



JURY INSTRUCTION CORNER

By Thomas Lundy

Part III: Jury Instruction Strategies When The Judge Says 'No'

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Resiliency in the face of rejection is a characteristic of successful people in general, and criminal defense attorneys in particular. Nowhere is this quality more important than in the realm of jury instructions. Notwithstanding techniques and strategies which can result in the acceptance of defense requested instructions (see "Part II: Strategies For Persuading The Trial Judge To Modify Or Supplement The Pattern Instructions," July 2001 issue of *THE CHAMPION*), it is a given that the judge will say "no" more often than "yes." But, as with any other aspect of criminal defense, the fact that the judge says "no" shouldn't end the fight.

This article presents some ideas for responding to the judge's denial of a jury instruction request by "finding another way" to gain an advantage or benefit from the rejected instruction.

Does The Judge Have A Duty To Correct Or Modify The Instructions?

The first response to consider when an instruction is rejected is whether to ask the court how the instruction can be corrected or modified to make it acceptable.

It has been widely recognized that the trial court has a duty to correct defective instruction requests arising from the trial court's ultimate responsibilities to assure that the jury is correctly instructed. (See *U.S. v. Newcomb* (6th Cir. 1993) 6 F.3d 1129, 1132 [trial court erred in failing to correct defendant's defective instruction on necessity]; *People v. Castillo* (CA 1997) 16 C4th 1009, 1016 [68 CR2d 648] [even when a trial court instructs on a

matter on which it has no sua sponte duty to instruct, it must do so correctly]; *People v. Fudge* (CA 1994) 7 C4th 1075, 1110 [31 CR2d 321] [judge must tailor instruction to conform with law rather than deny outright]; *State v. Sawyer* (HI 1998) 966 P.2d 637, 642 [trial court has the duty either to correct any defects or to fashion its own instructions]; *Bailey v. Commonwealth* (VA 2000) 529 S.E.2d 570, 584-85 [when a principle of law is materially vital to a defendant, it is reversible error for the trial court to fail to correct a defective instruction or verdict form when the error is patent or the subject of a proper objection even if the defendant fails to proffer alternative instructions or verdict forms]; *State v. Lambert* (WV 1984) 312 S.E.2d 311 [ultimate responsibility to ensure that jury is correctly instructed in criminal cases rests with the trial court].)

This duty may require the trial court to correct or tailor an instruction to the particular facts of the case even though the

instruction submitted by the defense was incorrect. (See *People v. Stewart* (CA 1976) 16 C3d 133, 140 [127 CR 117]; see also *Kass v. Great Coastal Express, Inc.* (NJ 1996) 676 A2d 1099, 1107 [because request as formulated by plaintiff omitted the standard of proof, the judge has the responsibility to determine the applicable standard of proof]; *People v. Parsons* (CO 1980) 610 P.2d 93, 94; *State v. Bunce* (NM 1993) 861 P.2d 965 [inadequate defense request on mistake of fact did not relieve trial court of obligation to correctly instruct on this defense theory]; *Williams v. State* (TX 1982) 630 S.W.2d 640, 643 [although a specially requested charge may be defective, it still may serve to call the court's attention to the need to charge on a defensive issue]; *Morse v. Commonwealth* (VA 1994) 440 S.E.2d 145 ["Trial court should have prepared its own instruction or required counsel to submit a new instruction that correctly defined the defense"]; *State v. Dellinger* (VA 1987) 358 S.E.2d 826 [failure of defense counsel to offer a sexual abuse instruction was such plain error the trial court should have intervened to avoid prejudice to the defendant].)

Hence, in many jurisdictions there may be a basis for asking the judge to explain how a rejected instruction can be corrected to make it acceptable.

Are There Other More Acceptable Instructions That Can Be Given?

A variation of the correction/modification response is to consider whether the point can be made using other instructions which may be more acceptable to the judge. For example, if counsel is not satisfied with the standard definition of reasonable doubt, and the judge denies counsel's requested definition, a burden-comparison instruction could be requested. This approach instructs the jurors using the standard definition of clear and convincing evidence and then informs them that proof beyond a reasonable



THOMAS LUNDY is a graduate of the University of California School of Law at Davis and has been a criminal appellate practitioner since 1974.

He is a faculty member of the California Appellate Advocacy Institute and lecturer for California Attorneys for Criminal Justice (CACJ)/California Public Defenders Association (CPDA). He is founder and editor of FORECITE California, a widely-used supplement to the California Criminal Pattern Jury Instructions (CALJIC) and FORECITE National, a federal and multi-state expansion.

