NOTES

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Trial by jury is central in the thinking about criminal justice in spite of the fact that very few felony cases are disposed of in that manner.[1] Important pre-trial decisions are influenced by the assumed reactions of a hypothetical jury to particular facts.[2] Instructions foster abundant folklore[3] and they are frequently selected as the most likely source of error in criminal trials;[4] certainly, a substantial number of the appeals decided each year by the Missouri Supreme Court, and by appellate courts in other jurisdictions,[5] deal with such errors.

Problems in this area fall into three groups: (1) *evidence sufficiency:* whether there is sufficient evidence in the case to justify giving a particular instruction; (2) *misdirection:* assuming an instruction is given and there is sufficient evidence to justify it, whether it is a correct statement of the law; and (3) *nondirection:* assuming an instruction is not given and there is sufficient evidence to justify it, whether it is error not to give it.

The purpose of this note is to analyze the Missouri Supreme Court cases which discuss the last of these issues, the circumstances which

1. Although statistics are not readily obtainable for Missouri, a representative picture may be obtained from the disposition of felony cases in the Recorder's Court, the trial-level court in Detroit, Michigan. In 1956, a total of 5,528 felony cases were disposed of by that court, in which formal charges had been made. Of this number, 289 were tried by a jury, 5.2% of the total. ANNUAL REPORT FOR THE RECORDER'S COURT OF DETROIT, MICHIGAN 2 (1956).

2. Many decisions leading to non-prosecution of cases result from a determination that there is very little likelihood of a conviction because of past performances of juries in similar cases. Those statistics cited in note 1, *supra*, do not indicate the large number of cases which do not even pass the charging stage—the issuance of arrest warrants. Thus, *e.g.*, in California in 1960, 28.5% of all adult felony arrests resulted in release by the police even prior to any charging decision being made by a magistrate or prosecutor. The use of the jury indicated by statistics from California, however, are remarkably close to those cited for Detroit. A jury was used in 7.5% of the total number of cases in which formal charges were filed. See Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962). It is not, however, suggested that all dispositions prior to charging, or after charging but without trial by jury, result from predictions about probable jury reaction.

3. "As one turns to the jury as a topic for basic study he is met with the conflicting reactions that there is a poverty of usable legal theory and an abundance of specific legal hypotheses to test. . . . How much can and ought jury equity be controlled by formal rules of law and procedure?" KALVEN, REPORT ON THE JURY PROJECT OF UNIVERSITY OF CHICAGO LAW SCHOOL 6 (1955).

4. GREEN, JUDGE AND JURY 351 (1930); MISSOURI ASSOCIATION FOR CRIMINAL JUSTICE, THE MISSOURI CRIME SURVEY 226 (1926); ORFIELD, CRIMINAL APPEALS IN AMERICA 206 (1939).

5. While the problem appears to be greater in Missouri than in most other states, it certainly is not confined to Missouri. See ORFIELD, *op. cit. supra* note 4, and GREEN, *op. cit. supra* note 4.

place a trial judge under a duty to give a certain instruction; particular attention will be paid to whether a request[6] by defense counsel is needed and, if so, whether the request must correctly state the law. Only felony cases are analyzed.[7] It will always be assumed that there was sufficient evidence to justify giving the instruction in question and that defendant properly preserved the issue for appeal.[8]

The issues arise because a trial judge failed to give an instruction favorable to a defendant who was subsequently convicted. For example, defense counsel in a murder prosecution introduced evidence which tended to show self-defense. He did not request an instruction on self-defense although the evidence was sufficient to justify giving it, and the trial judge failed to instruct the jury on his own initiative. Should the failure to instruct be reversible error? Suppose, on the other hand, the defense counsel requested such an instruction, but the law as stated in the request was not correct. How should this affect the trial judge's duty to instruct?

I. THE MISSOURI RULE

The most important decision expressing the Missouri rule, *State v. Chaney*,[9] attracted a majority in the Supreme Court only because of its particular facts. Since a majority of the court did not express approval of the "accepted" rule,[10] it is desirable to examine all suggestions and attempts at resolving the problem it raises.

6. "Request" was defined recently in State v. Harris, 356 S.W.2d 889, 891 (Mo. 1962): "A 'request' for an instruction consists of preparing and presenting to the court a written instruction with the request that it be given." See also State v. Martin, 364 Mo. 258, 260 S.W.2d 536 (1953). In State v. Michael, 361 S.W.2d 664 (1962) the court said "the trial court is not to be convicted of error for failing to draft in its entirety an instruction on a collateral issue pursuant to an oral request as was made in this case." *Id.* at 666. The defendant had orally requested the instruction but did not prepare a draft for the court.

7. Most of the rules relating to the giving of instructions in felony cases are purportedly based on Mo. REV. STAT. § 546.070 (1959) which does not apply to misdemeanors. See text accompanying note 11 *infra*. See also State v. Griffin, 289 S.W.2d 455 (Mo. Ct. App. 1956).

8. Often the failure to give an instruction does not lead to a reversal on appeal because the defense did not satisfy the procedural prerequisites. See cases cited in State v. Burrell, 298 Mo. 672, 252 S.W. 709 (1923).

9. 349 S.W.2d 238 (Mo. 1961).

10. Defendants were jointly charged and found guilty of robbery in the first degree and their appeals were consolidated. During the trial the defendants presented an alibi defense. On direct examination defendant Chaney's girl friend testified that Chaney was with her at the time of the robbery. Through the use of prior inconsistent statements made to the police, the prosecutor on cross-examination was able to elicit facts that were highly prejudicial to the defendants and destroyed the alibi defense. The court refused to give defendants' offered instructions by which they sought to limit the jury's consideration of the girl's

A. THE STATUTE

All appellate opinions since 1879 deciding the issues under discussion purport to rest on the Missouri statute, which provides:

> Whether requested or not, the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict; which instructions shall include, whenever necessary, the subjects of good character and reasonable doubt; and a failure to so instruct in cases of felony shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial . . . .[11]

B. STATE V. CHANEY: PRINCIPAL OPINION

In addition to reliance on the statute, there has been a pervasive tendency to establish four verbal categories, with differing legal consequences, to subsume the particular instruction under one of those categories, and thereby to reach a conclusion. This approach was

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testimony on cross-examination to judging her veracity as a witness, the defendants wanted it made clear that the jury was not to use that evidence to determine their guilt or innocence. A divided court reversed and remanded the case because of the trial court's failure properly to instruct the jury.

Hyde, C. J., delivered the principal opinion in which Westhues and Hollingsworth, JJ., concurred; Storckman, J., concurred in the result in a separate opinion; Dalton, J., concurred in the result; Eager, J., dissented in a separate opinion; Leedy, J., dissented.

11. MO. REV. STAT. § 546.070 (1959). See also MO. SUP. CT. RULE 26.02. The statute had its origin in the language of an early Missouri case, Hardy v. State, 7 Mo. 607 (1842). Defendant was convicted of operating a roulette wheel. The trial court had informed the jury that they were the judges of the law and had allowed them to take to the jury room a law book from which they were to ascertain the law applicable to the case. Holding this reversible error, the court said:

> It is the duty of the judge of a criminal court . . . to instruct the jury in all the law arising in the case, and it is the duty of the jury to respect the instruction of the court as to the law of the case . . . . *Id.* at 609.

The statute was first passed in 1879. It was amended in 1889, MO. REV. STAT. § 4208 (1889), to make failure to instruct good cause for granting a new trial. Sherwood, J., intimated in State v. Clark, 147 Mo. 20, 47 S.W. 886 (1898) that this provision resulted from what he believed to be the erroneous holding in State v. Brooks, 92 Mo. 542, 5 S.W. 257 (1887) that it was not reversible error to fail to instruct the jury on the effect of an extra-judicial confession unless requested by the defendant. An 1895 change (Mo. Laws 1895, p. 161) added "the subjects of good character and reasonable doubt" to its requirements. This amendment is at least partially attributable to the holding in State v. Murphy, 118 Mo. 7, 25 S.W. 95 (1893) where the court refused to reverse for failure to instruct on the subject of good character when not requested by the defendant. It was amended again in 1901 (Mo. Laws 1901, p. 140) to add the phrase "whether requested or not." The statute has remained unchanged since that amendment.

MO. REV. STAT. § 546.380 (1959) makes it clear that the court may instruct even when there is no duty to do so, provided that issue has arisen in the case.

followed by the principal opinion in *Chaney*. The following categories have been established.

1. *"Law of the Case" or "Main."* The result of an issue falling under this classification is that a failure to instruct on it will be reversible error whether an instruction has been requested or not. The authority for the result which follows the label is the statute and the case-law it codified.

2. *"Collateral."* When an issue is denominated "collateral," it will not be error for the trial court to fail to instruct on it on its own motion. But if the defense requests an instruction on a "collateral" issue, the trial court must give a correct instruction even though the request submitted by defense counsel may have been erroneous. The authority for the result which follows this label is case law.

3. *"Converse."* Instructions on behalf of the defendant which state what the jury shall do if it does not find those facts required by the state's instructions are denominated "converse." The court is under a duty to give such an instruction only if defendant submits a correctly worded instruction accompanied by a request that it be given.[12] The authority for this is case law.

4. *"Cautionary."* No error can be predicated on failure to give a cautionary instruction on the trial court's own motion or, apparently, where the instruction requested is erroneous. The authority for this proposition is weak and it may not be followed in all cases. In *Chaney*, the court said that "giving purely cautionary instructions, which may be discretionary with the court, should require the offer of a correct instruction . . ."[13]

C. State v. Chaney: Concurring Opinion

It is rare to find a Missouri case which does not use these categories in stating its decision. However, two other theories are occasionally suggested judicially. The concurring opinion in *State v. Chaney* urged that there be only two categories of instructions:

> Either the instruction in a felony case involves questions of law with reference to which it is necessary to inform the jury in arriving at its verdict or it does not. If it does, then under § 546.070(4) the trial court must give a proper instruction whether requested or not; the statute is mandatory. If it does not, then § 546.380 controls and the duty is, or should be, upon the defendant to request an instruction in proper form before he can claim error. The giving of such an instruction would be discre-

12. This is also limited by the type of state instruction involved. The rules are further developed in the section dealing with converse instructions, *infra*.

13. State v. Chaney, 349 S.W.2d 238, 244 (Mo. 1961).

> tionary or nonmandatory. I can see no sound reason for making the right to an instruction depend upon the happenstance of a defendant submitting a written request although erroneous.[14]

This opinion reached the same result as the majority opinion; the issue in question—limiting the effect of impeaching evidence—fell within the mandatory class and hence it was error to fail to instruct on it. Under this approach, however, it was immaterial that the defense in *Chaney* had requested an incorrect instruction, and the result would have been the same had there been no request at all.

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14. *Id.* at 246. Prior authority for this position may be found in State v. Foster, 335 Mo. 577, 197 S.W.2d 313 (1946). The concurring opinion also agrees with the statement in State v. Weinberg, 245 Mo. 564, 150 S.W. 1069 (1912):

> What questions are necessary for the information of the jury and upon which a failure to instruct will be a good cause for a new trial, and what are questions upon which an instruction may properly be given but which a failure to give will not entitle the defendant to a new trial unless proper instructions are requested, have not been definitely pointed out by this court. Indeed, it might be difficult to make such a distinction as would be applicable in all cases and inadvisable to attempt it. *Id.* at 575, 150 S.W. at 1072.

It would seem from this opinion that all those instructions which the majority would consider collateral, and therefore which give rise to a duty to instruct thereon only in the event of a request—correct or erroneous—, would constitute those cases in which the court must instruct without a request. The concurring judge said:

> I see no merit in a legal principle which requires the trial court to give a correct instruction on a so-called collateral matter simply because defense counsel has requested an improper one. It is not based on the controlling statute and is subject to abuse. If the subject matter of the instruction offered is of such importance that the court must redraft and give one in correct form, then it seems to me that it is a matter necessary for the information of the jury within the meaning of the statute and that the court should be required to instruct on it whether a written request is made or not. State v. Chaney, 349 S.W.2d 238, 248 (Mo. 1961).

