# PREJUDICE 202

## TIPS, TOOLS & TIRADES
## FOR ARGUING PREJUDICE
## UNDER ANY STANDARD


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# PREJUDICE 202

## Tips, Tools & Tirades
## For Arguing Prejudice Under Any Standard

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**Jan. 2014**
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**INTRODUCTION: GENERAL EXHORTATIONS ABOUT PREJUDICE**

- Prejudice, more than error, is what drives the appeal.

- You will ordinarily need to **devote at least as much attention to prejudice as to establishing that error occurred**.

- Prejudice inquiry is **more far ranging** than error analysis.
  - As to most kinds of issues, the error analysis will involve a relatively discrete portion of the record – e.g., an in limine hearing on an evidentiary matter, the particular evidence underlying a jury instruction, a challenged prosecutorial argument, etc.
  - But establishing that the error was prejudicial requires mining the entire record – evidence, closing arguments, instructions, mid-deliberations requests and responses – including evaluation of the strengths and infirmities of the prosecution's *other* evidence and legal theories.

- Prejudice is **more intuitive** than error analysis.
  - While many substantive claims turn on the application of complex and arcane legal tests, prejudice does not.
  - The basic standards governing prejudice are rather straightforward. The standards are framed in terms of the reviewing court's **level of certitude** as to the probable effect of the error on the outcome.
  - Prejudice analysis consists mainly of a common-sense assessment of the role of the error in the context of the overall trial.
  - Counsel should draw from anything in the record that appears relevant to the

importance of the subject, the effect of the error, or the overall closeness of the case – regardless of whether there's any prior case law specifically focusing on that item as a prejudice factor.

  - It's always nice to have some illustrative citations for particular indicia of prejudice. But, even without prior cases on the subject, most reviewing courts would readily recognize the materiality of such factors as juror questions or readback requests touching on the same subject as the erroneous instruction or evidence.

- Prejudice represents appellate counsel's **opportunity to argue the overall case, unbound by the usual deferential appellate standards of review**.

  - Many substantive issues are governed by standards requiring deference either to the trial court ruling or the jury's verdict ("substantial evidence," "abuse of discretion," etc.).

  - But prejudice allows you to argue the *weight* of conflicting evidence and to identify weaknesses that could potentially support reasonable doubt – even where the prosecution evidence could withstand a sufficiency challenge.

  - As to some kinds of error – e.g., instructions removing an issue from the jury – prejudice analysis *turns the usual deferential appellate standard on its head*. The focus is on whether the evidence *could* have supported a reasonable doubt as to that issue, not whether it was minimally sufficient to support a conviction.

- Prejudice isn't about "technicalities." The purpose of a prejudice argument – and the purpose of the overall appeal – is to show that **the errors <u>distorted</u> the <u>reliability of the fact-finding process</u> before <u>the jury</u>.** Note that there are three dimensions to that formulation:

  - **The jury**. Our system entrusts the solemn duty of deciding a defendant's guilt to ordinary men and women, rather than judges or other governmental officials. An error which *removes a crucial issue from the jury* (e.g., omission of an element, denial of instructions on a defense or lesser offense) defeats the fundamental purpose of a jury trial. If there was a genuine factual question as to that issue – i.e., jurors applying the reasonable doubt standard could have gone either way – then it was necessarily prejudicial.

  - **The reliability of the fact-finding process**. The errors most commonly raised

in criminal appeals involve violations of constitutional or statutory rules *intended to ensure reliability*. Most evidentiary errors involve either the presentation of unreliable evidence (e.g., hearsay or other evidence not tested through the "crucible" of cross-examination) or the exclusion of relevant, probative evidence.

- **Distortion.** Errors often distort the fact-finding process by exposing the jurors to evidence, allegations, or arguments with such powerful emotional impact that they may obscure the jurors' judgment and distract them from the true issues of the case.

{We'll come back to these in Part V – arguing prejudice under any standard.}

- **Prejudice isn't an afterthought. It should pervade the whole brief.**
  - The Statement of Facts and the Introduction (if any) should lay the foundation for the more specific prejudice arguments to come.
  - Often, the most valuable function of the Introduction or Summary of Argument is as a preview of *how the asserted errors relate to the overall trial*. An Introduction can serve as a preliminary cumulative prejudice argument.
  - In the arguments themselves, the substance of a prejudice discussion should ordinarily come after the error analysis. But there's no reason that an argument has to begin with a dry procedural background summary or standard-of-review statement.
    - Often the most effective way to begin an argument is a *brief* rhetorical statement of the importance of the subject to the overall trial, even though the real prejudice discussion won't come until later.
    - E.g., "There was no more important prosecution witness than Richard Rich. Yet the jury never learned that the Crown rewarded his testimony with an appointment as Attorney General for Wales." Cf. Robert Bolt, *A Man for All Seasons* (play (1960) & screenplay (1966)).
      - Not a direct quotation. Sir Thomas More was executed 5 days after the verdict, so there was evidently no appeal – and thus no Appellant's Brief.

- **Acknowledgments**: In preparing these materials, I have canvassed numerous other

prejudice articles prepared over the years by FDAP, the other appellate projects, and other appellate practitioners. I've lifted many of the illustrative citations for the relevance of particular factors from some of those articles.

- **Disclaimers about authorities.**

  - **Some of the cases cited here are no longer good law for one point or another**. Unlike a brief, this article does <u>not</u> dutifully note each case which has been "disapproved on another point" or otherwise undermined by subsequent developments.

  - Most of the cases with "red flags" in Westlaw or Lexis have been disapproved for some aspect of their error analyses, rather than their prejudice discussions.

  - Some of the cited cases nominally frame their reversal discussions in terms that would probably not be considered consistent with current prejudice standards.
    - For example, some older cases describe certain kinds of instructional error (e.g., refusing to instruct on defense theory of the case) as not amenable to harmless error analysis. **Those cases are still valuable for their recognition of factors necessitating reversal**.
    - Where the error does not appear to fit into current understanding of the narrow "structural defect" category, counsel should try to present those points as demonstrating why that error was necessarily prejudicial under *Chapman* or any other applicable standard.

# I. BORING (BUT IMPORTANT) DOCTRINAL STUFF.

## A. Further shrinking of the "structural defect" category.

- These materials are *not* intended as a primer on the distinction between "structural defects" – those few errors which by their nature defy harmless error analysis and are deemed reversible per se – and "trial errors," which are subject to prejudice/harmless error review under one of the various standards – *Chapman*, *Watson*, etc. See generally *Arizona v. Fulminante* (1991) 499 U.S. 279. But we will note recent decisions that have further curtailed the already-narrow category of "structural defects."

  1. **Failure to instruct on elements.** A failure to instruct on all or substantially all the elements of an offense is "very serious

constitutional error because it threatens the right to jury trial" under both the federal and state constitutions. But it is not a structural defect. Like omission of a single element (*Neder v. United States* (1999) 527 U.S. 1) or omission of two elements (*People v. Mil* (2012) 53 Cal.4th 400), it is amenable to harmless error review under *Chapman*. *People v. Merritt* (2017) 2 Cal.5th 819 (overruling *People v. Cummings* (1993) 4 Cal.4th 1233).

- In *Merritt*, the court properly instructed on the specific intent element of robbery and on a personal firearm use allegation, but (apparently inadvertently) failed to deliver CALCRIM 1600, stating the other elements of robbery (taking of property from immediate presence of victim by force or fear, etc.). However, during closing arguments, both the prosecutor and defense counsel properly recited all the elements of robbery.

- Both store robberies were recorded on video. The case was tried as a whodunnit. The defense was misidentification and alibi. Defense counsel conceded that whoever committed the acts was guilty of robbery.