CONTACT: Tom Lundy, 2500 Vallejo St., Suite 200, Santa Rosa, CA 95405-6959, Phone (800) 339-2483, Phone (707) 524-8112, Fax (707) 545-4642; E-mail juryinstruction.com

doubt requires more. In other words, such an instruction would effectively inform the jury that a firm belief in guilt is *not* enough to convict. (Go to <http://juryinstruction.com> [Going Beyond The Standard Pattern Instructions Part III: Jury Instruction Strategies When The Judge Says “No”] for sample instruction and points and authorities.)

Does Rejection Of The Defense Request Call For Rejection Of Analogous Prosecution Instructions?

Another response to consider when a proposed defense instruction is rejected is whether other analogous prosecution instructions have been accepted. For example, defense instructions are often rejected because they are allegedly a comment on a specific witness or type of evidence. Yet most sets of standard pattern instructions contain numerous prosecution oriented instructions which also comment on the evidence or specific witnesses. (E.g., consciousness of guilt, inference instructions such as recent possession of stolen property, instructions which highlight the defendant’s confession or admission, etc.) Allowing such instructions while denying analogous defense instructions results in an instruction imbalance which unfairly and unconstitutionally favors the prosecution. (See e.g., *Wardius v. Oregon* (1973) 412 U.S. 470 [93 S.Ct 2208; 37 L.Ed.2d 82].)

For example, a typical standard pattern instruction which is especially prejudicial to the defendant in a criminal case specifically informs the jury to consider the interest of a witness in the outcome of the trial in evaluating credibility. In a criminal case, this instruction effectively singles out the defendant’s testimony as less credible than the testimony of other witnesses.

Hence, if defense counsel’s requests for instructions on specific defense evidence or witnesses is denied, then the other standard instructions which comment on the evidence, such as the “outcome-of-the-trial” instruction, should also be excluded.

Responding To Rejection Of Proposed Instruction With Argument To The Jury

Most trial practitioners are familiar with having to argue legal points upon which the trial judge has refused specific instruction. Typically this approach is considered to be less effective than having the court to instruct on the principle. However,

there are some potentially powerful techniques that can be employed to increase the stature of these legal arguments.

For example, counsel should have the right to an instruction informing the jury that legal principles included in argument are to be followed so long as they are not inconsistent with the court’s instructions. Indeed, the right to such an instruction is guaranteed by the federal Constitution. (See *Herring v. New York* (1975) 422 U.S. 853, 858 [95 S.Ct 2550; 45 L.Ed.2d 593] [“the constitutional right of a defendant to be heard through counsel necessarily includes his right to have counsel make a proper argument on the ... applicable law in his favor.” [Citation.]”]; see also *Penry v. Johnson* (6/4/01, No. 00-6677) ___ US ___ [121 S.Ct 1910; ___ L.Ed.2d ___] [recognizing the legitimate role counsel’s argument plays in juror comprehension of the instructions].) In fact, many jurisdictions incorporate this concept into its standard pattern instructions. This is done by permitting the jury to consider as a governing legal principle any specific legal principle asserted by counsel during argument which is not inconsistent with the court’s instructions. For example:

YOU MUST ACCEPT AND FOLLOW THE LAW AS I STATE IT TO YOU, REGARDLESS OF WHETHER YOU AGREE WITH THE LAW. IF ANYTHING CONCERNING THE LAW SAID BY THE ATTORNEYS IN THEIR ARGUMENTS OR AT ANY OTHER TIME DURING THE TRIAL CONFLICTS WITH MY INSTRUCTIONS ON THE LAW, YOU MUST FOLLOW MY INSTRUCTIONS. (California Jury Instructions — Criminal, CALJIC 1.00, [Respective Duties Of Judge And Jury] ¶¶ 4 (WEST, 6th Ed. 1996).)

THE LAWYERS HAVE TALKED ABOUT THE LAW DURING THEIR ARGUMENTS. BUT IF WHAT THEY SAID IS DIFFERENT FROM WHAT I SAY, YOU MUST FOLLOW WHAT I SAY. WHAT I SAY ABOUT THE LAW CONTROLS. (6TH CIRCUIT PATTERN JURY INSTRUCTIONS - CRIMINAL 1.02 [Juror’s Duties] ¶¶ 3 (1991).)

IF ANYONE STATES A RULE OF LAW DIFFERENT FROM ANY I TELL YOU, IT IS MY INSTRUCTION THAT YOU MUST FOLLOW. (IDAHO CRIMINAL JURY INSTRUCTIONS, ICJI 201 [Role Of Judge And Jury] (Idaho Law Foundation, Inc., 1995).)