This rule would be further limited since the concurring opinion expressed the view that the circumstances of the case may be controlling so that a general rule could not always be laid down in advance of the case in which the issue is raised. A similar view was expressed by the court in State v. Worten, 263 S.W. 124 (Mo. 1924):

> Despite the presence of that fetish of the common law which we dignify by the term of "precedent," the tendency of the courts, especially in the consideration of criminal cases, is to sustain errors assigned, only when it appears that they are prejudicial to the substantive rights of the accused. *Id.* at 127.

That doctrine, of course, is a double-edged sword. Kennish J., reversing for failure to instruct despite the failure of the defense to satisfy procedural requirements for preserving the point for appeal, said:

> [I]f satisfied from the record that there has been a failure to instruct the jury upon a question which goes to the fundamental rights of the defendant, and that by such failure injustice may have been done or a verdict returned different than if such failure had not occurred, this court in the interest of justice will not hesitate to grant a new trial, though the question be presented here for the first time. State v. Conway, 241 Mo. 271, 292, 145 S.W. 441, 448 (1912).

D. STATE v. CHANEY: DISSENT

A third view was expressed in the dissenting opinion:

> While I agree with the analysis of our prior cases as made in the principal opinion, I believe that the rule reaffirmed therein is causing and will cause much uncertainty in the trials of criminal cases, and that it puts the burden in the wrong place. The complexity of the situation is shown by the various classifications discussed in the principal opinion. I do not believe in changing the law for the sake of change or to demonstrate some phase of advanced thinking, but I do conceive it to be our duty to change rule of nonstatutory law, procedural or substantive, when we are convinced that it is basically wrong. The various classifications as made, with very hazy delineations, can only tend to bewilder the trial judges and lawyers; I believe that the principle now reasserted does more harm to the public interest than any possible good which it may do for defendants. I would require the defendant to offer a correct instruction on all matters which he desires to have covered except those prescribed in § 546.070(4), before reversing.[15]

This approach, reversing only for failure to instruct on the minimal requirements of the statute (if, indeed, it does not limit even more than that), would seem to indicate some doubt in the mind of Judge Eager as to the efficacy of instructions. To the extent that the opinion is predicated on such a view, it is contrary to the basic assumption governing this area of the law.[16] This is not to say, however, that such a rejection is not supportable; it simply has not yet been supported by any empirical study of the assumption that juries are governed in their deliberations by the instructions.[17]

But, ordinarily, even in cases when the court has taken considerable time to discuss various ramifications of the decision, still recourse is had to the four-part division. For this reason, it can be said that the court has generally utilized the same language in its opinions. But a similar consensus is often lacking when the actual holdings of the cases are considered. This results from conflicting opinions of two

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15. State v. Chaney, 349 S.W.2d 238, 249 (Mo. 1961).

16. See, *e.g.*, United States v. Malinsky, 153 F. Supp. 321 (S.D.N.Y. 1957) where the court said that it must be assumed and presumed that juries follow instructions.

It is also possible to construe the language of the dissent to be in accord, in principle, with the concurring opinion. This is so if the phrase "those [matters] prescribed in" the statute is read to mean not just reasonable doubt and good character, but the law of the case generally. Under such construction the concurring opinion and the dissent differ only as to the category in which the instruction—limiting the effect of impeaching evidence—should be placed.

17. Such a study is now being undertaken at the University of Chicago, under the guidance of Harry Kalven, Jr. Kalven, REPORT ON THE JURY PROJECT OF THE UNIVERSITY OF CHICAGO LAW SCHOOL (1955).

types: (1) disagreement about which particular instructions belong in which of the categories; and (2) disagreement about the legal consequences of the categories denominated "collateral," "converse," and "cautionary," especially with reference to the effect of a request.[18]

II. THE LAW RELATING TO SPECIFIC INSTRUCTIONS

The purpose of this part of the note is to examine the specific instructions most often involved in appellate litigation. Despite frequent disagreements as to the proper classification of particular instructions, there is generally enough consensus to allow this material to be organized on the basis of the verbal categories, *i.e.*, law of the case (or main), collateral, converse and cautionary.

There is one exception to the general utilization by the court of these categories: word definition instructions are in a generically different class from the others. The rules applicable to definition ininstructions depend upon the particular word involved and usually the categories are not relied upon. Rather, the problem is resolved in terms of "technical" vis-a-vis "ordinary" words. Therefore, those instructions are discussed separately.

A. Duty to Instruct Without Request—"Law of the Case."

1. *Reasonable doubt and presumption of innocence.* No contrary authority exists to the proposition that it will be error to fail to instruct that the defendant may not be convicted unless the jury finds him guilty beyond a reasonable doubt, whether this instruction is requested[19] or not.[20] Although the statute was amended in 1895[21] to include the subject of reasonable doubt, the court had already reached this result by construction of the old statute, so the amendment was declarative of existing law.[22] Since the instruction must be given even when not requested, a fortiori it must be given when it is erroneously requested.[23]

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18. An example of this may be seen in the fact that the Supreme Court in *Chaney* decided the case on the issue of what the legal effect of being "collateral" was, while the state argued on appeal that, *inter alia*, the instruction involved was actually cautionary, not collateral. Brief for Respondent, p. 27, State v. Chaney, 349 S.W.2d 238 (Mo. 1961). In the respondent's supplemental brief, however, the denomination was changed to "collateral or cautionary."

19. State v. Fannon, 158 Mo. 149, 59 S.W. 75 (1900); State v. Clark, 147 Mo. 20, 47 S.W. 886 (1898); State v. Gonce, 79 Mo. 600 (1883).

20. State v. Gullette, 121 Mo. 447, 26 S.W. 354 (1894).

21. Mo. Laws 1895, p. 161.

22. See, *e.g.*, State v. Gullette, 121 Mo. 447, 26 S.W. 354 (1894) (apparently not requested); State v. Gonce, 79 Mo. 600 (1883) (requested).

23. See, *e.g.*, State v. Clark, 147 Mo. 20, 47 S.W. 886 (1898).

After 1895, the statute provided that instructions "shall include, *whenever necessary*, the subjects of good character and reasonable doubt."[24] But the court had previously held in *State v. Gonce*[25] that an instruction must be given "even though it may appear to the court there can be no grounds for a reasonable doubt."[26] Thus, the reasonable doubt instruction is an important exception to the general rule that instructions need only be given when put into issue by sufficient evidence. It is true the amendment was subsequent to the holding that such an instruction must be given in any event; nonetheless, since the amendment was declarative of existing law, presumably the *Gonce* case is still correct. An instruction on the subject of reasonable doubt is substantially, if not exactly, the same as an instruction on the presumption of innocence;[27] therefore the requirement is satisfied if the court instructs on either of these subjects.[28]

2. *Good Character.* When the issue of defendant's good character is raised, either by defendant[29] or by the state,[30] the court must inform the jury of its evidentiary value, whether or not the defendant requests the instruction. While this instruction was made mandatory by the same amendment to the statute that included reasonable doubt,[31] it was not a codification of existing law.[32] Rather, it has been

24. Mo. Rev. Stat. § 546.070(4) (1959). (Emphasis added.)

25. 79 Mo. 600 (1883).

26. *Id.* at 603.

27. See, *e.g.*, State v. Gonce, 79 Mo. 600 (1883), where the court quotes with approval the following instruction:

> The burden of proof to establish the guilt of defendant devolves upon the State, and the law clothes him with a *presumption of innocence* which attends and protects him until it is overcome by testimony which proves his guilt *beyond a reasonable doubt* . . . . *Id.* at 602. (Emphasis added.)

28. In State v. Douglas, 258 Mo. 281, 167 S.W. 552 (1914), it was held not to be error to fail to instruct as to the presumption of innocence if the court fully charges as to reasonable doubt. See also State v. Gregory, 170 Mo. 598, 71 S.W. 170 (1902). The effect of these and many other similar cases is that the court need not instruct on any subject which has already been adequately and fairly covered in other instructions. Thus, this instruction is an exception to the rule that no instruction need be given unless put in issue by the evidence but is not an exception to the rule that an instruction need not be given on an issue already covered.

29. See, *e.g.*, State v. Lindsey, 7 S.W.2d 253 (Mo. 1928).

30. In State v. Baird, 288 Mo. 62, 231 S.W. 625 (1921), the court adverted to the fact that the state had deliberately attempted to attack the character of the defendant, but the evidence elicited showed a good character. It was held that the state was not in a position to argue that the question of defendant's character was not in evidence and the case was reversed for failure to instruct on this issue.

31. Mo. Laws 1895, p. 161, added good character and the phrase "whether requested or not" was added by Mo. Laws 1901, p. 140. See also State v. Lindsey, 7 S.W.2d 253 (Mo. 1928).

32. Prior to the amendment, it was generally held not error to fail to instruct on this issue when erroneously requested or not requested at all. State v. Nickens,

said that a case holding to the contrary caused the amendment.[33] It seems clear that the issue was considered to be collateral by most judges prior to the amendment.[34] Thus, it is placed in the anomalous position of being the only "collateral" issue which must be instructed upon whether requested or not.

3. *Elements of the offense charged.* Surprisingly few cases have actually held that elements of the offense charged are part of the law of the case, but it is clear that this is the rule.[35] The instructions, therefore, must always include those elements. Perhaps the relative

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122 Mo. 607, 27 S.W. 339 (1894) (not requested); State v. Murphy, 118 Mo. 7, 25 S.W. 95 (1893) (not requested); State v. McNamara, 100 Mo. 100, 13 S.W. 938 (1889) (erroneously requested); State v. Nugent, 71 Mo. 136 (1879) (not requested; *contra*, State v. Swain, 68 Mo. 605 (1878) (it is possible that the instruction as requested was correct but the court did not place the opinion on that ground).

33. Sherwood, J., attributed the amendment to the holding in State v. Murphy, 118 Mo. 7, 25 S.W. 95 (1893) where the defendant did not request the instruction and the court on appeal refused to reverse.

34. At the time most of the decisions involving this issue were decided, there was considerable conflict as to the effect of being denominated collateral. Apparently there existed at the same time two different rules as to the effect of an erroneous request. But the cases which refused to reverse because the instruction requested was substantially wrong were following the rule that as to collateral matters, the defendant must request the instruction correctly. Thus, the court in State v. McNamara, 100 Mo. 100, 13 S.W. 938 (1889) called the instruction collateral, but refused to reverse because the request was not correct. This would not be the rule today even apart from the statute if the issue is in fact collateral.

The nature of this instruction was stated by Sherwood, C. J., in State v. Swain, 68 Mo. 605, 615 (1878):

> The object of the introduction of evidence respecting good character, is the improbability that a person of good character would have committed the offense alleged against him, and to lay such evidence before them with the purpose of inducing belief that either mistake or misrepresentation has occurred on the part of the prosecution.

35. State v. Gale, 322 S.W.2d 852 (Mo. 1959); State v. Webster, 230 S.W.2d 841 (Mo. 1950) (reversed for failure to instruct on the defense that defendant in good faith sold the hogs at his father's request which would destroy the intent element of the charge of larceny); State v. Decker, 321 Mo. 1163, 14 S.W.2d 617 (1929) (entrapment); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1928) (dictum); State v. Harris, 267 S.W. 802 (Mo. 1924) (lack of intent in larceny); State v. Mullins, 292 Mo. 42, 237 S.W. 502 (1922) (error to fail to inform the jury that the misrepresentation necessary in a prosecution for obtaining property under false pretenses is misrepresentation of an existing fact—defendant discharged); State v. Matthews, 20 Mo. 55 (1854) (lack of intent in larcey). In State v. Gale, *supra*, the charge was under MO. REV. STAT. § 560.156 (1959) the so-called "stealing" statute. Section 3 thereof provides:

> If the property stolen within the meaning of subsection 2 is a chattel and the person charged with stealing the same proves by a preponderance of the evidence that no further transfer was made, and that, at the time of the appropriation he intended merely to use the chattel and promptly to return or discontinue his use of it, he has a defense to a prosecution under subsection 2.

paucity of cases in this area derives from two facts: one of the earliest cases in Missouri dealt with that issue and has not been seriously questioned since;[36] secondly, "law of the case," taken literally, is certain to include a definition of the offense charged.

For the most part, those things which are elements of the offense charged are obvious. However, one is not: the Missouri court has held that instructions on entrapment come within the law of the case category.[37] The reasoning of the Missouri court was, in essence, that if the defendant was entrapped, he could not be found guilty; therefore, absence of entrapment must be an element of the offense.[38] Whatever is thought of the reasoning, this issue must be instructed on whether requested or not, but, unlike other "elements," only when it is put into issue by the evidence.