- The Supreme Court found the error harmless under *Chapman* and *Neder*. The jury resolved the only contested factual issue (identity). Under correct instructions, the jury found that the defendant acted with the requisite specific intent and personally used a firearm. Because the evidence as to the other elements was "overwhelming and uncontroverted," "No reasonable jury that made all these findings could have failed to find the remaining elements of robbery." *Merritt* at 832.

**2. Structural error requires prejudice showing when raised as IAC.**

- **Infringement of right to public trial**. *Weaver v. Massachusetts* (2017) 137 S.Ct. 1899. Because courtroom could not accommodate all potential jurors, a court officer closed the courtroom to all members of the general public, including defendant's mother and minister, during two days of jury selection. There was no objection at time, and the issue was not raised on direct appeal. It was first raised 5 years later as an ineffective assistance claim.

- A violation of the right to public trial is ordinarily deemed a structural defect and is reversible per se, where the issue is preserved and raised on direct appeal. However, **where the courtroom closure issue is not preserved and is raised via an IAC claim, the defendant must show either prejudice under *Strickland* (reasonable probability of a more favorable result) or that the partial closure "led to a fundamentally unfair trial" under the circumstances of the case.**

**B. Refinements of *Chapman* standard for specific errors.**

- For certain categories of errors, especially defective instructions, the U.S. and/or the California Supreme Courts have elaborated on the basic *Chapman* formulation and have framed the test in more rigorous terms.

**1. Omission of an element or other removal of question from the jury**.

- **Key passage in *Neder*:** "[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- [the reviewing court] should not find the error harmless." *Neder v. United States* (1999) 527 U.S. 1, 19.
  - General briefing tip. *Neder* opinion contains lots of text on relationship between *Chapman* review and the right to jury determination of all the elements. Don't bother with extended discussion of or excerpts from *Neder*. **The passage above is the only one you need to quote**.

- This means that removal of an element (or other question) from the jury is *necessarily prejudicial if the evidence on that element is in conflict or susceptible to conflicting inferences*.

- The California Supreme Court "gets" this lesson of *Neder*. As the Court explained in *People v. Mil* (2012) 53 Cal.4th 400, 417-419, under *Neder*, **prejudice review of an omitted or misstated element is the *converse of a "substantial evidence" test.***

  - While "substantial evidence" review of the sufficiency of evidence "views the evidence in the light most favorable to the prosecution" and indulges every reasonable inference in favor

of the jury's verdict, "our task in analysizing the prejudice from the instructional error is whether any rational fact finder could have come to the *opposite* conclusion." *Mil* at 418 (emphasis in original).

- In *Mil,* omission of "reckless indifference" element of special circumstance was prejudicial where "a rational juror, given proper instructions, could have had a reasonable doubt whether defendant was subjectively aware of a grave risk of death." *Mil* at 418-419.

- See also, e.g., *People v. Brooks* (2017) 3 Cal.5th 1, 119-120 (omission of "independent felonious purpose" element of special circumstance prejudicial where "the evidence did not establish this inference 'so overwhelmingly' that ... 'the jurors could not have had a reasonable doubt on the matter").

- This is one of the most consequential differences between *Chapman* and *Watson*.

    - Unlike *Neder* review of an omitted element, *Watson* does effectively allow the appellate court to reweigh evidence in assessing whether removal of an issue was prejudicial.

    - "[A]n appellate court may consider ... whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error ... affected the result." *People v. Breverman* (1998) 19 Cal.4th 142, 177 (emphasis in original). Thus, for example, under *Watson*, the existence of sufficient evidence to support a lesser offense, does *not* automatically render a failure to instruct prejudicial, because the reviewing court may still weigh the "relative" strength of the evidence.

    - In contrast, as explained in one recent appellate opinion, "*some* evidence" from which jurors could have a reasonable doubt as to the omitted element requires a finding of prejudice under *Neder* and *Mil*. *People v.*

*McCloud* (Sept. 27, 2017; modif., Oct. 5, 2017; E065359) __ Cal.App.5th __ [2017 Cal.App.LEXIS 850].)

2. **Submission of legally invalid theory**. Standard where case goes to jury on multiple alternative legal theories, including both valid and legally invalid theories (e.g., valid theory of malice and legally invalid felony-murder theory).

- Basic *Guiton-Green* principle: Submission of a legally unauthorized theory requires reversal where it's impossible to determine whether the jurors relied upon that invalid theory or on an alternative legally permissible ground. *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69.

    - Per *Guiton*, this rule applies only where the theory is "legally insufficient" rather than "factually insufficient." Submission of a factually unsupported theory is state law error subject to *Watson*. Usual assumption is that jurors will weed out factually unsupported theory, unless record shows a reasonable probability jurors relied on that ground.

- Relationship to *Chapman:* "Alternative-theory error" is <u>not</u> a structural defect or a per se reversal rule. Like most other instructional errors, it's subject to harmless error analysis. *Hedgpeth v. Pulido* (2008) 555 U.S. 57.

    - Nor does it supplant *Chapman*. A *Guiton-Green*-type analysis should *not* be cast as stating a standard different from *Chapman*. Cf. *Hedgpeth v. Pulido*, 555 U.S. at 59-62 (overturning Ninth Circuit rule that would have mandated reversal "unless the reviewing court could determine with 'absolute certainty' that the defendant was convicted under a proper theory").

    - As several recent California Supreme Court opinions reflect, ***Guiton-Green* is best understood as explanation of *how* *Chapman* review applies to review of an invalid alternative theory**:

        - "[A] reviewing court must conclude, beyond a reasonable

doubt, that the jury based its verdict on a legally valid theory...." *People v. Chun* (2009) 45 Cal.4th 1172, 1203.

  - "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citing *Guiton*.] Defendant's ... conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory...." *People v. Chiu* (2014) 59 Cal.4th 155, 167 (finding natural and probable consequences theory of first-degree murder prejudicial, where Court could not "conclude beyond a reasonable doubt that the jury ultimately based its ... verdict" on valid theory of traditional aiding-abetting).

- The California Supreme Court's recent *Chun* opinion reiterated the basic *Guiton-Green* principle, but tweaked the standard somewhat:

  - "If other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for [the valid theory], the erroneous [theory] instruction was harmless." *People v. Chun* (2009) 45 Cal.4th 1172, 1204 (citing Justice Scalia's concurrence in *California v. Roy* (1996) 519 U.S. 2, 7).

3. ***Chapman* review of confrontation error in cross-examination restrictions**. *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684, and *Olden v. Kentucky* (1988) 488 U.S. 227, 233, specifically identify the factors most relevant to *Chapman* assessment of confrontation violations in cross-examination and impeachment restrictions:

- " importance of the witness' testimony in the prosecution's case"
- " whether the testimony was cumulative"
- "presence or absence of evidence corroborating or contradicting ... the witness"
- "extent of cross-examination otherwise permitted"
- "overall strength of the prosecution's case."

## C. *Chapman* applicable on state habeas.

- **A federal constitutional error that would be subject to *Chapman* prejudice review on direct appeal is also subject to *Chapman* if properly raised on state habeas corpus.**

- Several recent California Supreme Court decisions have clarified the elements of offenses or have repudiated previously-recognized theories of liability. E.g., *People v. Chun* (2009) 45 Cal.4th 1172 (curtailing predicate offenses for second-degree felony-murder); *People v. Chiu* (2014) 59 Cal.4th 155 (disallowing natural-and-probable-consequences theory for first-degree murder liability); *People v. Banks* (2015) 61 Cal.4th 788 (clarifying "reckless disregard" and "major participant" elements of felony-murder special circumstance). Generally, decisions such as these that clarify the elements of an offense are deemed fully retroactive. Claims based on the intervening decisions are reviewable on a post-affirmance state habeas corpus petition.