IF, HOWEVER, YOU THINK THERE IS ANY DIFFERENCE BETWEEN THE LAW STATED BY COUNSEL AND THE LAW STATED IN THESE INSTRUCTIONS, YOU MUST FOLLOW THE INSTRUCTIONS I AM GIVING YOU. (ALEXANDER, MAINE JURY INSTRUCTIONS MANUAL 6-5 [INSTRUCTION 16-MISTAKES OF LAW IN ARGUMENT] (LEXIS, 1999).)

IF AN ATTORNEY’S ARGUMENT CONTAINS ANY STATEMENT OF THE LAW, WHICH DIFFERS FROM THE LAW WHICH I GIVE YOU, YOU SHOULD DISREGARD THE STATEMENT. (MINNESOTA JURY INSTRUCTION GUIDES - CRIMINAL, CRIMJIG 3.11, [STATEMENTS OF JUDGE AND ATTORNEYS] ¶¶ 2, sent. 2 (WEST, 4th ed. 1999).)

COUNSEL ARE QUITE PROPERLY REFERRED TO SOME OF THE GOVERNING RULES OF LAW IN THEIR ARGUMENTS. IF HOWEVER, ANY DIFFERENCE APPEARS TO YOU BETWEEN THE LAW AS STATED BY COUNSEL AND THAT STATED BY THE COURT IN THESE INSTRUCTIONS, YOU OF COURSE ARE TO BE GOVERNED BY THE INSTRUCTIONS. (DINSE, BERGER, & LANE, VERMONT JURY INSTRUCTIONS - CIVIL & CRIMINAL 5.01, [INSTRUCTION: OPENING REMARKS-RESPONSIBILITIES OF COURT AND JURY] ¶¶ 6. (LEXIS, 1993).)

Based on such an instruction counsel should be able to admonish the jury that specific legal points made during argument, to which the prosecutor does not object, should be accorded the same stature as the instructions given by the court. To bolster this view the actual language of the specific legal principle can be included in a “blow-up” or graphic for use during the argument.

Of course, in jurisdictions without the necessary language in the standard pattern instructions, appropriate language will have to be requested.

Additionally, for greater emphasis, more express language can be requested. For example:

IF COUNSEL ARGUES THAT A LEGAL RULE IS INCLUDED IN ONE OF THE INSTRUCTIONS, YOU MUST ACCEPT AND ABIDE BY THAT RULE AS A CORRECT STATEMENT OF THE LAW UNLESS IT CONFLICTS WITH THE INSTRUCTIONS OR I SUSTAIN AN

OBJECTION TO COUNSEL’S ARGUMENT ON THAT POINT. THUS EVEN IF THERE IS NO SPECIFIC INSTRUCTION ON THE RULE ARGUED BY COUNSEL YOU MUST TREAT IT AS THE EQUIVALENT OF AN INSTRUCTION TO BE CONSIDERED, IF APPLICABLE, ALONG WITH ALL THE OTHER INSTRUCTIONS IN DECIDING THE CASE.]

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Nor should the prosecutor be allowed to argue a contrary interpretation of the legal principle to the jury. While differing interpretations of the facts are appropriate for the jury to resolve, it is not appropriate for the jury to resolve different interpretations of the law. *See e.g., People v. Thomas* (CA 1945) 25 C2d 880, 897 [156 P.2d 7]; *U.S. v. Delano* (W.D.N.Y. 1993) 825 F.Supp 534.) Hence, the prosecutor who has a quarrel with defense counsel’s argument of the specific legal principles should object at the time defense counsel’s argument is made or be deemed to have waived the opportunity to advance a different interpretation.

In sum, fundamental constitutional principles require that the defendant be allowed to assure that the jury fully understands any correct principle of law which may have a bearing on its verdict. (*See Herring, supra; Penry, supra.*) If counsel is precluded from conveying this principle by specific instruction, then the jury should be informed to accept and follow counsel’s recitation of the principle during argument.

CAVEAT: This approach will also apply to the prosecution’s argument. This strategy should, therefore, be carefully evaluated because it may allow the jury to consider legal argument from either side in the same fashion. Hence, caution should be used to object to or preclude argument on any misstatements of the law by the District Attorney and/or cocounsel. (See FORECITE® National 272.3.5 [Admonition Regarding Improper Summation/Closing Argument On Term Contained In Instructions But Not Defined]. [Readers may access these excerpts from FORECITE National at [*cle.htm* \[Going Beyond The Standard Pattern Instructions Part III: Jury Instruction Strategies When The Judge Says “No”\].\)](http://juryinstruction.com/featured arti -</p></div><div data-bbox=)

Assumption That The Jury Will Understand Without The Proposed Instruction

Trial judges often deny proposed defense instructions because the point is “covered by” or “included in” other instructions or is within the general understanding of the jury. And, their appellate brethren often back them on this point. (*See e.g., People v. Musselwhite* (CA 1998) 17 C4th 1216, 1271 [74 CR2d 212] [jury will glean specific mitigating factors from the general catch-all mitigating factor instruction in death penalty cases].)