4. *Lesser included offenses.* Offenses which might be found by the jury on the evidence and which constitute lesser included offenses are law of the case and must be instructed upon whether requested[39] or not.[40] This instruction is analogous to that defining the elements of

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36. State v. Matthews, *supra* note 35.

37. State v. Decker, 321 Mo. 1163, 14 S.W.2d 617 (1929).

38. The court said in State v. Decker, *supra* note 37, at 1170, 14 S.W.2d at 620:

> The law of the case comprehends the elements of the offense charged, as shown by the evidence. Entrapment was one of the elements of the offense, for, if defendant was entrapped, he was not guilty, as we have shown.

This apparently was on the theory that the entrappers actually committed the "offense" and that defendant was an aider and abetter. Since the jury could not find the officers guilty, defendant could not be guilty as a principal in the second degree. See also Sorrells v. United States, 287 U.S. 435 (1932) where two theories are discussed: (1) the requirements of highest public policy in the maintenance of the integrity of administration require the courts to prevent such prosecution (concurring opinion); (2) the legislature did not intend enforcement in such cases (majority opinion). If the defense is construed as being predicated on legislative intent, then it could theoretically be considered an "element" of the charge in all cases where supported by the evidence.

39. State v. Nicholas, 222 Mo. 425, 121 S.W. 12 (1909) (degrees of larceny); State v. Young, 99 Mo. 666, 12 S.W. 879 (1890) (grades of homicide).

40. State v. Watson, 364 S.W.2d 519 (Mo. 1963) (common assault under charge of felonious assault); State v. Smart, 328 S.W.2d 569 (Mo. 1959) (manslaughter); State v. Davis, 328 S.W.2d 706 (Mo. 1959) (manslaughter); State v. Taylor, 309 S.W.2d 621 (Mo. 1958) (manslaughter); State v. Craft, 338 Mo. 831, 92 S.W.2d 626 (1936) (robbery without a dangerous and deadly weapon and grand larceny); State v. Enochs, 339 Mo. 953, 98 S.W.2d 685 (1936) (petit larceny); State v. Johnson, 6 S.W.2d 898 (Mo. 1928) (manslaughter); State v. Connor, 252 S.W. 713 (Mo. 1923) (manslaughter); State v. Liolios, 285 Mo. 1, 225 S.W. 941 (1920) (murder second degree); State v. Conley, 255 Mo. 185, 164 S.W. 193 (1914) (fourth degree manslaughter); State v. Hoag, 232 Mo. 308, 134 S.W. 509 (1911) (common assault in charge of attempting to rape); State v. Palmer, 88 Mo. 568 (1886) (different degrees of murder); State v. Banks, 73 Mo. 592 (1881) (murder second degree); State v. Branstetter, 65 Mo. 149 (1877) (manslaughter). *Contra*, State v. Ray, 225 S.W. 969 (Mo. (1920) (dictum which

the offense charged; in a sense, each lesser included offense which the evidence will support is "charged" since the jury is authorized to convict therefor.[41]

5. *Joinder of Burglary and Larceny.* It is the duty of a court to instruct on all of the possible verdicts when the defendant has been charged with both larceny and burglary, whether requested[42] or not.[43] Presumably, this would also apply to other instances of joinder, but specific authority is lacking for that proposition. This instruction is similar to that for "lesser included offenses," except that in the present case the defendant may be found guilty of both, whereas, by definition, he may not be found guilty of both a lesser included offense and the offense alleged.

6. *Joinder of defendants.* The court has held that failure to instruct the jury that they may convict one defendant and acquit the other, or find both of them guilty, or find both of them not guilty, involves the law of the case, so a trial court is in error if it fails to instruct on this issue regardless of a request by the defense.[44] The issue is similar to the two preceding ones; all three relate to possible alternative verdicts of the jury.

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was later refuted in State v. Crowley, 345 Mo. 1177, 139 S.W.2d 473 (1940)); State v. Coleman, 186 Mo. 151, 84 S.W. 978 (1905); State v. Brewer, 109 Mo. 648, 19 S.W. 96 (1892) (the defense did not satisfy procedural requirements so that the statement may be regarded as dictum).

41. Mo. REV. STAT. § 556.220 (1959) provides:

> Upon indictment for any offense consisting of different degrees, as prescribed by this law, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such offense, or any degree thereof; and any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide.

Mo. REV. STAT. § 556.230 (1959) provides:

> Upon an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a less offense; and in all other cases, whether prosecuted by indictment or information, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charge against him.

42. State v. Brinkley, 146 Mo. 37, 47 S.W. 793 (1898).

43. State v. Lackey, 230 Mo. 720, 132 S.W. 602 (1910); State v. Hutchinson, 111 Mo. 257, 20 S.W. 34 (1892). Thus, for example, in *State v. Lackey, supra,* it was error to instruct the jury that they could find defendant guilty of both or neither, but failed to instruct that they could find him guilty of one or the other.

44. State v. Craft, 23 S.W.2d 183 (Mo. 1929); State v. Lambert, 318 Mo. 705, 300 S.W. 707 (1927). *Contra,* State v. James, 216 Mo. 394, 115 S.W. 994 (1909). The court, in an early Missouri case, refused to reverse on this ground when the instructions were not requested. However, the facts of that case make it distinguishable from the usual sequence of events. The trial court in *State v. James, supra,* specifically requested the defendant's counsel to present any instructions they might desire. The defense failed to comply. While recognizing that the

7. *Punishment.* The amount of punishment that may be given by the jury, both maximum and minimum, has been denominated law of the case and therefore instructions on this must be given whether requested or not.[45] This is true despite the fact that the punishment actually assessed by the jury was within the permissible range.[46] Again, this issue relates to the function of the jury in reaching a verdict, and, in a sense, it might be said to be an "element of the offense"; it is, at least, part of the substantive law of the offense.

8. *Self-defense.* It is clear that when the defendant requests an instruction on self-defense, the court must give the instruction, or correct defendant's erroneous one.[47] The requirement appears to be the same with respect to the area of "imperfect" self-defense.[48] A self-defense instruction must be given even though the court's attention is not specifically directed to that defense by a request.[49] Some cases have found reversible error in the court's omission to instruct on the issue when it was raised by evidence presented by the prosecution using defendant's extra-judicial statements.[50] The rule has been held to be the same even when such evidence is inconsistent with the defendant's testimony and when specifically denied by him.[51]

The defense of self-defense in essence denies the existence of the corpus delicti.[52] By definition there can be no murder if the homicide

court should instruct on this issue, the Supreme Court refused to reverse because of the failure of the defense counsel to comply. No extended discussion of the arguably erroneous result of this approach need be undertaken. Insofar as the court held that no instruction on this issue need be given in the absence of a request, it is overruled by *State v. Craft, supra,* and *State v. Lambert, supra.*

45. State v. Bevins, 328 Mo. 1046, 43 S.W.2d 432 (1931); State v. Duddrear, 309 Mo. 1, 274 S.W. 360 (1925).

46. State v. Bevins, *supra* note 45.

47. State v. Chamineak, 328 S.W.2d 10 (Mo. 1959); State v. Stone, 354 Mo. 41, 188 S.W.2d 20 (1945); State v. Turnbo, 267 S.W. 847 (Mo. 1924); State v. Goode, 220 S.W. 854 (Mo. 1920); State v. Bidstrup, 237 Mo. 273, 140 S.W. 904 (1911); State v. Little, 228 Mo. 273, 128 S.W. 971 (1910). In *State v. Bidstrup, supra,* it is clear that the defendant did not request the instruction in question.

48. State v. Moncado, 34 S.W.2d 59 (Mo. 1930); State v. Adler, 146 Mo. 18, 47 S.W. 794 (1898).

49. State v. Bidstrup, 237 Mo. 273, 140 S.W. 904 (1911).

50. State v. Stone, 354 Mo. 41, 188 S.W.2d 20 (1945).

51. State v. Bidstrup, 237 Mo. 273, 140 S.W. 904 (1911).

52. The defense has been codified in Mo. REV. STAT. § 559.040 (1959):

Justifiable homicide

Homicide shall be deemed justifiable when committed by any person in either of the following cases:

(1) In resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or

(2) When committed in the lawful defense of such person, or of his or her husband or wife, parent, child, brother, sister, uncle, aunt, nephew, niece, master, mistress, apprentice or servant, when there shall be reasonable cause to apprehend a design to commit a felony or to do some great personal

was committed because of a reasonable motive of self-defense.[53] Thus, the lack of a motive of self-defense may be consideded to be a part of the offense charged,[54] although the burden of coming forward with the evidence may be on the defendant. Viewed in this way, the defense is clearly a part of the law of the case along with the more familiar concepts of the elements of an offense. When self-defense can be shown by the defendant, it may be said that no offense has been committed, just as, under the court's view, it may be said that when the defendant can show entrapment, no offense has been committed.

9. *Conclusions.* Apart from the express statutory requirements, the issues constituting law of the case may be classed as follows: (1) substantive rules (including, according to the court, those concerning self-defense and entrapment) relating to the definition of all of the offenses for which the jury may convict the accused; (2) rules, which the jury rather than the court must apply, relating to possible verdicts arising out of multiple charges or against multiple defendants. The Missouri Supreme Court has determined that it is reasonable to

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injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished; or

(3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace.

Special problems of evidence sufficiency arise in consideration of self-defense issues. The court has several times said that the instruction need not be given if the only evidence is incredible. This may occur when the defendant himself is the only one who testifies to facts which would indicate the existence of such a defense. Thus, *e.g.*, the court held it not error to refuse to instruct on self-defense when defendant had testified to that effect but four state's witnesses testified to the contrary. State v. Webb, 205 S.W. 187 (Mo. 1918). However, the existence of such a doctrine has recently been questioned in State v. Chamineak, 328 S.W.2d 10 (Mo. 1959). If the doctrine exists at all, it is usually denominated the doctrine of evidence contrary to the physical facts. See cases cited in State v. Chamineak, *supra.*

53. When the requisite *actus reas* and *mens rea* have been shown, motive may still be determinative of guilt in a small number of cases. In a prosecution for murder when it is shown that defendant intended to kill (*mens rea*) and committed the homicide (*actus reus*), motive will still be determinative. Self-defense is the motive for the act and is a recognized defense. See generally, PERKINS, CRIMINAL LAW 721-22 (1957).

Missouri has acceded to this analysis. Considering the correctness of an instruction given on the part of the state, the court, in *State v. Webb*, *supra* note 52, said:

> In the instant case self-defense was assigned by the defendant as the sole reason for the homicide. This, therefore, constituted the motive for the act. . . . Self-defense being the sole motive, the jury, familiar, as we are authorized in presuming they were, with the meaning of words in ordinary use, could not, under this instruction, have found that there was a lack of motive, without at the same time finding that there was not sufficient proof of self-defense. . . . It is true that, where an instruction on self-defense has been given, as was the case here, one on motive is not necessary. *Id.* at 189.

54. This view is expressed in State v. Clary, 350 S.W.2d 809 (Mo. 1961).

place the entire burden on the trial court with respect to those issues by requiring it to instruct upon them whether requested or not.[55] The primary significance of this classification is that questions relating to the use or weight of evidence are excluded.

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55. One possible criterion for defining the category of cases in which an instruction is required without a request, *i.e.*, the law of the case category, could theoretically be found in the field of constitutional law. It is at least arguable that a total failure to instruct the jury would render the trial process so meaningless as to amount to a denial of due process of law. Obviously no such total lack of instructions is likely to occur, but it is certainly possible that a state court might affirm a conviction despite a failure to instruct on a substantive element of a crime, and that a constitutional argument based on such an omission might be made. An examination of federal cases reveals statements roughly equivalent to the following:

> The admissibility of evidence, the sufficiency of evidence, and *instructions to the jury* in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. Grundler v. North Carolina, 283 F.2d 798, 802 (4th Cir. 1960). (Emphasis added.)

See also Buchalter v. New York, 319 U.S. 427 (1943); Application of Faust, 202 F. Supp. 205 (E.D.N.C. 1962); Hammil v. Tinsley, 202 F. Supp. 76 (D. Colo. 1962); Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961); Draper v. Denno, 113 F. Supp. 290 (S.D.N.Y. 1953).