- In addition to applying the new Supreme Court precedents retroactively, several recent appellate opinions have explicitly held that habeas claims based on erroneous instructions on elements and theories of liability are subject to *Chapman* review, just as they would be on direct appeal. *In re Hansen* (2014) 227 Cal.App.4th 906, 921 (*Chun*); *In re Lucero* (2011) 200 Cal.App.4th 38, 47-52; *In re Johnson* (2016) 246 Cal.App.4th 1396, 1404-1407 (*Chiu*); *In re Brigham* (2016) 3 Cal.App.5th 318, 329-332 (*Chiu*). In so holding, the *Hansen*, *Johnson*, and *Brigham* courts each rebuffed the Attorney General's contentions that a defendant must satisfy a more difficult standard where the issue is raised on state habeas. (In *Lucero*, there was apparently no dispute over the applicability of *Chapman*.)

- One court found it unnecessary to resolve the choice between standards, where the defendant was entitled to habeas relief even under the less favorable standard urged by the Attorney General. *In re Lopez* (2016) 246 Cal.App.4th 350, 360-361 ("[u]nder the undisputed facts," petitioner's conduct did not qualify as first-degree murder under natural-and-probable consequences doctrine, as clarified in *Chiu*). (*Lopez* was decided before the opinions in *Johnson* and *Brigham*; each of which agreed with *Hansen* that *Chapman* is the appropriate standard.)

- The California Supreme Court recently heard argument on a habeas petition raising a *Chiu* claim. *In re Martinez*, S226596, argued Sept. 5, 2017.

Although it remains to be seen which prejudice standard the Supreme Court will apply, the weight of current appellate authority (*Hansen, Brigham*, *Johnson*) supports *Chapman* review.

- Note that the applicability of *Chapman* on *state* habeas review contrasts with federal habeas, where the less favorable *Brecht* standard applies. *Brecht v. Abrahamson* (1993) 507 U.S. 619. (Although the California habeas cases applying *Chapman* do not discuss *Brecht*, the distinction between state and federal habeas standards makes sense. *Brecht*'s adoption of a more "forgiving" harmless error standard for federal habeas review was predicated on principles of comity between federal and state courts, which are inapplicable to state court habeas review.)

## D. Reasonable probability. *Watson = Strickland = Brady* (and other uses).

- *Watson* "reasonable probability" standard for state law error (*People v. Watson* (1956) 46 Cal.2d 818) is identical to similarly-phrased *Strickland* prejudice prong for ineffective assistance (*Strickland v. Washington* (1984) 466 U.S. 668). *College Hospital v. Superior Court* (1994) 8 Cal.4th 704, 715.

- "Reasonable probability" is also the reversal standard for *Brady* error (though, in *Brady* context, it's termed "materiality" rather than "prejudice" standard). See *Kyles v. Whitley* (1995) 514 U.S. 419; *United States v. Bagley* (1985) 473 U.S. 667.

- Some other state law uses of "reasonable probability":

    - Materiality standard for a state statutory habeas claim of "false evidence." Pen. Code § 1473(b)(1); *In re Sassounian* (1995) 9 Cal.4th 535, 546.

    - Newly-discovered evidence ground *for new trial motion*. *People v. Martinez* (1984) 36 Cal.3d 816, 822; *People v. Soojian* (2010) 190 Cal.App.4th 491, 518-519. See Part I-G, *post*, for new statutory standard for *state habeas* review of newly-discovered evidence claims.

    - DNA testing, Pen. Code § 1405. To obtain post-conviction DNA testing under § 1405, defendant must show "a reasonable probability of a more favorable verdict *assuming the DNA test came back favorable to the defendant*." *Jointer v. Superior Court* (2013) 217 Cal.App.4th

759, 765 (emphasis in original).

- This means that *explanations of "reasonable probability" in one context are equally applicable to application of that standard in another*. E.g., *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 ("In the context of section 1405, the term 'reasonable probability' has the same meaning it has in the *Strickland* and *Watson* contexts").

## E. Important clarifications of "reasonable probability."

- "A reasonable probability *does not mean that the defendant 'would more likely than not have received a different verdict*...,'" only that the likelihood of a different result is sufficient to "'undermine[ ] confidence in the outcome of the trial.'" *Smith v. Cain* (2012) 132 S.Ct. 627, 630 (emphasis added); accord, e.g., *Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *In re Wilson* (1992) 3 Cal.4th 945, 956; *College Hospital v. Superior Court* (1994) 8 Cal.4th 704, 715.

- "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*" *College Hospital*, 8 Cal.4th at 715 (emphasis in original); accord, e.g., *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 68.

    - The *College Hospital* formulation represents an important refinement of the *Watson* standard and frames the "reasonable probability" inquiry in more defense-friendly terms than some courts might otherwise derive from the bare term "reasonable probability." Every *Watson* (or *Strickland*) prejudice argument should frame the matter in those terms ("reasonable chance, etc.").

- "[W]hether there is a reasonable probability that the [error] *would have altered at least one juror's assessment* ...." *Cone v. Bell* (2009) 556 U.S. 449, 452 (emphasis added); accord *Buck v. Davis* (2017) 137 S.Ct. 759, 776 ("a reasonable probability that [but for the error] *at least one juror would have harbored a reasonable doubt*" (emphasis added)); see also *People v. Soojian* (2010) 190 Cal.App.4th 491, 520-521.

## F. Prejudice review of plea-related errors.

- Most prejudice inquiries (whether under *Chapman* or *Watson-Strickland*) are directed to the effect of the error on the outcome of the trial. But the focus is different where an error assertedly induced the defendant to give up his right to trial and to enter a plea.

- *Lee v. United States* (2017) 137 S.Ct. 1958, addressed *Strickland* prejudice review of an attorney's erroneous advice on the immigration consequences of a plea to a drug offense:

  - "When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, *we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain*." Instead, "a defendant can show prejudice by demonstrating a '*reasonable probability that, but for counsel's errors, he would not have pleaded guilty* and would have insisted on going to trial.'" *Lee* at 1965 (emphasis added).

  - "[T]he inquiry ... focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Lee* at 1966.

  - Although the strength of the case is ordinarily highly material to assessment of the likelihood the defendant would have taken the plea anyway, "common sense recognizes that there is more to consider than simply the likelihood of success at trial." *Ibid*.

  - Under the "unusual circumstances" of *Lee*, the Supreme Court found that "substantial and uncontroverted evidence" established that Lee would not have accepted the plea had he known it would trigger mandatory deportation. Lee had lived in the United States for three decades and had no ties to his native country; his preeminent concern was avoiding deportation. Lee adequately showed that he would have preferred to go to trial, where he "*almost* certainly" would have been convicted and deported, rather than accept a plea that "would *certainly* lead to deportation." *Lee* at 1968-1969 (emphasis added).

- As discussed in *Lee*, a similar focus on the effect of the attorney's error on a defendant's decision applies where the attorney fails to inform a defendant of his right to file an appeal or otherwise forfeits his opportunity for an appeal.

See *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 483.

## G. New statutory standard for newly discovered evidence on state habeas corpus.

- Although it does not concern a "prejudice" standard, as such, a recent revision of a state habeas corpus statute also merits note. **The Legislature has substantially relaxed the standard for obtaining state habeas relief based on newly discovered evidence.**

- Where potentially exculpatory evidence is not presented at trial due to either ineffective assistance of defense counsel (*Strickland*) or prosecutorial suppression of evidence (*Brady*) , a habeas petitioner is entitled to relief upon showing a "reasonable probability" of a more favorable outcome. Similarly, a "reasonable probability" standard governs a "newly discovered evidence" claim, *when raised on a motion for a new trial*. See Part I-D, *ante*.

