*Id.*, at p. 845; see also *Chambers v. Mississippi,* supra, 410 U.S. 284, 302-303; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928.)

When a claim of cumulative prejudice is raised, it is necessary to advance the point as a separate issue under the federal Constitution. If the issue is not preserved in this

manner, it will not be cognizable on federal habeas. (*Wooten v. Kirkland* (9th Cir. 2008) 540 F.3d 1010, 1026 [cumulative prejudice claim was rejected since it was not specifically pled in the state petition for review].)

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

IX. A FEW WORDS ABOUT THE METHODOLOGY OF PRESENTING A PREJUDICE ARGUMENT.

The skillful practice of appellate law is not limited to the mere citation of applicable authority and the rote recitation of the facts of the case. Rather, the best lawyers are those who employ superior techniques to actually persuade the reader that an injustice occurred in the trial court. A few of these techniques will be briefly described below.

A. The Facts Uber Alles

A successful showing of prejudice depends upon a careful massaging of the facts. While counsel must, of course, include all of the critical facts which support the judgment, it is imperative that the facts which support the defense theory of the case be prominently displayed. There are essentially four methods for achieving this result.

First, the brief should start with an Introduction. In this section, the defense narrative should be set forth with due regard for the People's version. Without misleading the reader,

counsel should emphasize the key facts which point towards innocence or a miscarriage of justice. In this way, the appellate justices and their law clerks will be primed to pay close attention to the defense version of what transpired at trial.

Second, in the Statement of Facts section of the brief, a Defense section should be included. In this section, counsel should set forth the evidence adduced by the defense. By using a separate section, counsel can show that there was indeed a defense version of what happened. If the defense did not present any evidence, the section can include a brief summary of defense counsel's closing argument.

Third, the helpful facts should saturate the brief. Without being heavy handed, counsel can highlight a good fact in at least four places: (1) the Introduction; (2) the Statement of Facts; (3) the discussion of the legal error; and (4) the discussion of prejudice. By careful repetition, the defense facts will come to predominate the reader's thinking.

Fourth, the facts must ultimately be placed in the context of the proof beyond a reasonable doubt standard. Insofar as appellate courts have a propensity to find that the evidence of guilt was "overwhelming," the goal of defense counsel is to demonstrate that there was actually a reasonable doubt about the defendant's guilt. If such a doubt can be raised, a reversal may result.

B. Comparing The Case As It Was Litigated With The Case As It Would Have Been Litigated Were It Fairly Tried.

As a matter of both logic and common sense, a showing of prejudice can be made by comparing the trial which occurred with the one which would have transpired had error not

infested the trial court proceedings. The merit of this approach is illustrated by a case which was briefed not long ago.

The defendant resided in a two bedroom house with her ex-husband. The government adduced evidence that a substantial amount of drugs was found in a bedroom and outdoor shed. Although defense counsel was aware that the defendant was estranged from her husband and that he alone had dominion and control over the bedroom and shed, counsel failed to call three witnesses who would have testified to these facts. Nonetheless, in his closing argument, defense counsel advanced the theory that the drugs belonged to the estranged husband. In his rebuttal argument, the prosecutor quite properly noted that the defense had presented "no evidence" to support its theory. On this record, prejudice could not be more amply demonstrated.

At the actual trial, defense counsel argued a theory which was not factually supported. In the plainest terms, the prosecutor told the jury that the defense theory had no factual basis. However, at the trial which would have occurred but for counsel's ineffective assistance, the defense theory would have been powerfully supported by three credible witnesses. A comparison of the two trials reveals an overwhelming showing of prejudice. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.2d 926, 940 ["in order to determine whether counsel's errors prejudiced the outcome of the trial, 'it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently.' [Citation.]"].)

The premise of any prejudice argument is that the result would have been different had error not occurred. By demonstrating that the trial would have been conducted in a distinctly different manner but for the error in question, appellate counsel should be able to persuasively argue that prejudice must be found.

C. Never Be Afraid To Appeal To The Justices' Better Angels

The ultimate goal of the judicial system is to see that justice is done. Of course, justice is a protean concept and judges are mere mortals. In order to achieve the goal, it is necessary to motivate the judges to do the right thing.

Most judges believe that our judicial system is fair. If it can be shown that a particular legal proceeding was unfair, a remedy may be forthcoming regardless of the weight of the evidence.

People v. Hill, supra, 17 Cal.4th 800 is a paradigmatic case. In *Hill*, the prosecutor engaged in a pattern of misconduct at a capital trial which was hard to believe. The Supreme Court expressed its outrage by going so far as to note that the prosecutor in question had a long record of committing misconduct. (*Id*. at pp. 847-848.) Notwithstanding the fact that the defendant had stabbed a man to death, the judgment was reversed with the finding that the "sheer number of the instances of prosecutorial misconduct, together with the other trial errors, is profoundly troubling." (*Id*. at p. 847.)

The lesson of the *Hill* case is a simple one. Fair minded appellate justices are willing to reverse judgments when they are persuaded that some aspect of the proper functioning of

the system has gone awry. In a proper case, counsel should not hesitate to argue that adherence to our constitutional principles demands a remedy.

D. Prejudice Can Sometimes Be Shown By Pointing To Something Which Is Unique About The Case At Bar.

Although only an occasional case falls within this category, it is sometimes possible to show prejudice by establishing that a particular aspect of the case caused harm to the defendant's case. *People v. Criscione* (1981) 125 Cal.3d 275 is such a case.

In *Criscione,* an Italian-American defendant was on trial for murder. The defense was that the defendant was mentally ill at the time of the killing. The prosecutor, who was an Italian-American, relentlessly asked questions for the "purpose of establishing that appellant's violent attitudes and conduct toward the victim, and women in general, were not symptomatic of mental disease, but merely the normal responses of a man raised in a traditional Italian culture." (*Id.* at p. 287.) Given this patent prosecutorial misconduct, the Court of Appeal reversed and ordered a new trial on the question of sanity. Interestingly, in his concurring opinion, Judge Figone (presumably an Italian-American) noted:

> "However, the felling blow in the prosecutor's appeal to ethnic prejudice came when in argument he gave personal opinions concerning the defendant's sanity, by referring to his understanding of Italians and, in particular, to his own wife. 'I hope my wife doesn't hear me say that. But that's not a sign of manicness.' The implication was, clearly, that he, as the prosecutor and an Italian-American, knew that the defendant acted as a sane man, because Italian men normally abuse woman." (*Criscione,* supra, 125 Cal.App.3d at p. 297 (conc. opn. of Figone, J.).)

The stars in the galaxy will rarely align as well for a defendant as they did in

Criscione. However, the case provides a clear example that prejudice can be shown by focusing on the highly unfair and unique circumstances of the case of bar.

CONCLUSION

Ultimately, the subject of prejudicial error boils down to a single question: Did the defendant receive a fair trial? Since unfairness means different things in different contexts, appellate counsel often has the opportunity to creatively demonstrate why a particular client was not treated fairly. Although it has become ever more difficult to obtain a reversal in today's appellate courts, the diligent pursuit of justice can be its own reward. Indeed, if we do not demand fairness in our judicial system, liberty will certainly cease to exist.