Lest too much be read into this kind of statement, some distinctions must be made. Not infrequently an instruction in a state case—or its omission—has been premised on a principle itself violative of the federal constitution. The best illustrations are two cases, both of which involve a state effort to make conduct criminal which could constitutionally be made criminal only if a particular mental element is present. In Wood v. State, 77 Okla. Crim. 305, 141 P.2d 309 (Crim. Ct. App. 1943), the trial judge failed to instruct the jury that the defendant was guilty of criminal syndicalism only if he intended to engage in conduct which he realized would lead to a clear and present danger to the existence of the government. The conviction was reversed on the ground that the state was not free, whether acting through its legislature or through its courts, to interfere with the exercise of free speech by making utterances criminal in the absence of such a mental state. Gitlow v. New York, 268 U.S. 652 (1925).

Similarly in Smith v. California, 361 U.S. 147 (1959), the Supreme Court invalidated a Los Angeles ordinance which had been interpreted as imposing liability for possession of obscene literature on one who lacked knowledge of or a fair opportunity to determine the obscene character of the publication. Again the ground was that such a statute would indirectly inhibit freedom of speech and the press. Obviously if a trial judge instructed a jury that they could convict even though they believed that defendant was unaware of the obscene nature of the publication and that he had no reasonable means of obtaining that knowledge, that instruction would deprive the defendant of a federal constitutional right. In that sense it is clearly true that federal constitutional rights, whether substantive due process rights as in *Wood* and *Smith*, or procedural due process rights guaranteed by cases like Watts v. Indiana, 338 U.S. 49 (1949), may be infringed via the medium of incorrect or even omitted instructions, the relation between the law of instructions and the federal constitutional law is fundamentally coinci-

Because of the foregoing analysis, issues arising in several areas require separate discussion.

a. Corroboration of the corpus delicti. An instruction in this class has been placed in the collateral category and need not, therefore, be given unless the court's attention has been directed to it.[56] In *State v. Brooks*,[57] the majority of the court refused to reverse for failure of

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dental. And it is in this light that the concluding sentence from the above quotation must be read.

The duty to instruct on the presumption of innocence and the burden of proof in criminal prosecutions has been litigated in federal courts. In Coffin v. United States, 156 U.S. 432 (1895), the Supreme Court reversed a finding of guilty in a prosecution under federal law because of failure to instruct as to the presumption of innocence even though the lower court had instructed on the subject of reasonable doubt. The Court reasoned that the two instructions did not cover the same subject matter. It held that the presumption of innocence is evidence in favor of the accused introduced by the law in his behalf, and that reasonable doubt is the condition of mind produced by the proof resulting from the evidence in the case: one is a cause, the other an effect. This holding has been placed in serious doubt by subsequent opinions. The court in United States v. Newman, 143 F.2d 389 (2d Cir. 1944) said:

> The charge as to reasonable doubt certainly covered the question as to the burden of proof; and, if there still remains some mystic difference between the presumption of innocence and the burden of proof, it is at least impalpable enough to require an accused to bring the omission to the judge's attention. *Id.* at 390.

See also United States v. Jonikas, 197 F.2d 675 (7th Cir. 1952). Further, there is considerable doubt that such a rule was ever applicable to state trials. The Court in Howard v. Fleming, 191 U.S. 126 (1903) said:

> Again, it is said that there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is meant by the term "reasonable doubt." The Supreme Court sustained the charge. Of course, that is a decision of the highest court of the State that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the state, the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law. *Id.* at 136-37.

The duty to instruct on the punishment the jury was authorized to inflict has also been litigated in the federal system. In Calton v. Utah, 130 U.S. 83 (1889), the Supreme Court reversed the Supreme Court of the Territory of Utah because of "fundamental rules obtaining in the trial of criminal cases involving life. *Id.* at 87. There, the trial court had failed to inform the jury that they could recommend life imprisonment at hard labor instead of the otherwise automatic death penalty. While the Court did not rely expressly on the requirements of the sixth amendment, a subsequent state case, Davis v. Texas, 139 U.S. 651 (1891), distinguished *Calton v. Utah* on the grounds that the latter "came directly to us from the Supreme Court of the Territory." Further, Reynolds v. United States, 98 U.S. 145 (1878) had held that the sixth amendment was applicable to the Territory of Utah.

56. State v. English, 11 S.W.2d 1020 (Mo. 1928) (dictum).

57. 92 Mo. 542 (1887).

the trial court to instruct the jury that defendant could not be convicted on his confession alone when the defendant had not requested such an instruction. Judge Sherwood, dissenting in the strongest possible language, contended that such an instruction must be given whether requested or not—that it was part of the law of the case. But his contention was recently reconsidered and rejected.[58]

The primary impact of the corpus delicti rule is to impose a minimal requirement that evidence supporting all elements of the offense be introduced before his confession is put into evidence against the accused. It is therefore logical for the court to characterize it as collateral rather than law of the case. Further, the fact that the effect of the rule would be exclusion of evidence if the corpus delicti were not proved does not provide a sufficient basis to distinguish it from other rules of evidence. Discussion in a later part of this note—that relating to collateral issues—will make it clear that other rules of exclusion are also uniformly classed as collateral issues. Thus, despite the strong position taken by Judge Sherwood, the court has refused to denominate this issue law of the case.

b. Use of Force (other than self-defense). Force is often a factor in situations other than that of pure self-defense. Thus, for example, the court has held it error to refuse to give defendant's requested instruction that he had the right to use that amount of force necessary to prevent sodomy from being committed on him.[59] Most of the cases in this area arose from refusals to give requested instructions.[60] It is therefore difficult to tell whether the court is classifying the instruction as law of the case or collateral. When no request was made, the court held it was not error to fail to instruct that the defendants had a right to use sufficient force to subdue a mental patient,[61] thus rejecting it as law of the case. On the other hand, the instruction has been analogized to that of self-defense,[62] which would seem to be more con-

58. State v. Truster, 334 S.W.2d 104 (Mo. 1960).

59. State v. Robinson, 328 S.W.2d 667 (Mo. 1959).

60. State v. Ford, 344 Mo. 1219, 130 S.W.2d 635 (1939); State v. Fielder, 330 Mo. 747, 50 S.W.2d 1031 (1932). In *Fielder* the court held that it was error to refuse to give an instruction requested by defendant that he should be acquitted if the jury finds that deceased was killed while defendant was defending himself from an attack by others. The *Ford* case held it error to refuse the requested instruction defining an officer's right to use force in arresting a person on a misdemeanor charge.

61. State v. Herring, 268 Mo. 536, 188 S.W. 169 (1916). See also State v. Groves, 194 Mo. 452, 92 S.W. 631 (1906). The court did not commit error in failing to instruct on its own motion that defendant had a right to pursue one who had taken his cap.

62. State v. Ford, 344 Mo. 1219, 130 S.W.2d 635 (1939).

sistent, under the foregoing analysis, with a law of the case classification.

c. Defense of Duress. That it may be a defense if defendant committed the crime because of a well grounded fear of present, imminent and impending death or serious bodily injury must be submitted to the jury in an instruction if the defendant so requests.[63] The common law presumption of coercion when a married woman commits a crime in her husband's presence is not changed by the Married Women Act.[64] Thus, such an instruction, if requested, must be given in favor of the wife when the facts fall within the ambit of the presumption. However, in the latter situation, this defense has been called "a rule of evidence" and is therefore collateral, so the instruction under *Chaney,* must at least be erroneously requested.[65] Whether this rule applies when the defendant shows that he or she was under actual, rather than presumptive, duress remains uncertain. Arguably it would not. Where the defendant introduces evidence, no presumption is involved. The defense may not be "a rule of evidence" under those circumstances. It is nonetheless possible that the court will classify the defense as collateral despite the fact that it is an affirmative defense similar to self-defense.

d. Conspiracy. With regard to conspiracy, the court has said:

> The [trial] court might very properly have instructed the jury as to what was necessary to prove a conspiracy, and what might properly be shown if a conspiracy existed, but the failure of the court in that respect is not complained of. It was a matter merely incidental and collateral, not an essential element of the crime, and therefore nondirection in respect to it was not error.[66]

On another occasion, however, the court held that a conspiracy instruction must be given if one is requested.[67] Taken together, these two holdings would seem to classify such instructions as collateral. But it would also seem clear that if the state must rely upon a conspiracy theory, the instruction ought to be classed as law of the case because it would define the elements of the offense charged.

B. DUTY TO INSTRUCT UPON ERRONEOUS REQUEST—"COLLATERAL."

1. *Not evidence of guilt.* The issues involved in this area generally concern two types of evidence: that which is not to be considered by

63. State v. St. Clair, 262 S.W.2d 25 (Mo. 1953).

64. MO. REV. STAT. § 451.290 (1959) as construed by State v. Murray, 316 Mo. 31, 292 S.W. 434 (1926).

65. State v. Murray, 316 Mo. 31, 42, 292 S.W. 434, 439 (1926).

66. State v. Kolafa, 291 Mo. 340, 348, 236 S.W. 302, 305 (1922).

67. State v. Simpson, 237 S.W. 748 (Mo. 1922).

the jury at all, and that which, though it may be used for some purposes, is not evidence of defendant's guilt. In both cases the defendant may have a right to have the jury informed of the use to be made, if any, of the evidence. However, the court must be requested to give such an instruction.

Representative of those facts which are no evidence at all are the following: (a) indictments; (b) defendant's refusal to testify; (c) arguments of the prosecutor; and (d) involuntary confessions.

a. Indictments. The court has held that it was not error to fail to instruct that an indictment is not to be considered by the jury when the defendant had not requested such an instruction.[68] However, since no case has been found in which the instruction was refused, the actual effect of a request is not known. The cases have used language broad enough to imply that it might not be error to omit such an instruction even when requested.[69] Its inclusion in this section, then, is at best argumentative.

b. Refusal to testify. The Missouri Constitution,[70] a statute,[71] and a Supreme Court Rule[72] prohibit raising any presumptions from the defendant's refusal to testify; such a refusal can be no evidence of guilt. This rule has been construed by the court as meaning that the defendant is not entitled to an instruction on his right to refuse to testify even though it may be correctly requested,[73] because it is provided that the failure to testify shall not "be referred to by any attorney in the case, nor be considered by the court or jury."[74] The inclusion of this issue under "collateral" would therefore be problematic were it not for two recent cases which adverted to the fact that no proper request was made.[75]

c. Arguments of prosecutor. The rule that statements of the prosecutor are not to be considered by the jury as evidence has been

68. State v. Baker, 136 Mo. 74, 37 S.W. 810 (1896); State v. Donnelly, 130 Mo. 642, 32 S.W. 1124 (1895).

69. In *State v. Donnelly, supra* note 68, the court said it had "never held that it was error to fail to instruct in this regard, as such an instruction could have no possible bearing on any issue of law involved in a criminal case . . . [and] could not in any way have affected the result of the trial." *Id.* at 648, 32 S.W. at 1126.

70. MO. CONST. art. I, § 19.

71. MO. REV. STAT. § 546.270 (1959).

72. MO. SUP. CT. R. 26.08.

73. State v. West, 356 S.W.2d 880 (Mo. 1962); State v. Denison, 352 Mo. 572, 178 S.W.2d 449 (1944).

74. This language appears in both the Supreme Court Rule and the statute, notes 72 & 71, *supra*.

75. State v. Smith, 357 S.W.2d 120 (Mo. 1962); State v. Phillips, 324 S.W.2d 693 (Mo. 1959).

classed as "cautionary" and will be discussed further under that section.[76]

d. Involuntary confessions. The jury is entitled to pass upon the voluntariness of a confession and to disregard it if it is involuntary.[77] Despite some early authority to the contrary,[78] the rule is now well established that, if defendant submits a correct or erroneous instruction on the voluntariness of his confession, the court has a duty to correctly instruct on that issue.[79]

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76. State v. Lindsey, 333 Mo. 139, 62 S.W.2d 420 (1933).

77. Note, *The McNabb Rule and the Missouri Courts*, 1954 WASH. U.L.Q. 93.

78. State v. Brennan, 164 Mo. 487, 65 S.W. 325 (1901); State v. Clump, 16 Mo. 385 (1852). In the *Clump* case, *supra* there apparently was no evidence to suggest that the confession was in fact coerced. For this reason the court denounced the requested instruction as the "enunciation of an abstraction." The court in *Brennan, supra,* refused the "most unhappily worded" instruction. The Supreme Court refused to reverse on that ground adverting to the fact that the jury had already been instructed that it was for them to consider how much of the defendant's statements as proved by the state was worthy of belief. Thus, both cases can be distinguished and therefore are arguably not really contrary authority.