- Until recently, however, a newly discovered evidence claim faced a far more daunting standard when raised in a state habeas corpus petition. In the "no fault" situation, where the failure to present that evidence at trial was *not* attributable to attorney negligence or prosecutorial misconduct, it was necessary for a habeas petitioner to meet an almost-insurmountable standard of materiality:

    - "[A] criminal judgment may be collaterally attacked on the basis of 'newly discovered' evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, *must undermine the entire prosecution case and point unerringly to innocence* or reduced culpability." *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246 (emphasis added); accord, e.g., *In re Lawley* (2008) 42 Cal.4th 1231, 1239.

- Effective Jan. 1, 2017, the Legislature has adopted a new, considerably less onerous standard for habeas claims based on newly discovered evidence. As amended, Pen. Code § 1473(b)(3), establishes the following materiality standard for state habeas relief based on newly discovered evidence:

    - "(A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would

have *more likely than not changed the outcome at trial*.
(B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." (Revised § 1473(b)(3) (emphasis added).)

- § 1473(b)(3)'s "more likely than not" standard appears somewhat more difficult than a *Watson-Strickland* "reasonable probability" test. As noted earlier, *Strickland* and other cases instruct that a "reasonable probability" standard does *not* require showing that the defendant would "more likely than not" have received a more favorable outcome, but only a showing that "undermines confidence" in the verdict.

- Nonetheless, "the difference between a *Strickland* [reasonable probability] standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter* (2011) 562 U.S. 86, 112. Though §1473(b)(3)'s new "more likely than not" test may require a slightly greater showing than a "reasonable probability," that subtle difference should not obscure the more important development: The revised standard for "newly discovered evidence" habeas claims represents a dramatic improvement upon the previous standard ("point unerringly to innocence, etc."). The new test provides a much more realistic prospect of obtaining habeas relief.

- There is no currently-published case law construing the new § 1473(b)(3). A Fourth District opinion granted habeas relief under the new standard. The panel viewed the "more likely than not" standard as "close to" but not the same as *Watson-Strickland* "reasonable probility": "Rather the phrase 'more likely than not' has the same meaning as the phrase 'preponderance of evidence,' the familiar burden of proof in civil proceedings." *In re Miles* (2017) 7 Cal.App.5th 821, 849 [213 Cal.Rptr.3d 770]. However, the Supreme Court subsequently depublished the *Miles* opinion (S240683: May 10, 2017), so we are again left with no citable authority construing the revised statute.

## II. RED HERRINGS – NOT TO BE USED AS PREJUDICE TESTS IN STATE APPEALS.

### A. *Boyde* "reasonable likelihood" – an error test, not a prejudice test.

- "Reasonable likelihood" is the test for determining whether "an

*ambiguous* instruction" amounts to federal constitutional error: "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380.

    - California Supreme Court has also adopted "reasonable likelihood" as standard for reviewing ambiguous or confusing instructions, as well as prosecutorial arguments, under *state* law. *People v. Clair* (1992) 2 Cal.4th 629, 663.

- "Reasonable likelihood" looks and sounds like a prejudice standard.

    - Recent U.S. Supreme Court cases applying "reasonable likelihood" test have looked beyond the challenged instruction itself to the rest of the record, including other instructions, counsel's arguments, and the evidence, much as in a harmless error analysis. E.g., *Middleton v. McNeil* (2004) 541 U.S. 433; *Waddington v. Sarausad* (2009) 555 U.S. 179.

- But it's not!

    - "**The *Boyde* [reasonable likelihood] test is not a harmless error test at all**. It is, rather, the test for determining ... whether constitutional error occurred when the jury was given an ambiguous instruction...." *Calderon v. Coleman* (1998) 525 U.S. 141, 146 (emphasis added).

    - If reviewing court does find a "reasonable likelihood" that the jury interpreted instruction in unconstitutional way, *it must then proceed to analyze prejudice under the applicable standard – Chapman* on direct appeal or *Brecht* (see below) on federal habeas review.

        - That said, courts sometimes appear to skip that final step. E.g., *People v. Petite* (Oct. 10, 2017; H041739) __ Cal.App.5th __ [2017 Cal.App.LEXIS 878] (reversing based on reasonable likelihood jurors misapplied ambiguous aiding/abetting instructions to convict defendant based on mere presence; no separate

discussion or application of *Chapman*).

- Lessons for counsel.

  - Only work through a "reasonable likelihood" analysis when you have to – where the challenged instructions are "ambiguous." If the instruction is *clear but wrong*, you can skip the "reasonable likelihood" analysis and proceed immediately to prejudice review. E.g., *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 590.

  - Sometimes you may *want* to employ "reasonable likelihood." The "reasonable likelihood" error analysis looks to prosecutorial (and defense) arguments, as well as the instructions as a whole.

    - Sometimes an instruction which appears satisfactory on its face may become fatally ambiguous when considered in conjunction with the prosecutor's arguments.
    - In that situation, **the prosecutor's argument is crucial, not only to prejudice, but to establishing that the instruction was erroneous in the first place**.

  - When you do employ the "reasonable likelihood" analysis, don't stop there. After establishing the requisite reasonable likelihood of improper construction – i.e. constitutional, error – *you should then go on to analyze prejudice under Chapman* (or other applicable standard, depending on the procedural context and nature of the error).

### B. *Brecht* "substantial and injurious influence" – relaxed harmless error standard for federal habeas.

- It's great to use helpful federal cases as authority, as to both error and prejudice. But be careful *not* to import the less defense-friendly prejudice standards employed in many federal cases.

- *Chapman* does not apply on federal habeas review. Instead, federal petitioners face a more "forgiving" harmless error test – or, put another way, a more difficult to satisfy prejudice standard: whether the error "had a substantial and injurious effect or influence in determining the

jury's verdict." *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637.

- The *Brecht* "substantial and injurious effect" test is a decidedly less favorable standard than *Chapman*. However, federal cases are inconsistent on its precise relationship to *Strickland* "reasonable probability."

  - Compare, e.g., *Babb v. Lozowsky* (9th Cir. 2013) 719 F.3d 1019, 1034; *Clark v. Brown,* 450 F.3d 898, 916 (9th Cir. 2006) (*Brecht* equivalent to *Strickland*);
  - with *Pirtle v. Morgan*, 313 F3d 1160, 1173 fn. 8 (9th Cir. 2002) ("*Brecht* ... involves a lower" (i.e., easier to satisfy) "standard than *Strickland*").

- It's fine to draw from a federal habeas opinion's prejudice analysis. But be careful not to imply that the same test applies to your state appeal.

  - It's easy to turn this distinction to your advantage. E.g., "The federal court found an identical error prejudicial even under the more forgiving harmless error standard governing federal habeas. It is still more clear that the error here requires reversal under the rigorous *Chapman* test applicable to this direct appeal."

## C. "Plain error" – another standard applicable only in federal appeals.

- "Plain error" is a standard of appellate review on federal criminal appeals. It's a "safety valve" for review of serious and consequential issues in *federal trials* that were not adequately raised and preserved below. Constitutional errors in federal criminal trials, which would otherwise be subject to *Chapman* (e.g., misinstruction on element), are reviewed under "plain error" test if not adequately raised below.

- The "plain error" framework has no direct analog in California appellate practice. (In California practice, an issue is either reviewable or it isn't; there isn't any intermediate or fallback standard of review/prejudice for forfeited issues.)

- **Counsel should not inadvertently adopt "plain error" language in**

**applying a federal criminal opinion to a state appeal.**

## III. GENERAL THOUGHTS ON WRITING PREJUDICE ARGUMENTS

### A. Don't get bogged down in standards.

- **Minimize boilerplate.** Justices (and their law clerks/research attorneys) are familiar with the basic standards – *Chapman*, *Strickland*, *Watson*, etc. **Avoid long text (including long quotations) defining the respective standards**.

- Keep focus on crucial, but less familiar, aspects of standards.