Similarly, many jurisdictions hold that the trial judge has no obligation to clarify “commonly understood” terms. (See generally WHARTON’S CRIMINAL PROCEDURE (WEST, 13th ed. 1989) §§ 463.)

However, these justifications for rejecting a proposed instruction are founded on assumptions which may be subject to challenge.

Use Of Empirical Studies To Illustrate Jurors' Difficulty In Understanding Instructions

Empirical studies suggest that jurors have much more difficulty understanding instructions than the courts assume they do. For example, in one study of ten separate California juries, the following findings were made: (1) Consideration of mitigating evidence — “[F]ully 8 out of the 10 California juries included persons who dismissed mitigating evidence because it did not directly lessen the defendant’s responsibility for the crime itself.” (2) Comprehension of Legal Crimes and Legal Terms — “Of the 30 California jurors interviewed, only 13 showed reasonably accurate comprehension of the concepts of aggravating and mitigating.” (See Haney, Sontag and Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* 50 JOURNAL OF SOCIAL SCIENCES No. 2 (Summer 1994) [For a copy of this study contact: Subscription Dept., Plenum Publishing Corporation, 233 Spring Street, New York, NY 10013. Orders can also be faxed to the Subscription Dept. at 212/807-1047. Single issues are \$49.50 each.]

Additionally, *Free v. Peters* (7th Cir. 1993) 12 F.3d 700, 704-06, provides a basis for challenging confusing jury instructions by the use of a jury study conducted by an appropriate expert. In *Free*, the trial court relied upon such a study to conclude that the instructions given were overly confusing and invalid. Although the court of appeals reversed the lower court, it did not rule out the use of an appropriate jury study for jury instruction evaluation. Rather, the court of appeal relied on two perceived defects in the study methodology. (*Free*, 12 F.3d at 705.) Presumably, a study which eliminates those defects would be a valid basis upon which to challenge jury instructions as overly confusing. (*But see also Gacy v. Welborn* (7th Cir. 1993) 994 F.2d 305, 309.)

Challenging The Assumption That The Jurors Are Walking Dictionaries

The assumptions that all jurors necessarily understand the correct meaning of every word in the instructions which is not a technical or legal term is patently false, as demonstrated by the countless cases in which jurors have unilaterally referred to dictionaries to seek definitions of supposedly common terms. (*See e.g.*,

People v. Karis (CA 1988) 46 C3d 612, 642 [250 CR 659]; *State v. Williamson* (HI 1991) 807 P.2d 593, 596; *U.S. v. Gillespie* (6th Cir. 1995) 61 F.3d 457, 459; *Maslinski v. Brunswick Hosp. Center Inc.* (NY 1986) 118 A.D.2d 834 [500 N.Y.S.2d 318]; *State v. Richards* (VA 1995) 466 S.E.2d 395, 400; *but see People v. Landwer* (IL 1996) 664 N.E.2d 677, 682 [error to refuse jury’s request for dictionary].)

Hence, given the fact that, on the one hand, jurors are forbidden from referring to dictionaries and, on the other hand, it is falsely assumed that jurors do understand the correct meaning, there is no logical support for denial of a request to give the jury the dictionary definition of important terms used in the instructions.

Counsel Should Be Permitted To Include The Dictionary Definition In Argument

As already discussed in Section B above, the defendant has a federal constitutional right to argue specific points of law to the jury that are legally correct and consistent with the more general instructions given by the judge.

Certainly, the correct dictionary definition of a term used in the instructions should fall within this right to argue specific points of law. Moreover, the propriety of this argument is further supported by the fact that the jurors are typically not permitted to consult the dictionary themselves to obtain the correct definition.

Strengthening The Appellate Record

The focus of this article has been trial strategy, not appeal. Appellate concerns will be addressed in a future article. However, it bears noting at this juncture that when a defendant’s instructional argument is rejected trial counsel can greatly help the appellate attorney by assuring that potential sources of prejudice are on the record. For example, when the judge instructs, over objection, on a prosecution theory not included in the charging document, a specification of how the new theory unfairly surprised the defense and a request for continuance could make the appellate issue much stronger. (*Compare Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1236-37 [*habeas* petition granted where defendant unfairly surprised] *with People v. Memro* (CA 1995) 11 C4th 786, 869 [47 CR2d 219 [failure to ask to reopen waived error in instructing on uncharged felony murder theory].) ↵