79. State v. Aitkens, 352 Mo. 746, 179 S.W.2d 84 (1944); State v. Gibilterra, 342 Mo. 577, 116 S.W.2d 88 (1938); State v. Moore, 160 Mo. 443, 61 S.W. 199 (1901). Further authority is found in State v. Chaney, 349 S.W.2d 238 (Mo. 1961) which incorporated the statement of the court in State v. Bounds, 305 S.W.2d 487 (Mo. 1957) that as to the subject of involuntary confessions, it was the duty of the trial court to give correct instructions on the enumerated subjects even though the instructions offered by the defendants were erroneous, citing, *inter alia, State v. Gibilterra, supra.*

Conversely, if no request at all is made by the defendant, the court will not commit error in failing to give the instruction on its own motion. State v. Truster, 334 S.W.2d 104 (Mo. 1960); State v. Francies, 295 S.W.2d 8 (Mo. 1956) ("collateral"); State v. Herman, 280 S.W.2d 44 (Mo. 1955) ("collateral," but no evidence supported the assertion in the motion for a new trial that the confession was involuntary); State v. Martin, 260 S.W.2d 536 (Mo. 1953) (reversed on other grounds); State v. Ramsey, 355 Mo. 720, 197 S.W.2d 949 (1946) ("purely collateral"); State v. McCullough, 316 Mo. 42, 289 S.W. 811 (1926); State v. Cox 264 Mo. 408, 175 S.W. 50 (1915) ("cautionary" but this was dictum since it was not preserved for review by raising the issue in the motion for a new trial); State v. Simenson, 263 Mo. 264, 172 S.W. 601 (1915) ("collateral" in dictum). See also State v. Lee, 361 Mo. 163, 233 S.W.2d 666 (1950) which was expressly overruled by State v. Chaney, 349 S.W.2d 238 (Mo. 1961) on another point but which did call it collateral.

Although the court is not required to undertake to instruct on the voluntariness of a confession unless requested to do so, if the court does undertake to so instruct,

> it should cover the entire law on the subject, and should not omit therefrom, as was done in the instant case, the question of whether or not the confession was voluntarily given. State v. Schnurr, 285 Mo. 74, 225 S.W. 678 (1920).

Thus, it was held error to instruct the jury on the weight that they may give to statements made by the defendant against his own interest, unless the court then

Issues involving evidence which may only be used for a limited purpose by the jury include: (e) statements of a co-defendant; (f) extra-judicial statements by witnesses inconsistent with their testimony on trial; and (g) impeaching evidence.

e. Statements of a co-defendant. When one defendant has confessed or made admissions, the other defendant is entitled to an instruction limiting the effect of that evidence to the other defendant, but only if he requests it.[80]

f. Extra-judicial statements by witnesses inconsistent with their testimony on trial. Evidence of this type may not be used by the jury to establish the guilt of the accused, and the court has held it error to refuse to instruct on this point when defendant has requested it.[81]

g. Impeaching evidence. It is error for a trial court to fail to instruct that impeaching evidence may be used only to impeach the witness, including the defendant himself, and not as evidence of guilt, but only if the instruction is requested.[82] The issue has consistently been denominated collateral.

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went further and required that the jury first find such statements or confessions to have been voluntarily made. See also State v. Hancock, 340 Mo. 918, 104 S.W.2d 241 (1937); State v. Thomas, 250 Mo. 189, 157 S.W. 330 (1913).

80. State v. Sandoe, 316 Mo. 55, 289 S.W. 890 (1926); State v. Taylor, 261 Mo. 210, 168 S.W. 1191 (1914).

81. State v. Warren, 326 Mo. 843, 33 S.W.2d 125 (1930).

82. When not requested, not error: State v. Bozarth, 361 S.W.2d 819 (Mo. 1962); State v. Chaney, 349 S.W.2d 238 (Mo. 1961); State v. Parker, 324 S.W.2d 717 (Mo. 1959); State v. Quilling, 363 Mo. 1016, 256 S.W.2d 751 (1953); State v. Wilson, 248 S.W.2d 857 (Mo. 1952); State v. Davis, 143 S.W.2d 244 (Mo. 1940); State v. Headley, 18 S.W.2d 37 (Mo. 1929); State v. Simon, 317 Mo. 336, 295 S.W. 1076 (1927); State v. Miller, 292 S.W. 440 (Mo. 1927); State v. Broaddus, 315 Mo. 1279, 289 S.W. 792 (1926); State v. Aurentz, 315 Mo. 242, 286 S.W. 69 (1926); State v. Pfeifer, 267 Mo. 23, 183 S.W. 337 (1916); State v. Hobson, 177 S.W. 374 (Mo. 1915); State v. Douglas, 258 Mo. 281, 167 S.W. 552 (1914); State v. Weinberg, 245 Mo. 564, 150 S.W. 1069 (1912); State v. Starr, 244 Mo. 161, 148 S.W. 862 (1912); State v. Rasco, 239 Mo. 535, 144 S.W. 449 (1912); State v. Westlake, 159 Mo. 669, 61 S.W. 243 (1901).

When requested, error to fail to give instruction: State v. Chaney, *supra;* State v. Starr, *supra* (dictum); State v. Swain, 68 Mo. 605 (1878) (instruction requested was correct.)

For cases referring to "credibility of witnesses" generally, see State v. Drake, 298 S.W.2d 374 (Mo. 1957); State v. McPhearson, 92 S.W.2d 129 (Mo. 1936); State v. Shuls, 329 Mo. 245, 44 S.W.2d 94 (1931); State v. Hardin, 324 Mo. 28, 21 S.W.2d 758 (1929); State v. English, 308 Mo. 695, 274 S.W. 470 (1925); State v. Cunningham, 130 Mo. 507, 32 S.W. 970 (1895).

State v. Lee, *supra,* and State v. Sanders, 4 S.W.2d 813 (Mo. 1928) both held that a request must be correct before the court would be under a duty to instruct with respect to collateral matters and both cases were overruled by State v. Chaney, 349 S.W.2d 238 (Mo. 1961).

2. *Weight to be given evidence.* The instructions in this area are intended to overcome some supposed predilection on the part of the jury to misevaluate certain kinds of evidence. As in the preceding section, the law is in doubt as to some of these issues.

a. Falsus in uno. Relatively few cases have dealt with an instruction on the effect of wilfully false testimony. The defendant may be entitled to an instruction that if a witness wilfully falsified any material part of his testimony, the jury is free to disregard his entire testimony. But it has generally been stated that the giving of such an instruction is entirely within the discretion of the trial court.[83] On the other hand, the court once said that it "would have been better satisfied" if the trial court had corrected and given defendant's requested instruction.[84] In a recent case the issue was called "cautionary";[85] but still the court referred to the absence of a request, the implication being that the issue might be classed as collateral.

b. Testimony of accomplice or co-defendant. While it is true that a defendant may be convicted in Missouri on the uncorroborated testimony of an accomplice,[86] or even of a co-defendant, he is, nevertheless, entitled to an instruction informing the jury that such testimony is to be received with the greatest caution. The issue has generally been labeled collateral.[87]

c. Circumstantial evidence. In the absence of a request, the trial court will not be in error for failure to instruct that in order to convict on circumstantial evidence alone, the facts must be consistent with each other and inconsistent with any reasonable theory of innocence.[88] On the other hand, when the court is properly requested to give such an instruction, it will be error to refuse.[89]

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83. State v. Turner, 272 S.W.2d 266 (Mo. 1954); State v. Barnes, 274 Mo. 625, 204 S.W. 267 (1918); Wein v. State, 14 Mo. 95 (1849). In State v. Barnes, *supra*, the defendant complained of the giving of the instruction rather than a refusal to instruct.

84. Wein v. State, *supra* note 83 at 98.

85. State v. Turner, 272 S.W.2d 266 (Mo. 1954).

86. See, *e.g.*, State v. Black, 143 Mo. 166, 44 S.W. 340 (1898) and cases cited therein.

87. State v. Rutledge, 267 S.W.2d 625 (Mo. 1951); State v. Mansker, 339 Mo. 913, 98 S.W.2d 666 (1936); State v. Crow, 337 Mo. 397, 84 S.W.2d 926 (1935); State v. Rowe, 324 Mo. 863, 24 S.W.2d 1032 (1930); State v. London, 295 S.W. 547 (Mo. 1927). But see State v. Weatherman, 202 Mo. 6, 100 S.W. 482 (1907) and State v. Turner, 272 S.W.2d 266 (Mo. 1954) where the court denominated the instruction "cautionary." See also State v. Crow, *supra*, where the court called it both "cautionary" and "collateral."

88. State v. Turner, 272 S.W.2d 266 (Mo. 1954); State v. Allen, 235 S.W.2d 294 (Mo. 1950).

89. State v. Rawson, 259 S.W. 421 (Mo. 1924); State v. Moxley, 102 Mo. 374, 14 S.W. 969 (1890). It is often pointed out by the courts that this instruction

A more difficult question is presented when the instruction requested by defendant is erroneous. No case has been found which squarely holds that in the event of an erroneous request for an instruction on circumstantial evidence, the court must give a correct one, but *State v. Barton*[90] approaches this point of view. In *Barton*, the instruction requested was not clearly erroneous, but the court said it was "not a model by any means," and added, the "principle having been expressly invoked by the defendant, the . . . court should have given a correct instruction on this point." Furthermore, *Chaney* holds[91] that the court must instruct even though the request is erroneous if the subject matter of the request is denominated "collateral," and the weight to be given circumstantial evidence has been called collateral.[92] The difficulty with that position, however, is that such an instruction appears to be purely "cautionary" from the defendant's point of view, and in one case it was called that.[93] Nonetheless, on the basis of the authority discussed, the issue is probably collateral.

d. Extra-judicial admissions made by defendant. Prior to the *Chaney* case, the court did not always have to instruct on the weight the jury was to give extra-judicial admissions made by defendant.[94] Although, in *State v. Hendricks*,[95] the court held that such an instruction must be given if at least erroneously requested, several cases subsequently held that it was discretionary, even when requested.[96] The attitude of the courts at that time was set out in *State v. Henderson*:

> [We] have often ruled that while an instruction *may be called for in some cases*, and even error to fail to give it, it does not necessarily follow it must be given in every case. Whether such a cautionary instruction should be given *must depend on the facts developed in the case*. Where the statements or admissions are merely casual statements extending over a long time, or there is a

need not be given in any event unless the state rests its case *entirely* on circumstantial evidence. See, *e.g.*, State v. Lyle, 296 Mo. 427, 246 S.W. 883 (1922). This is apparently true despite the jury's possible rejection of the direct evidence in the case and total reliance by them on the circumstantial evidence.

90. 214 Mo. 316, 113 S.W. 1111 (1908).

91. State v. Chaney, 349 S.W.2d 238 (Mo. 1961).

92. State v. Mansker, 339 Mo. 913, 98 S.W.2d 666 (1936).

93. State v. Singleton, 77 S.W.2d 80 (Mo. 1934).

94. Certainly this is true when there has been no request for such an instruction. State v. Hampton, 172 S.W.2d 1 (Mo. 1943); State v. Mulconry, 270 S.W. 375 (Mo. 1925). See also State v. Evans, 324 Mo. 159, 23 S.W.2d 152 (1929) (oral request not sufficient.)

95. 172 Mo. 654, 73 S.W. 194 (1903).

96. State v. Bobbst, 269 Mo. 214, 190 S.W. 257 (1916); State v. Smith, 250 Mo. 350, 157 S.W. 319 (1913); State v. Henderson, 186 Mo. 473, 85 S.W. 576 (1905). In State v. Bozarth, 361 S.W.2d 819 (Mo. 1962) the court refers to the instruction as "cautionary" and said the requested instruction was properly refused because (1) it was wrong in substance; and (2) it was covered by other instructions.