    - E.g., For *Chapman* review of any misinstruction on an element, focus on *Neder*'s explanation that removal of an element can't be harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding" (see Part I-C).

        - Same with *Green-Guiton-Chiu* framework for legally invalid alternative theory.

    - E.g. Any statement of the "reasonable probability" standard (whether under *Watson* or *Strickland*) should include the *College Hospital* formulation of "merely a *reasonable chance,* more than an *abstract possibility*" (see Part I-E).

### B. "Say something once, why say it again?"

- (Byrne et al., "Psycho Killer," *Talking Heads '77.* )

- **Minimize repetition** in your prejudice arguments.

- **Minimize repetition in arguing effect of particular error under different standards.**

    - Frequently will want to argue for *Chapman* standard, but include fallback "reasonable probability" argument – due to questions regarding the constitutional magnitude of error (necessitating *Watson* fallback) or the adequacy of preservation of the issue (necessitating *Strickland* fallback).

    - But the *main substance of your prejudice argument will be the same, regardless of standard*. (Part V, *post*.)

- Avoid organization in which you analyze entire case under *Chapman* and then re-analyze under *Strickland/Watson*, going back through same case-specific factors.
  - Go through complete case-specific analysis in one place.
  - Can explain that same factors are relevant and reversal is required under either standard.

- **Minimize repetition between prejudice arguments as to different errors.**

  - Be sure your first prejudice discussion thoroughly lays out all the "case-wide" prejudice considerations – overall state of the evidence and contested factual issues; "close case" indicia; etc.

  - In prejudice sections for later arguments, you can *briefly* refer back to those factors without repeating the whole analysis.

  - Concentrate prejudice discussions in subsequent sections on specific effect of that error.

## IV. NOT ALL ERRORS ARE EQUAL.

- Any kind of error (misinstruction, admission or exclusion of evidence, conduct of counsel, courtroom dynamics (shackling, etc.)) *may* be prejudicial under the circumstances of a case.

- But certain categories of error are recognized as having far greater potential for prejudice than others. So it's fair to remind the court of that recognition if you have the good fortune to argue the effect of one of those errors.

### A. Instructions, especially responses to juror queries.

"[F]rom our appellate perspective, of the many and varied contentions of trial court error we are asked to review, **nothing results in more cases of reversible error than mistakes in jury instructions**. And if jury instructions are important in general, **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* (1987) 195 Cal.App.3d 244, 252-253 (emphasis added).

**B. Confessions.**

"**A confession is like no other evidence.** Indeed, 'the defendant's own confession is **probably the most probative and damaging evidence that can be admitted against him**....'" *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 (emphasis added).

"'[T]he confession operates as a kind of **evidentiary bombshell** which shatters the defense.' [Citations.] [¶] .... [T]he improper admission of a confession is **much more likely to affect the outcome of a trial than are other categories of evidence**, and thus is **much more likely to be prejudicial** under the traditional harmless-error standard." *People v. Cahill* (1993) 5 Cal.4th 478, 503 (emphasis added); accord, e.g., *People v. Neal* (2003) 31 Cal.4th 63, 86.

**C. Other offenses (<u>if</u> you can establish error)**.

- Over the past three decades, both case law and legislative developments have dramatically relaxed California's previous limitations on admission of a defendant's prior convictions or other criminal conduct (charged or uncharged).
-
    - These include the more expansive use of priors for impeachment (under the 1982 initiative, Prop. 8), admission of otherwise irrelevant gang affiliations and crimes as proof of gang enhancements (Pen. Code § 186.22), and the statutory authorizations of "propensity" evidence in sex offense and domestic violence cases (Evid. Code §§ 1108, 1109). Consequently, it is much more difficult today to establish that the admission of other crimes evidence amounted to error.

- However, **on the relatively rare occasions when appellate courts <u>do</u> find error in admission of other offenses evidence, they often seem to find prejudice as well**:

    - *People v. Harris* (1998) 60 Cal.App.4th 727, 741 (evidence of prior rape prejudicial under *Watson* where the prior was remote (23 years old) and extraordinarily brutal and inflammatory in comparison to currently-charged offense).

    - *People v. Albarran* (2007) 149 Cal.App.4th 214, 227-231, was a classic

case of prosecutorial overkill in presentation of extensive and "extremely inflammatory gang evidence," much of which "had no connection to these crimes." "[C]ertain gang evidence ... was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran's actual guilt."

- E.g., *People v. Younger* (2000) 84 Cal.App.4th 1360, 1385 (erroneous instruction allowing inference of guilt from prior offenses evidence alone prejudicial in view of "tendency of propensity evidence to prejudice the jury").

## V. ARGUING PREJUDICE UNDER ANY STANDARD.

"**In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.**" *Brecht v. Abrahamson* (1993) 507 U.S. 619, 643 (conc. opn. of Stevens, J.).

- An effective prejudice argument doesn't get bogged down in fine points of doctrine. It focuses on how the specific error (or combination of errors) could have affected the outcome of trial, in light of the totality of the record, including evidence, counsel's arguments, the judge's instructions (and any other comments), and any mid-deliberations questions or other events.

- **Most of the tools of an effective prejudice argument are going to be the same, regardless of the standard** (e.g., *Chapman*, reasonable probability, etc.).

- Generally, three components of a prejudice argument (as elaborated below):

    - (a) **Effect of this specific error on the questions before the jury**.
    - (b) **This case could have come out differently** (placing the error in the context of the overall trial).
    - (c) **Other indicia of the importance of the error, the jurors' focus, and closeness of overall case**.

    - (a) & (b) are essential to any prejudice argument. Should generally be able to find *something* showing (c), as well.

## A. Effect of this specific error on the questions before the jury.

In no particular order, here are a handful of lines of argument for highlighting the prejudicial impact of various kinds of errors.

- All-purpose prejudice reminder: "An error that impairs the jury's determination of *an issue that is both critical and closely balanced* will rarely be harmless." *People v. McDonald* (1984) 37 Cal.3d 351, 376 (emphasis added).

### 1. Removal of crucial issues from the jury.

- The error effectively **prevented the defendant's theory of defense from going to the jury**. E.g., *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741; *People v. Lemus* (1988) 203 Cal.App.3d 470.
  - Though this line of argument is especially applicable to denials of instructions on affirmative defenses or lesser offenses, it may also apply to exclusions of evidence or preclusion of defense counsel's arguments.
    - E.g., *Chambers v. Mississippi* (1973) 410 U.S. 284 (seminal opinion finding due process violation in exclusion of third-party culpability evidence (another person's multiple confessions to that murder));
    - E.g., *People v. McDonald* (1984) 37 Cal.3d 351, 376 ("exclusion of [eyewitness identification expert's] testimony undercut the evidentiary basis of defendant's main line of defense").
- Error gave jurors **a shortcut to a conviction**, relieving them of consideration of the more difficult or subtle questions necessary to convict under proper theory.
  - E.g., *People v. Sanchez* (2001) 86 Cal.App.4th 970, 981 (erroneous felony-murder theory allowed jury to convict without resolving factual questions on malice aforethought); *Suniga v. Bunnell* (9th Cir. 1989) 998 F.2d 664, 669-670 (same).

- Error **removed a disputed factual issue** from the jury. *Neder v. United States* (1999) 527 U.S. 1, 19; *People v. Mil* (2012) 53 Cal.4th 400, 418-419; *Barker v. Yukim* (6th Cir. 1999) 199 F.3d 867, 874-875.

- Error **distorted jury's consideration** of an element or other issue through an erroneous presumption or other misguidance. E.g., *Yates v. Evatt* (1991) 500 U.S. 391, 407-411.

- **Incorrect instruction not cured by correct one**.

    - "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin* (1985) 471 U.S. 307, 322; *People v. Gay* (2008) 42 Cal.4th 1195, 1225-1226.

- **Jurors' rejection of related, but different, defense does not render error harmless.**

    - E.g., *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264 (because elements are different, "jury's rejection of a heat of passion theory ... is irrelevant to the potential success of an imperfect self-defense theory").

    - E.g., *People v. Lee* (2005) 131 Cal.App.4th 1413, 1429-1430 ("the fact the jury rejected the defense of necessity does not necessarily mean that it would have rejected the defense of self-defense").

- **Defense counsel's argument** on theory **no substitute for instructions**.

    - "Arguments of counsel cannot substitute for instructions by the court." *Taylor* v. *Kentucky* (1978) 436 U.S. 478, 488-489; accord *Carter* v. *Kentucky* (1981) 450 U.S. 288, 304.

    - "[B]ecause of the court's refusal to instruct ..., [counsel] could not point to a legal ground[] on which the jury could acquit..." *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099.

- “[I]nstruction by the trial court would weigh more than a thousand words from the most eloquent defense counsel.” *People v. Mathews* (1994) 25 Cal.App.4th 89, 99.

**2. Effect on the reliability of the fact-finding process.**

- **Importance of the affected witness** (prosecution or defense) or subject to the contested issues at trial.

    - Restriction on cross-examination, exclusion of impeachment, or other evidentiary errors going to **credibility of key prosecution witness**. E.g., *Olden v. Kentucky* (1988) 488 U.S. 227 (exclusion of motive to lie or other potential bias prejudicial where her “testimony was central, indeed crucia.l to the prosecution’s case”).

    - Error seemingly provided **corroboration for key prosecution witness**, whose reliability was otherwise suspect. E.g., *People v. Duarte* (2000) 24 Cal.4th 603, 618-619 (hearsay corroborating prosecution witness prejudicial where “the prosecution’s case depended so heavily on the unreliable and impeached testimony” of that witness).

- Error conferred **“false aura” of reliability** on key prosecution evidence.

    - *People v. Acevedo* (2001) 93 Cal.App.4th 757, 772 (restriction on cross-examination on partition-ratios used to calculate blood alcohol gave criminalist’s estimate “a false aura of absolute reliability”).

    - *People v. Hernandez* (1997) 55 Cal.App.4th 225, 241-244 (police analysis of computerized police report data created “false aura of computer infallibility”).

- Error suggested **prosecutorial or judicial corroboration** of witnesses’ testimony. E.g., *United States v. Rudberg* ($9^{th}$ Cir. 1997) 122 F.3d 1119, 1206 (prosecutorial vouching implied that FBI had established veracity of informant witnesses or that a court had already found them

truthful).

- Excluded evidence would have **dispelled common stereotypes** or misconceptions.

    - This reasoning is especially applicable to exclusion of expert testimony on a subject which lay jurors may (mistakenly) feel they already understand – such as effects of intoxication or particular factors affecting reliability of identification.

    - E.g., *People v. Day* (1992) 2 Cal.App.4th 405, 419-420 (defense counsel's failure to present expert testimony on Battered Woman Syndrome allowed prosecutor to exploit "myths" and "misconceptions about battered women in urging" rejection of self-defense claim).

- **Stripping away the "cumulative" label.**

    - **Erroneously <u>admitted</u> evidence not cumulative**.

        - Emphasize infirmities of the other evidence on a subject.
            - In *Arizona v. Fulminante* (1991) 499 U.S. 279, 298-299, an alleged second confession to informant's wife didn't render an involuntary confession to informant himself harmless, where, "absent ... the first confession, the jurors might have found the [wife's] story unbelievable."
            - "[T]he jury might have believed that the two confessions reinforced and corroborated each other."

    - **Erroneously <u>excluded</u> evidence not cumulative**.

        - E.g., evidence would have corroborated or otherwise supported the defendant's own testimony. E.g., *Riley v. Payne* (9th Cir. 2003) 352 F.3d 1313, 1324-1325; *United States v. James* (9th Cir. 1999) 169 F.3d 1210, 1214-1215.

        - E.g., evidence would have corroborated some other

defense witness, whom the jurors might otherwise have doubted (such as a relative or friend of the defendant).

- Defense's ability to impeach witness on some <u>other</u> point (e.g., inconsistent statement) doesn't mitigate exclusion of evidence which would have provided an entirely different ground for doubting his veracity (e.g., probation status, pending case or other grounds for bias). E.g., *Redmond v. Kingston* (7th Cir. 2001) 240 F.3d 590.

- **Other factors calling witness's testimony into doubt** don't mitigate error but **provide <u>greater</u> cause** to find it may have affected verdict.

  - E.g., *Olden v. Kentucky* (1988) 488 U.S. 227, 233 (complainant's testimony contradicted by both defendant and acquitted co-defendant).

**3. Distortions and distractions.**

- Error **distracted jurors from the true questions before them or played to potential biases**.

- E.g., **references to race, ethnicity, or religion**. "[P]rosecutorial remarks kindling racial or ethnic predilections 'can violently affect a juror's impartiality.'" *United States v. Doe* (D.C. Cir. 1990) 903 F.2d 13, 28.

  - See also, e.g., *United States v. Cannon* (8th Cir. 1996) 88 F.3d 1495, 1503 ("the prosecutor gave the jury an improper and convenient hook on which to hang their verdict"); *People v. Criscione* (1981) 125 Cal.App.3d 275, 287.

  - Note that prejudicial effect may be even greater when the prosecutor is of same race or ethnicity as defendant. Cf. *People v. Bain* (1971) 5 Cal.3d 839, 849 ("This tactic was a way of persuading the jury that the defendant's story was a sham that could not convince any other black person").

- E.g., **appeals to sympathy** for victim and family "shifted the jury's attention" from difficult questions surrounding degree of murder to "all

too natural" empathy "with the victim's suffering." *People v. Vance* (2010) 188 Cal.App.4th 1182, 1206.

- Other **appeals to passion and prejudice**, including invocations of community values or public safety, such as exhortation to "send a message" or to take a defendant "off the streets." E.g., *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.

- Error **stigmatized defendant**.

  - *People v. Carrillo* (2004) 119 Cal.App.4th 94, 104 (portrayal of defendant as "unemployed, unwed mother on government assistance").

  - *People v. Holt* (1984) 37 Cal.3d 436, 459 ("erroneously admitted evidence portrayed defendant as a drug abuser, an often-convicted felon with a history of unpunished crimes, a person with a propensity for crime and an associate of criminals").

  - *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1087 ("effect of [sex offender profile testimony] was not to help the jury objectively evaluate the prosecution evidence ... but to guide the jury to the conclusion that defendant was guilty because he fit the profile").

- This is the vice of <u>all</u> the various errors relating to a defendant's prior misconduct, in whatever form – e.g., impeachment priors, "other offenses" (charged and uncharged), prior arrests, parole status, gang affiliation, etc.

  - Evidence of other criminal conduct is likely to have a powerful effect on jurors *out of proportion to its true probative value.*

    - *People v. Thompson* (1980) 27 Cal.3d 303, 716-718 (explaining rationale of historic limitations on other offenses evidence, especially as proof of propensity).

    - "'It is objectionable, not because it has no appreciable probative value, but because it has too much,'" in view

of "'natural and inevitable tendency... to give excessive weight'" to prior criminal record. *People v. Schader* (1969) 71 Cal.2d 761, 772 & fn. 6.

- May also encourage jurors to convict to ensure defendant is punished for his *other* crimes. E.g., *People v. Harris* (1998) 60 Cal.App.4th 727, 738.

- Passion, prejudice, and the state of the evidence.

  - More so than most forms of errors, egregious appeals to passion and prejudice may trump the usual tendency to find errors harmless based on the assertedly "overwhelming" prosecution case. Perhaps because such appeals undermine the jurors' own impartiality, a number of cases have found prejudice even while acknowledging the strength of the prosecution case.