> material variation between the witnesses, or the same conversation is differently narrated by different witnesses, or there is a direct conflict as to the statements or admissions, or the circumstances are such as to indicate the witnesses may not have heard all that the defendant said or were not in a position to hear all that the defendant said, or considerable time has elapsed and the memory of the witness may not be clear for that reason, then the instruction . . . should be given *if requested.*[97]

The case held that the trial court did not err in failing to correct and give defendant's requested instruction. Still later in *Chaney,*[98] the court said that:

> [O]n the subjects set out in *State v. Bounds*[99] . . . and other cases herein cited and similar subjects, the principles of which are *applicable to the facts shown by the evidence in the case* and to the charges being tried, we hold that it is the duty of the trial court to give a correct instruction if an instruction on the subject is offered by defendant even though the offered instruction is erroneous.

None of the subjects set out in *Bounds* dealt with the subject here under discussion; however, *State v. Hendricks* was therein cited and in that case the court held that the offered instruction should have been given in a corrected form, even though the requested instruction was properly refused as being argumentative. It may be that the court in an appropriate case will require the trial court to give such an instruction when erroneously requested.

The extent to which this rule will change the meaning of prior cases is problematical. When the language of the *Henderson* case is carefully read, it is seen that the court in large part was addressing itself to the problem of the evidentiary basis for, rather than to the pure question of the necessity of giving, a corrected instruction. The court in *State v. Smith* said:[100]

> It is true that when verbal statements of a defendant are casually made in the course of ordinary conversation, and form part of the evidence, and it appears that such statements were made on occasions more or less remote from the time when they were disclosed, a cautionary instruction, such as is requested by defendant, should be given as a corollary to the instruction upon the weight to be attached to such verbal statements. This rule, however, is not uniformly followed, and the present case is one of the exceptions.[101]

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97. State v. Henderson, 186 Mo. 473, 497-98, 85 S.W. 576, 583 (1905).

98. 349 S.W.2d 238, 244 (Mo. 1961).

99. 305 S.W.2d 487 (Mo. 1957).

100. 250 Mo. 350, 157 S.W. 319 (1913).

101. *Id.* at 372, 157 S.W. at 325.

The court then found that the evidence did not support such an instruction. It is submitted, therefore, that if the rule is stated to include the requirement of sufficient evidence to support the instruction, the rule *has* been followed that the court will correct and give an instruction on that subject. The *Chaney* case should not be read as a blanket command to give such an instruction anytime there is testimony reciting statements of the defendant. Only when the evidence indicates the presence of those additional factors adverted to in the *Henderson* and *Smith* cases, should an instruction be required.

e. Evidence of rape. In a prosecution for rape of a mature woman, the defendant is entitled to an instruction telling the jury that the failure of the prosecutrix to make a complaint soon after the alleged assault is a factor they may consider, and the court will err in failing to give such an instruction when requested.[102]

f. Conflicting statements. A court does not err in failing to give an instruction as to the conflicting statements of one of the state's witnesses when it was not requested. The issue is collateral.[103]

g. Defendant's testimony and deposition are competent evidence. The instructions discussed above limit the strength of evidence against the accused. The converse situation is sometimes presented by defendant's request for an instruction informing the jury that they are *not* to disregard certain evidence. In one case the court implied that it was error for the trial court to fail to instruct that depositions are good evidence and should be considered,[104] and, in another, that the defendant is competent to testify.[105] As on other collateral issues, however, the defendant must request such instructions.

3. *Inferences to be drawn from the evidence.* Several instructions may be described as directing the jury's attention to the fact that more than one inference is possible, particularly when the evidence is conflicting. Some of these have been classed as collateral and some as cautionary. In the latter category, the court found no error in the trial court's failure to instruct on its own motion that a person other than the defendant might have been guilty under the evidence.[106] On the other hand, in a prosecution for driving while intoxicated, it was not error to fail to instruct, in the absence of a request, about the possibility of defendant's condition being due to shock rather than alcohol; the instruction was called collateral.[107] The inference was that it would have been error if it had been requested.

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102. State v. Thomas, 351 Mo. 804, 174 S.W.2d 337 (1943).
103. State v. Bell, 359 Mo. 785, 223 S.W.2d 469 (1949).
104. State v. Albritton, 328 Mo. 349, 40 S.W.2d 676 (1931).
105. State v. Emory, 246 S.W. 950 (Mo. 1922).
106. State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945).
107. State v. Hurley, 251 S.W.2d 617 (Mo. 1952).

Two other instructions of this type have been called collateral: alibi and flight. Until recently the rule was that the court did not have to give an alibi instruction on its own motion,[108] but did if requested.[109] The court recently held,[110] however, that alibi instructions are *converse* insofar as the state's instructions require the presence of the defendant at the scene of the crime, so the rules governing converse instructions apply. By this the court apparently meant that the instruction had to be requested, but did not say whether the request had to be correct. The instruction will be discussed in that section.

An instruction directing the jury's attention to defendant's explanation of flight is a collateral issue, and must be requested.[111]

4. *Conclusions.* While the above discussion has not established the proposition that issues concerned with evidentiary rules are coextensive with the class of "collateral" issues, it has shown that none of the litigated issues involving the use of evidence, the weight to be given to it, or the inferences to be drawn from it, are deemed to be law

108. State v. Harris, 356 S.W.2d 889 (Mo. 1962); State v. Hutchin, 353 S.W.2d 701 (Mo. 1962); State v. White, 301 S.W.2d 827 (Mo. 1957); State v. Brooks, 254 S.W.2d 642 (Mo. 1953); State v. Johnson, 361 Mo. 214, 234 S.W.2d 219 (1950); State v. Quinn, 344 Mo. 1072, 130 S.W.2d 511 (1939); State v. Trice, 338 Mo. 744, 92 S.W.2d 135 (1936); State v. Rowe, 324 Mo. 863, 24 S.W.2d 1032 (1930); State v. Wilson, 321 Mo. 564, 12 S.W.2d 445 (1928); State v. Hubbard, 295 S.W. 788 (Mo. 1927); State v. Brazel, 270 S.W. 273 (Mo. 1925); State v. Carr, 256 S.W. 1043 (Mo. 1923); State v. Parker, 301 Mo. 294, 256 S.W. 1040 (1923); State v. Cook, 207 S.W. 831 (Mo. 1918); State v. Dockery, 243 Mo. 592, 147 S.W. 976 (1912). *Contra,* State v. Taylor, 118 Mo. 153, 24 S.W. 449 (1893).

109. State v. Bobbitt, 228 Mo. 252, 128 S.W. 953 (1910); State v. Fox, 148 Mo. 517, 50 S.W. 98 (1899); State v. Taylor, 118 Mo. 153, 24 S.W. 449 (1893); State v. Lewis, 69 Mo. 92 (1878).

110. State v. Hutchin, 353 S.W.2d 701 (Mo. 1962).

111. State v. Rhoden, 243 S.W.2d 75 (Mo. 1951); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1938); State v. Brown, 62 S.W.2d 426 (Mo. 1933). However, in State v. Harris, 232 Mo. 317, 134 S.W. 535 (1911), the court refused to decide if the instruction in question was collateral or law of the case. The state had requested and the court had given an instruction on flight but did not include a reference to defendant's explanation. The court reversed on the theory that, while the instruction may not have been required unless requested by defendant absent the instruction on behalf of the state, once the court undertakes to instruct the jury on the state's side, then it becomes the duty of the court to give a full instruction presenting both sides of a proposition if it has two. See also State v. Sparks, 195 S.W. 1031 (Mo. 1917).

Westhues, J., has suggested eliminating this instruction entirely:

> Instructions on the above subjects [incriminating statements of defendant and evidentiary effect of possession of recently stolen property] have been held erroneous because they have been considered comments on the evidence and as invading the province of the jury. In my humble opinion instructions on flight should be placed in the same class. It seems to me that an instruction on flight, no matter how worded, calls the jury's attention to this particular evidence and gives it emphasis. Westhues, *Criminal Law and Procedure,* 14 Mo. BAR J. 103, 104 (1943).

of the case. Therefore, it seems clear that if a rule of evidence is involved, the instruction will not be law of the case. But the line of demarcation between what is collateral and what is cautionary is obscure. That problem is discussed in a following section.

C. DUTY TO INSTRUCT UPON CORRECT REQUEST—"CONVERSE"

It is clear that the trial court will not be charged with error in failing to give on its own motion instructions converse to those given on behalf of the state,[112] but the effect of a request varies. It has been consistently held that the trial court may refuse to give an instruction converse to the state's if the instruction submitted by the defendant is incorrect.[113] When the defendant has correctly requested such an instruction, he still may not have a right to have the instruction delivered. This results from the nature of converse instructions: they do not designate a specific category of issues, such as self-defense or the effect of impeaching testimony, as do the other instructions discussed in this note. Potentially they encompass all such categories. Therefore, it is not surprising to find the Supreme Court differentiating the effect of a correct request for a converse instruction on the basis of the issue involved. Thus, the court has ruled that even if correct, the instruction need not be given if it is converse to a state instruction which has been designated "cautionary"[114] or "collateral,"[115] but must be given only when converse to the state's main or law of the case instruction.[116]

A trial court need not give any instruction requested by the defendant when the issue has been covered in other instructions. In

112. State v. Harris, 356 S.W.2d 889 (Mo. 1962); State v. Worley, 353 S.W.2d 589 (Mo. 1962); State v. Nasello, 325 Mo. 442, 30 S.W.2d 132 (1930); State v. Cardwell, 312 Mo. 140, 279 S.W. 99 (1925); State v. Gurnee, 309 Mo. 6, 274 S.W. 58 (1925); State v. Dougherty, 287 Mo. 82, 228 S.W. 786 (1921).

113. State v. Washington, 357 S.W.2d 92 (Mo. 1962); State v. Van Horn, 288 S.W.2d 919 (Mo. 1956); State v. Bradley, 361 Mo. 267, 234, S.W.2d 556 (1950); State v. Hicks, 353 Mo. 950, 185 S.W.2d 650 (1945).

114. State v. McWilliams, 331 S.W.2d 610 (Mo. 1960) (dictum).

115. State v. Worten, 263 S.W. 124 (Mo. 1924). See also State v. Ledbetter, 332 Mo. 225, 58 S.W.2d 453 (1933) where the court pointed out that the issue involved in *Worten* was collateral.

116. State v. McWilliams, 331 S.W.2d 610 (Mo. 1960); State v. Quinn, 344 Mo. 1072, 130 S.W.2d 511 (1939); State v. Fraley, 342 Mo. 442, 116 S.W.2d 17 (1938); State v. Gillum, 336 Mo. 69, 77 S.W.2d 110 (1934); State v. Shields, 296 Mo. 389, 246 S.W. 932 (1922); State v. Majors, 237 S.W. 486 (Mo. 1922); State v. Cantrell, 290 Mo. 232, 234 S.W. 800 (1921); State v. Johnson, 234 S.W. 794 (Mo. 1921); State v. Dougherty, 287 Mo. 82, 228 S.W. 786 (1921); State v. Levitt, 278 Mo. 372, 213 S.W. 108 (1919); State v. Harris, 232 Mo. 317, 134 S.W. 535 (1911); State v. Rutherford, 152 Mo. 124, 53 S.W. 417 (1899); State v. Fredericks, 136 Mo. 51, 37 S.W. 832 (1896); State v. Jackson, 126 Mo. 521, 29 S.W. 601 (1895).

State v. Fraley,[117] the court overruled cases which had held that, by concluding its main instructions with the words "and unless you so find you will acquit the defendant," the state precluded the defendant from getting a converse instruction on that issue. The court held:

> [T]hat in all criminal cases, if a defendant offers a correct instruction as the converse of the State's main instructions, it should be given, unless fully and fairly covered by other instructions. We rule that the practice of concluding the State's main instruction with the following words "and unless you so find you will acquit," or words of like import, is not a sufficient reason for refusing a correct converse instruction offered by the defendant.[118]

Alibi presents a special problem in this category. With slight exception[119] this issue has been treated as collateral.[120] The court said in *Chaney* that trial courts had a duty to instruct on those matters set out in *State v. Bounds*[121] if the defendant so requested whether correctly or not. One of those subjects was alibi.[122] However, the court recently said in *State v. Hutchin*:[123]

> It has been ruled that "an instruction on alibi constitutes no part of the state's case"; and that "it is not a question of law upon which the court is required to instruct" as part of the law of the case because "an instruction on alibi is the converse of the state's main instruction in so far as such main instruction requires the defendant's presence at the scene of the crime"; and, therefore, the rule concerning converse instructions should apply.[124]

State v. Pope,[125] relied upon by *Hutchin*, was perhaps the only case that ever so held. The court was right in pointing out that the issue did not involve the law of the case; no case had held it did for many years.[126] But, as noted, alibi instructions had generally been treated

117. 342 Mo. 442, 116 S.W.2d 17 (1938). See also State v. Chevlin, 284 S.W.2d 563 (Mo. 1955).