    - E.g., *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 (although "prosecutor presented to the jury a strong case, she needlessly coupled that case with an even stronger appeal to passion and prejudice").

- Errors in courtroom dynamics or procedures may **affect witnesses' testimony and demeanor**, as well as jurors' perceptions.

  - Effect on accusing witness's testimony and demeanor. E.g., *Coy v. Iowa* (1987) 487 U.S. 1012 (confrontation violation in placing screen between child molestation complainant and defendant could have affected substance of testimony; "assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged," as that "would obviously involve pure speculation").

  - Effect on defendant's testimony and demeanor. *People v. Mar* (2002) 28 Cal.4th 1201, 1224-1225 (defendant's "anxiety" in wearing a "stun belt" during testimony could have affected his concentration and the "quality of his testimony," especially his "demeanor").

- Effect of error on overall **defense trial strategy**. *People v. Neal* (2003)

31 Cal.4th 63, 87 (potential effect of error on defendant's decision to testify).

- **"Vicious circle" errors** – use of defendant's denials as proof of guilt.

  - E.g., *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1008 ("profile" evidence on auto theft rings allowed prosecution to "bootstrap" guilt by "implicitly asking the jury to use defendant's disavowal of knowledge ... to reach conclusion defendant knew the vehicle was stolen").

- Error unfairly portrayed defendant's or defense counsel's legitimate reliance on criminal process as **impeding the investigation, corrupting the process, or otherwise frustrating justice**.

  - E.g., *People v. Lindsey* (1988) 205 Cal.App.3d 112 (prosecutor exploited defendant's postarrest silence in condemning defendant and defense counsel for not disclosing alibi defense before trial).

  - Disparagement of defense counsel's function or "denigrat[ion of] the presumption of innocence." E.g., *People v. Herring* (1993) 20 Cal.App.4th 1066 ("My people are victims. His people are rapists, murderers, robbers, child molesters.")

  - Unfounded insinuations that defense counsel fabricated the defense. E.g., *People* v. *Bain* (1971) 5 Cal.3d 839, 845-847.

**B. This case could have come out differently.**

- Some arguments fully discuss the pernicious character of an error (e.g., the inflammatory character of evidence of a defendant's criminal background.) (category "A," above) *but fail to relate that error to the state of the overall case*.

- Prejudice is generally an outcome-determinative inquiry. It's essential to **relate the error to overall state of the evidence and show how jurors could have come to a more favorable verdict**, if not for the error.

- **Your "casewide" prejudice argument begins in the Statement of Facts.**

The Facts must communicate to the reader what the key contested factual questions were, as the case went to the jury.

- Counsel should **craft the Statement of Facts with an eye toward the factual questions most affected by the issues being briefed**.

- By same token, the Statement should **minimize text on questions which have essentially dropped out of the case** (e.g., identification questions, where appeal arguments only going to theories of liability or degree of offense).

- While the Statement must dutifully recite all the evidence supporting the verdict, it must also provide a sufficiently comprehensive sense of the evidence (and its weaknesses) so that the reader understands the verdicts weren't a foregone conclusion.

- **Where necessary, add your own text briefly stating the defense theory at trial**, if it's not otherwise apparent from the factual summary.

    - This may be especially useful where the defense presents no evidence, but develops a consistent defense theory (e.g., misidentification, bias of the complaining witness, etc.) through cross-examination and argument.

- After laying the foundation (in relatively non-argumentative exposition) in your Facts, address the conflicts in the evidence, weaknesses in particular parts of the prosecution case, etc., more forcefully and rhetorically in your later prejudice arguments (especially the prejudice section for the first error briefed).

- Remember that **most appellate justices were once trial judges** (and many were previously prosecutors). Where possible, try to turn that experience to your advantage. Argue that this was a case that could well have come out differently if properly tried – for example, the type of basic factual scenario that often results in a lesser verdict.

- Emphasize *what's missing from prosecution case* – especially where such evidence is commonly presented in cases of that type.

    - Any eyewitness testimony identifying defendant? E.g., *People v.*

*Duarte* (2000) 24 Cal.4th 603, 619.

- Any fingerprints, DNA, or other forensic or physical evidence? E.g., *People v. Stoll* (1989) 49 Cal.3d 1136, 1161-1162 ("no physical evidence corroborated any of the five witnesses").

- Any confession or admission? E.g., *Duarte*, *supra*.

- Any cellphone, surveillance video, or other evidence establishing defendant's movements around time of crime?

- Emphasize **reliability problems with the *other* prosecution evidence** (i.e., the evidence seemingly independent from the error).

  - **Bias and dubious character of accusers**.

    - Witness's own possible exposure to charges in this case or on other matters – possible accomplice, other pending charges, probation or parole status, etc.
    - Witness's own criminal background.
    - Other sources of witness bias – history of animosity toward defendant, romantic rival, different gang affiliation, etc.

  - **Infirmities of eyewitness identification**.

    - "'Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence.'" *United States v. Jernigan* (9th Cir. 2007) 492 F.3d 1050, 1054.
    - Call attention to any factors specifically applicable to situation – e.g., cross-racial ID, brevity of observation opportunity, stress, suggestiveness of show-up or other identification procedure, misleading import of a witness's certainty, etc.
    - In addition to prior California cases and instructions (CALCRIM 315; CALJIC 2.92), may also look to more recent out-of-state cases, scientific literature, and criminal justice studies. E.g., *State v. Henderson* (2011) 208 N.J. 208 [27 A.3d 872, 885-912] (extensive discussion of recent studies); *State v. Lawson* (2012) 352 Ore. 724 [245 P.3d 705]; *Brodes v. State* (2005) 279 Ga. 435 [614 S.E.2d 766, 771]; California Commission on Fair Administration of Justice, Final Report

(2008), pp. 23-25 ("Mistaken eyewitness identification has been identified as a factor in 80% of DNA exonerations" (also discussing additional studies)).

- Consider each factual question (and verdict choice) potentially affected by the error.
  - In multi-count cases, consider whether an error affects some counts more than others.
  - Consider effect on particular enhancements (e.g., gun use, GBI) and choices between charged offense and any lessers submitted.
  - Nothing wrong with fallback arguments. It's fine to argue that an error was prejudicial as to all charges, but to place particular emphasis on impact on specific aspects of the verdicts.

## C. Indicia of importance and effect of an error.

### 1. The prosecutor.

- "Evidence matters; closing argument matters; **statements from the prosecutor matter a great deal**." *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 (emphasis added).

- Few portions of the record are as fertile a source of proof of prejudice than the prosecutor's statements and conduct, especially in closing arguments. As a general matter, **expect to make *some* use of the prosecutor's arguments or other statements in almost every prejudice argument**.

- Prosecutor's argument or cross-examination *aggravated* a judicial error (e.g., instructional or evidentiary error). E.g., *People v. Godinez* (1992) 2 Cal.App.4th 492, 504; *Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, 1057.
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  - E.g., prosecutor's argument exploited the misleading import of ambiguous instruction.

  - E.g., though evidence was supposedly admitted for limited purpose, prosecutor used it for additional purposes (e.g., prior admitted for impeachment, but used to suggest criminal propensity in argument).

- Prosecutor's argument *repeated or called particular attention* to the erroneous evidence or instruction. E.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341 (prosecutor used erroneously-admitted prior to discredit defense witness).

    - "A prosecutor's reference to evidence that should not have been presented to the jury increases the potential for prejudice flowing from the error." *People v. Diaz* (2014) 227 Cal.App.4th 362, 384.

- Prosecutor *called attention to the defense's failure to present evidence* on a point, where prior ruling or prosecutorial action had blocked defense from obtaining or introducing that evidence. E.g., *People v. Frohner* (1976) 65 Cal.App.3d 94, 108-109; *People v. Varona* (1983) 143 Cal.App.3d 566, 570; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315.

- Value of *prosecutor's own opinion reflecting importance* of particular evidence to overall case.

    - "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." *People v. Cruz* (1964) 61 Cal.2d 861, 868; accord *People v. Pantoja* (2004) 115 Cal.App.4th 1, 14-15; see also *Singh v. Prunty* (9th Cir. 1998) 142 F.3d 1157, 1163 ("prosecutor ... can better perceive the weakness of the state's case").
        - Note that (unlike the other categories of prosecutorial "indicia") a prosecutor's assessment of the importance of certain evidence can be relevant, even if that statement was not before the jury (e.g., prosecutorial comments during an in limine hearing).

**2. The judge.**

- Consider whether judge's statements before jury (e.g., in course of overruling a defense objection) magnified effect of an error.

- Judge's remarks in overruling a defense objection appear to ratify prosecutor's misstatement of the law or facts or to buttress prosecution

witness.

  - E.g., *People v. Sergill* (1982) 138 Cal.App.3d 34, 41 ("The court's comment may well have caused the jury to place undue emphasis on the officers' testimony").

- Judge's comments disallowing certain defense cross-examination (e.g., witness's probation status) conveyed misleading impression that there was no factual basis for the inquiry or that it was irrelevant.

  - E.g., *Davis v. Alaska* (1974) 415 U.S. 308, 318 ("the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness").

- Take advantage of principle that jurors are expected to follow judge's admonishments. That presumption applies equally to admonitions or instructions that misdirect the jurors. E.g., *People v. Younger* (2000) 84 Cal.App.4th 1360, 1384-1385.

- Any comments at sentencing recognizing closeness of case.

**3. Defense counsel.**

- Defense counsel's closing argument usually provides the best guide to the "defense theory" at trial. It provides an opportunity to correlate specific errors (e.g., impeachment of a particular witness) with the defense's overall view of the case.

- As with the prosecutor, defense counsel's statements – including those outside the jury's presence – are a valuable guide to what he or she considered most important to effective presentation of the defense.

  - Take particular note of defense counsel's remarks in response to adverse rulings – e.g., complaint that an exclusion of evidence or denial of a requested instruction would "cripple" the defense.

**4. Co-defendant's counsel.**

- Error committed or aggravated by counsel for co-defendant. Cf.

(*People* v. *Estrada* (1998) 63 Cal.App.4th 1090, 1096, 1106-1107 ("the direction of a blow is less important than the wound inflicted" ).

**5. The jurors.**

- Events during deliberations provide some of the most powerful indicia of prejudice. These are most potent where they explicitly relate to the subject of an error. But, even where there the relationship is less explicit, these are commonly recognized as indicia of a close case.

- **Jurors' questions and requests concerning instructions**. "Juror questions and requests to have testimony reread are indications the deliberations were close." *People* v. *Pearch* (1991) 229 Cal.App.3d 1282, 1295; see also, e.g., *People v. Diaz* (2014) 227 Cal.App.4th 362, 384-385; *People v. Cameron* (1994) 30 Cal.App.4th 591, 600; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250-251; *People* v. *Day* (1992) 2 Cal.App.4th 405, 420.

- **Requests for readbacks**. *Diaz*, *supra*, *Pearch*, *supra*; *Day*, *supra*; *People* v. *Woods* (1991) 226 Cal.App.3d 1037, 1052.

- **Lengthy deliberations**. E.g., *In re Martin* (1987) 44 Cal.3d 1, 51.
  - How long is long? E.g., *People v. Woods* (1991) 226 Cal.App.3d 1037, 1052 (3 days); *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633 (9 hours over 3 days); *People v. Cardenas* 1982) 31 Cal.3d 897, 907 (12 hours).
  - Some older cases describe periods even shorter than these as indicating the "case was far from open and shut." *People v. Woodard* (1979) 23 Cal.3d 329, 341 ("nearly six hours").

- **Timing of verdict in relation to error.** *People v. Markus* (1978) 82 Cal.App.3d 477, 482 ("very brief lapse of time between the erroneous additional instruction and the return of a guilty verdict"); *People v. Williams* (1976) 16 Cal.3d 663, 669 (jury returned verdict short time after rehearing erroneously admitted evidence). (See also "Timing of error," # 6 below.)

- **Juror questions or statements suggesting a risk of deadlock** – e.g., note asking what will happen if jurors can't agree unanimously. *People v. Diaz* (2014) 227 Cal.App.4th 362, 384-385.

- **Mixed verdicts** – acquittals or deadlocks on some counts or enhancements. *Olden v. Kentucky* (1988) 488 U.S. 227, 233 ( "the jury's verdicts ... cannot be squared with the State's theory of the alleged crime"); see also *People* v. *Woods* (1991) 226 Cal.App.3d 1037, 1052; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1398 (deadlock on other counts).
  - Pay particular attention to the jury's **disposition of weapon or GBI enhancements**. An acquittal or a deadlock on a personal use allegation frequently indicates the jurors' rejection of the prosecution theory of the defendant's exact role in the crime. See, e.g., *People v. Godinez* (1992) 2 Cal.App.4th 492, 504-505.

- **Previous hung jury**. E.g., *People v. Valdez* (2017) 14 Cal.App.5h 1019, 1044; *People v. Diaz* (2014) 227 Cal.App.4th 362, 384-385; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39; *People v. Duarte* (2000) 24 Cal.4th 603, 619; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1055.
  - A prior jury deadlock is especially persuasive evidence of prejudice, where no similar error occurred at the earlier trial. E.g., *Diaz, supra*; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099-1100.

**6. Timing of error.**

- Also consider the timing of the error itself (or the evidence to which it relates) as evidence of the importance of that subject to the case.

- The prosecutor's **choice either to begin or to conclude evidentiary case or closing argument** with particular subject usually demonstrates the prosecutor's view of its importance to the overall case. E.g., *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 (calling expert as second witness in case-in-chief "reflects the State's firmly held belief that [expert's] testimony was critical" to proof of premeditation).

- Erroneous evidence or line of argument **in proportion to overall case.** Consider how much time a challenged subject took up in the overall trial – for example, the total number of witnesses and court time devoted to a "mini-trial" on other offenses.

- Effect of timing on jurors. Misstatements during the prosecutor's **rebuttal argument** can carry particular weight because:
  - They're the last thing the jurors hear from either counsel before deliberations; and
  - Defense counsel has no opportunity to counter in his or her own argument.

## VI. CUMULATIVE PREJUDICE.

- **Minimize boilerplate. Get specific.**

- Many cumulative prejudice arguments consist of 2-3 pages of boilerplate (including quotations & citations) on general concept of cumulative prejudice *but say nothing or almost nothing about specifics of case*.

- It's easy and more effective to state the basic cumulative error principle *very briefly,* citing a few leading cases, state and federal. E.g., *People v. Hill* (1998) 17 Cal.4th 800, 844-847; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1202, 1211.

  - Add that, as long as "some of the errors ... are of constitutional dimension," *Chapman* governs review of their cumulative effect. *People v. Williams* (1971) 22 Cal.App.3d 34, 58; also cf. *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 470. (It would be nice to have more recent and more clear authorities than these, but *Williams* appears to be the most explicit statement of this principle.)

- **Discuss how the specific errors of the case interact or otherwise relate to one another**.

  - E.g., two errors relating to the **same aspect of the case** (such as evidentiary ruling and defective instruction regarding same evidence).
  - E.g., errors relating to **different foundations of the prosecution case** – such as distinct errors affecting alternative prosecution legal theories (e.g., felony-murder, premeditation, etc.).
  - E.g., **combination of errors tipped the scales** – such as where disparate impeachment or other evidentiary rulings effectively bolstered prosecution witness while undermining defendant and other defense witnesses.