118. *Id.* at 447, 116 S.W.2d at 20. *But see* State v. Washington, 357 S.W.2d 92 (Mo. 1962). It appears that one of defendant's two requested converse instructions was correct, but the court refused to reverse on that ground because of the exculpatory clause included in the state's principal instructions.

119. State v. Pope, 338 Mo. 919, 92 S.W.2d 904 (1936). See also State v. Worten, 263 S.W. 124 (Mo. 1924) as explained by State v. Ledbetter, 332 Mo. 225, 58 S.W.2d 453 (1933).

120. State v. Trice, 338 Mo. 744, 92 S.W.2d 135 (1936); State v. Bobbitt, 228 Mo. 252, 128 S.W. 953 (1910); State v. Koplan, 167 Mo. 298, 66 S.W. 967 (1902); State v. Fox, 148 Mo. 517, 50 S.W. 98 (1899); State v. Lewis, 69 Mo. 92 (1878).

121. 305 S.W.2d 487 (Mo. 1957).

122. *Id.* at 491.

123. 353 S.W.2d 701 (Mo. 1962).

124. *Id.* at 704.

125. 338 Mo. 919, 92 S.W.2d 904 (1936).

126. Some very early cases so held. See, *e.g.*, State v. Taylor, 118 Mo. 153, 24 S.W. 449 (1893).

as collateral, for which an erroneous request would suffice under *Chaney*. Under this new rule, only a correct request will place the court under a duty to instruct on alibi.

The theory which underlies treating alibi as a converse instruction is sound. Insofar as the state's case requires the presence of the accused at the scene of the crime—*i.e.*, when conspiracy or a similar theory is not relied upon—it is an element on which the state has the burden of proof. It constitutes part of the law of the case upon which the state must instruct in any event or suffer reversal of a conviction. In terms of trying to maximize the information available to the jury, then, the goal is reached by placing the entire risk of error for failure to instruct on the state, and very little in defendant's favor would be added by applying "collateral" rules to a converse instruction. Indeed, this reasoning applies to all converse instructions because, as noted above, only those converse instructions which pertain to a state instruction which is law of the case ever need be given by the trial court.

D. No Duty to Instruct—"Cautionary."

In *Chaney*, the court said that "giving purely cautionary instructions, which may be discretionary with the court, should require the offer of a correct instruction. . . ." If that statement is interpreted to mean that an instruction from the cautionary class must be given if it is correctly requested, but need not be given if erroneously requested, then it appears that no such class exists. To prove the existence of such a group, there should be cases involving the same instruction when error was predicated on the failure to instruct when the instruction was correctly requested, and refusal to reverse when erroneously requested. Only the contrary is found. Soon after *Chaney* the court held that a definition of "check" was "inappropriate" even though the request was correct.[127]

Unless this class of instructions is really composed of two different groups, only one of the following rules could apply: (1) either the court has absolute discretion whether to instruct, or (2) it may be placed under a duty to do so by a correct instruction. It seems likely that a great deal of the confusion was caused by the court relying on the fact that an instruction was not requested, or was erroneously requested, instead of saying that there was absolute discretion whether to instruct. For example, in *State v. Brown*,[128] the defendant complained on appeal that the court did not instruct the jury not to "en-

127. State v. Gillman, 354 S.W.2d 843 (Mo. 1962) ("would be cautionary in nature and discretionary on the part of the trial court." *Id.* at 853).

128. 360 S.W.2d 618, 621 (1962).

gage in or be swayed by guess, speculation, conjecture or suspicion, no matter how strong their suspicion might have been in arriving at their verdict." The court called this a collateral matter, and said that the court did not have to instruct on such an issue on its own motion. However, several years earlier the court had decided *State v. Hinojosa*,[129] in which the trial court had been correctly requested to warn the jury generally not to let their sympathies interfere with their judgment. If the court had called this collateral, as it did in *Brown*, reversal would have been necessary; the rule even prior to *Chaney* called for reversal for failure to instruct on collateral matters if the requested instruction was correct. The court in *Hinojosa* said, however, the question was purely within the discretion of the court. In short, no case has been found in which an instruction of this sort has been called collateral when to do so would require reversal.

Some cautionary instructions are generically different from those in the collateral class, such as an instruction that rape is easy to allege but difficult to defend.[130] Others, however, are clearly questions of evidence, such as an instruction that the prosecutor's opening remarks are not evidence.[131] Thus, some instructions which the court has placed in the cautionary class state rules relating to the use of evidence. These cautionary instructions are not readily discernable from those classed as collateral.

It would make more sense to define the cautionary class as being composed of instructions the giving of which is always within the trial judge's discretion, unaffected by whether a request for the instruction has been made, and by whether, if made, the request was correct. Those instructions on issues which the court considers so trivial that the defendant could not have been prejudiced by an omission to instruct on them would constitute the class of cautionary instructions. The court could then refuse to reverse either on the ground that failure to instruct was not prejudicial error,[132] or simply because the instruction was classed as cautionary. These would amount to the same thing.

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129. 242 S.W.2d 1 (Mo. 1951).

130. State v. Lindsey, 80 S.W.2d 123 (Mo. 1935). The court said that this alleged error related to a collateral matter. But calling it collateral there did not give rise to a reversal since it had not been requested at all. The question remains whether the court would have called it collateral if there had been such a request.

131. State v. Lindsey, 333 Mo. 139, 62 S.W.2d 420 (1933).

132. Some support for this is found in State v. Henderson, 186 Mo. 473, 85 S.W. 576 (1905). The court there said that the giving of cautionary instructions depends upon the facts adduced on trial, and relied on the doctrine of non-prejudicial error in refusing to reverse.

E. DEFINITIONS.

The category of definition instructions is not generically the same as the preceding four categories. An instruction in this area may involve the definition of a word or phrase which is in one of the above categories. Thus, the court may be asked to define for the jury a phrase such as "heat of passion," which might be an element of a lesser included offense to murder. As such, it would involve the law of the case. Examples may similarly be found in the collateral ("impeach"), and cautionary ("check") categories, though probably this would not arise in the converse group of instructions.

Perhaps for this reason the court has created two different verbal formulae for handling these instructions. In some instances the word or phrase in question is called law of the case and hence must be defined without request. But most cases draw the distinction between technical words and words of common usage.[133] The latter approach is the more common.[134] It is also conceivable that in most instances the two amount to the same thing: "technical" words that must be defined are generally words which constitute part of the law of the case. But the groups are not coterminous. If a word constitutes part of the law of the case but is a word of common understanding, it probably need not be defined. The word "voluntary" is an example. Similarly, the court has required definition of "corroborative," a "technical" word, which, however, is not part of the law of the case under the present rule.

The court reversed for failure to define, in the absence of any re-

133. The court in State v. LaMance, 348 Mo. 484, 154 S.W.2d 110 (1941), seemed to rely on both of these dichotomies in reversing for failure to define "premeditatedly," "malice aforethought" and "deliberation," even though the defense had made no request for such instructions. At one point the court relied upon the statute:

> [I]t is the duty of a trial court to instruct a jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict. We are of the opinion that under the statute it was the duty of the trial court to define the words . . . . *Id.* at 500, 154 S.W.2d at 119.

But later in the opinion the court seemed to rely primarily on the technicality of the word. Referring to the words "transporting" and "intoxicated condition," the court said that such words were held not to have technical significance and to be of such common use that a jury would readily understand their meaning, but that the words involved here have "special significance in defining the crime of murder." This case is used illustratively since it uses both theories to support the same result. This is not the usual approach; most cases rely upon one or the other.

134. There is some indication that the technical word approach is the only one in use now. In State v. Holmes, 364 S.W.2d 537, 541 (Mo. 1963) the court said: "The rule is that words in common use need not be defined for the jury," and included "intent" within that rule. *Contra,* State v. Gillman, 354 S.W.2d 843 (Mo. 1962). See note 127 *supra.*

quest, the following terms: "premeditatedly,"[135] "malice aforethought,"[136] "deliberation,"[137] "in the heat of passion,"[138] and "corroborative."[139]

The following words and phrases do not have to be defined:[140] "accomplice,"[141] "credible evidence,"[142] "feloniously,"[143] "good repute,"[144] "voluntary,"[145] "cohabit,"[146] "intent,"[147] "provoked the difficulty or began the quarrel,"[148] "improper conduct,"[149] "goods, wares, and merchandise,"[150] "other valuable thing, kept and deposited,"[151] "self-defense,"[152] "bring on the difficulty,"[153] "justifiable,"[154] "designedly,"[155] "heat of passion."[156] In none of these cases does the court say whether the defendant requested the instruction.

When a request, correct or erroneous, is involved, the results vary. It was held to be error in *State v. Reed*[157] to fail to correct and de-

135. State v. LaMance, 348 Mo. 484, 154 S.W.2d 110 (1941).

136. *Ibid.*

137. *Ibid.*

138. State v. Strong, 153 Mo. 548, 55 S.W. 78 (1900). *Contra,* State v. Rose, 142 Mo. 418, 44 S.W. 329 (1898).

139. State v. Hunter, 181 Mo. 316, 80 S.W. 955 (1904).

140. Those words used unnecessarily in the instructions need not be defined. See, *e.g.,* State v. Daly, 210 Mo. 664, 109 S.W. 53 (1908) which held that "malice aforethought," "premeditation" and "corroboration" did not have to be defined since they were not elements of the offense when the theory of prosecution is the felony-murder rule. It would seem to be arguable from cases of this type, combined with the technical word rule, that perhaps the court is actually requiring both: (1) part of the law of the case; and (2) technical meaning not of common understanding.

141. State v. Gridley, 353 S.W.2d 705 (Mo. 1962).

142. State v. Thresher, 350 S.W.2d 1 (Mo. 1961).

143. State v. Cantlin, 118 Mo. 100, 23 S.W. 1091 (1893).

144. State v. Walker, 232 Mo. 252, 134 S.W. 516 (1911).

145. State v. Garrett, 285 Mo. 279, 226 S.W. 4 (1920) ("purely collateral or incidental").

146. State v. Knost, 207 Mo. 18, 105 S.W. 616 (1907) ("this is a word in general use, in no sense a word of art, and it is only a fair presumption that the jury fully understood the word in its usual and ordinary acceptation").

147. State v. Holmes, 364 S.W.2d 537 (1963).

148. State v. Long, 201 Mo. 664, 100 S.W. 587 (1907).

149. State v. Barrington, 198 Mo. 23, 95 S.W. 235 (1906) ("has no technical meaning").

150. State v. McGuire, 193 Mo. 215, 91 S.W. 939 (1906).

151. *Ibid.*

152. State v. Bailey, 190 Mo. 257, 88 S.W. 733 (1905) ("self-explanatory").

153. *Ibid.*

154. State v. Jacobs, 152 Mo. 565, 54 S.W. 441 (1899).

155. State v. Smith, 299 Mo. 269, 252 S.W. 662 (1923) ("not used in a technical sense").

156. State v. Reed, 154 Mo. 122, 55 S.W. 278 (1900).

157. *Ibid.*

liver an instruction defining "in the heat of passion" and "upon a sudden provocation." However, the court held in a recent case[158] that the trial court need not give an instruction defining the word "check" in a prosecution for forgery of a check, even though the instruction as requested was correct. The court said:

> [S]uch an instruction would be cautionary in nature and discretionary on the part of the trial court. In the Chaney case . . . it was expressly held that the giving of a cautionary instruction "should require the offer of a correct instruction," and while the requested instruction in this case as worded may correctly state an abstract principle of law it is inappropriate under the facts of this case and under the theory of the State as submitted in the instructions. No prejudicial error resulted in refusing the offered instruction . . . .[159]

It is difficult to determine exactly why the court thought the instruction would be "inappropriate." In *State v. Garrett*,[160] the court did not say whether the request was correct or not; probably the defense merely asked that the word "deliberately" be defined. The court refused, and the case was reversed on that point.

Some cases superficially appear to be inconsistent with each other and with the theory set out in the first part of this section. Thus, for example, one case was reversed for failure to define "corroborative"[161] while another refused to reverse for failure to define "corroboration."[162] But these cases can be distinguished on the charge involved in each of them. In the former the charge was perjury, a difficult case generally in proving the corpus delicti, while the latter case involved a charge of first degree murder and the state's theory was predicated on the felony-murder rule. Corroboration played an indiscernable role in the proof of the state's case. On the other hand, some results are inconsistent. The cases are divided on whether "heat of passion" must be defined without a request.[163]

III. CRITIQUE

The preceding sections have developed the rules the Missouri Supreme Court has created within two problem areas: (1) the categories of instructions; and (2) the particular instructions which

158. State v. Gillman, 354 S.W.2d 843 (Mo. 1962).

159. *Id.* at 853.

160. 276 Mo. 302, 207 S.W. 784 (1918).

161. State v. Hunter, 181 Mo. 316, 80 S.W. 955 (1904).

162. State v. Daly, 210 Mo. 664, 109 S.W. 53 (1908). See also State v. Yates, 252 S.W. 641 (Mo. 1923); State v. Tedder, 294 Mo. 390, 242 S.W. 889 (1922); State v. Affronti, 292 Mo. 53, 238 S.W. 106 (1922); State v. Sublett, 191 Mo. 163, 90 S.W. 374 (1905) (not requested).

163. See cases cited note 138 *supra*.

should be included within each category. This section of the note is a critical examination of the rules that have been developed in those areas.

A. THE CATEGORIES.

Central to an analysis is an understanding of the *raison d'être* of the problem itself. That problem is best understood in terms of the conflict between an ideal concept of the function of instructions vis-à vis the practical administration of that ideal.[164] The court has at-

164. With rare exception the only function assigned to instructions is to inform the jury of the applicable law on the facts presented at the trial. The following is a typical approach taken by standard treatises on the subject:

> The sole function of instructions is to convey to the minds of the jury the correct legal principles that are to govern them in weighing the evidence presented to them, in order that upon their determination of the facts from the evidence they may apply the correct principles of law and thereby decide correctly and justly . . . . 1 REID'S BRANSON INSTRUCTIONS TO JURIES 1 (3d ed. 1936).

See also 1 BLASHFIELD, INSTRUCTIONS TO JURIES § 4 (2d ed. 1916); FERRIS & ROSSKOPF, INSTRUCTIONS TO JURIES § 1 (1916); 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 2090 (12th ed. 1957). Ideally, the jury's role in this process is to apply to the facts the legal principles given to it by the court. Just as the appellate court reviews the sufficiency of the evidence, *i.e.*, the facts presented upon which the jury reaches its determination, so the appellate court must review, in a sense, the sufficiency of the law which has been presented to the jury by the court. The difference is that from the facts presented to the jury, other facts are deducible and the question presented in a sufficiency of the evidence situation is how far the court will allow the jury to go in making such deductions. But the jury can make no such deductions from the law which is presented to it in instructions.

Two other functions are seldom adverted to by writers, with the notable exception of Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194 (1932). Those functions are control of the jury and control of the law applied at the trial. The functions of controlling the jury operate at both the trial court and appellate court levels. While the primary thrust of this function—the peremptory instruction directing a verdict—relates primarily to civil cases, it is also applicable to criminal trials. It is commonly assumed that the jury does in fact follow the instructions given to it and it is rare in a criminal case for this function to actually come into play.

Thus, for example, many years prior to the enactment of the statute under discussion, the Missouri Supreme Court said, in Hardy v. State, 7 Mo. 607 (1842):

> [I]t is the duty of the jury to respect the instructions of the court as to the law of the case, and to find the prisoner guilty or not guilty according to the law as delivered to them by the court, and the evidence, as they receive it from the witnesses, under the direction of the court. *Id.* at 609.

See also Malinsky v. United States, 153 F. Supp. 321, 323 (S.D.N.Y. 1957) where the court said that it must be assumed and presumed that juries follow instructions.

Further evidence of the fact that informing the jury of the applicable law is not the only function of instructions may be obtained from those civil cases where the case is not tried to a jury, but to a judge alone. In Harbison v. School Dist. No. 1, 89 Mo. 184, 1 S.W. 30 (1886), *e.g.*, there is advertence to the right of the

tempted to formulate rules that will provide juries with the maximum amount of information about pertinent rules of law, but which will not result in an undue number of reversals.[165]

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party to have the court declare the principles of law which the court applies in the case. Obviously, the function here is primarily to allow adequate review of the decision.

Finally, instructions may be used as one of the vehicles by which the law applied in criminal trials may be shaped by appellate courts. The vacillation in Missouri cases on the effect of possession of recently stolen goods may be cited as a clear example of this function in action. For many years, the Missouri rule was that exclusive possession by the defendant of recently stolen property gives rise to a presumption of guilt, rebuttable by the defendant. In State v. Swarens, 294 Mo. 139, 241 S.W. 934 (1922), the court changed this rule by reversing on an instruction which had stated the prior rule. Because the court desired a change in the rule, the instruction was erroneous even though it was in accord with previous cases. See also Westhues, *Criminal Law and Procedure*, 14 Mo. BAR J. 103 (1943).

While it is clear that these functions developed at various times during the evolution of the jury system, the exact history of instructions is as obscure as is the origins of the jury itself. Farley, *op. cit. supra;* Sokilov, *The Judge's Charge to the Jury in Criminal Cases*, 10 CAN. BAR REV. 228 (1932). It is not within the ambit of this note to explore that history and mention is made of this dual origin only to point up the fact that there is historically more than one function involved in their usage.

165. The rules relating to the giving of instructions may be used by a defense attorney to lay a foundation in the record to allow reversal in the event that the defendant is found guilty. Thus, the defendant, if the strategy is correct, will either be found not guilty, or, if found guilty, the conviction will be reversed on the basis of the error committed by the trial court. Consider, for example, the situation presented in State v. Wright, 352 Mo. 66, 175 S.W.2d 866 (1943). Defendant was accused and found guilty of first degree murder. Immediately after his arrest, he had given an account of the fight which suggested a defense of self-defense despite an admission that the defendant may have been the first to commit an assault. The state introduced that admission into evidence. On trial, however, the defendant told a different story; he denied that he had killed the deceased, and admitted only that they had had a fight.

From the point of view of the defendant, it is possible that he would not request an instruction on self-defense: (1) it would be inconsistent with the defendant's own testimony; (2) the case would be reversed in the event of a verdict of guilty if the trial court did not instruct since it is law of the case. It is equally certain that the prosecution in that situation would not ask for a self-defense instruction. Thus, it falls upon the court to undertake on its own motion to instruct on self-defense. The trial court in *Wright, supra,* failed to do so and the conviction was reversed.

While it may be clear in that case that the defense attorney did not himself create the trap for the trial court, nonetheless the facts of the case itself did present one. In other cases it is less clear that the defense counsel could not avoid such a trap. He may be in a position to force the trial court to make a decision which makes no difference to his case but nonetheless would cause reversal if the court makes an error.

Cases of this sort probably more often arise as a result of an instruction sub-

Logically, there are three ways in which this conflict could be resolved, expressed in terms of defense participation in the decision whether to instruct: (1) no request necessary; (2) request always necessary; (3) request necessary with respect to some instructions but not to others. However, the selection of any one of these rules as the most desirable, still is based upon the assumption that it is necessary or desirable to have a predetermined set of rules to facilitate administration. The contrary approach may be more desirable and has, indeed, been substantially adopted by the federal courts.[166]

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mitted to the court which incorrectly states the substantive law in favor of the accused. If the instruction is given as requested, the defendant gains an advantage with the jury; if it is refused and a correct one on that point is not given, it may result in a reversal; and finally, if the trial court undertakes to correct it, he runs the risk of making an error in the substantive law.

The defense counsel may be tempted to trap the trial court in these two areas: (1) by not requesting an instruction at all where not to give it would be reversible error, *e.g.*, self-defense; or (2) to request an erroneous instruction with the three possible ramifications just discussed. Thus, a defense counsel operating under a thesis partly contrary to the general assumption that the instructions are actually meaningful in the deliberations of a jury gains a considerable advantage by rules relating to the giving of instructions.

166. Two rules govern the giving of instructions in the federal system. FED. R. CRIM. P. 30 provides that "No party may assign as error any . . . omission . . . unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." FED. R. CRIM. P. 52(b) says in substance that plain errors or defects affecting substantial rights of the accused may be noticed on appeal although not brought to the attention of the court. These two rules have been considered *in pari materia*. See, *e.g.*, Lash v. United States, 221 F.2d 237 (1st Cir.), *cert. denied*, 350 U.S. 826 (1955). The holdings under them have generally been much less lenient on the defense than have Missouri cases. For example, it has been held that refusal to charge may be regarded as reversible error only if the tendered instruction is correct, not substantially covered in the main charge and is on such a vital point in the case that the failure to give it would deprive defendant of a defense or seriously impair its effective presentation. Phelps v. United States, 252 F.2d 49 (5th Cir. 1958).

The conflict in the federal system has been analyzed as follows:

> The two Rules quoted above [30 and 52(b)] impinge upon one another but do not actually conflict. The Rule requiring objection to the charge before the jury retires is a salutary one in that it affords an opportunity for the prompt correction of inadvertent misstatements, oversights, omissions, or even erroneous statements of law, which if not corrected at the time would necessitate a new trial after an appeal with consequent delay and expense to the defendant and to the public. Furthermore, the Rule prevents a defendant from sitting silently by when he is aware of an error in the charge perhaps more technical than seriously prejudicial, which could and undoubtedly would be corrected on the spot if brought to the court's attention, to the end that in the event of an adverse verdict, he would have good grounds for a new trial with the chance of a favorable verdict from another jury. On the other hand, should the Rule be rigidly applied, appellate courts would be powerless to correct grave miscarriages of justice resulting from serious errors in the charge whenever a defendant or his counsel through ignorance, inadvertence, or inexperience failed to object before the jury re-

Thus, the decision whether to reverse for failure to instruct may be made on an *ad hoc* basis, by utilization of the doctrine of non-prejudicial error, without formulating in advance rules for the implementation of that doctrine in order to provide predictability.

Rather than rely solely upon the doctrine of non-prejudicial error, the Missouri Supreme Court has divided the instructions into categories with differing legal results following from inclusion in one category or the other. In effect, those categories consist of a predetermination by the court of what degree of prejudice is involved in the omission of one of the class of instructions. Also implicit in the categories approach is the rejection of a rule that no request is ever necessary, or that a request is always needed. The rejection is predicated on the concept of burden, the same reason justifying the division of responsibility for the giving of collateral and converse instructions between the court and the defense.

Adopting the rule that the court must instruct on all issues in the case, whether requested or not, would assure that the jury receives

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tired to consider its verdict. Therefore, appellate courts will take notice of errors asserted by counsel for the first time on appeal, and also notice errors *sua sponte*, when in their discretion notice of the error is necessary to prevent an injustice. Lash v. United States, 321 F.2d 237, 240 (1st Cir. 1955).

Thus, the federal cases, while acknowledging the issue in substantially the same terms as the Missouri cases, offer no real analysis of the criteria which should be considered in determining how the conflict should be resolved. The federal resolution does, however, seem to place more confidence in the defense attorney's competence and thereby assumes that he will in fact call the court's attention to any omission. The number of cases in that system involving the same issue would seem to cast some doubt on that assumption.

See Holland v. United States, 348 U.S. 121 (1954) (where jury has been properly instructed on reasonable doubt, instruction on circumstantial evidence should be refused); Lutwak v. United States, 344 U.S. 604 (1953) (not reversible error to limit use of co-conspirator's evidence); Berry v. United States, 271 F.2d 775 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960) (not error to fail to limit use of evidence in absence of any objection by defendant). *But see* Weiler v. United States, 323 U.S. 606 (1945) (reversed for failure of trial court to instruct that defendant could not be convicted by less than two witnesses for perjury, refusing to apply harmless error doctrine); Bruno v. United States, 308 U.S. 287 (1939) (reversed for failure to give defendant requested instruction on his right not to testify under federal constitution and federal statute which says that no presumption shall arise from such refusal to testify).

The Final Report of the Senate Criminal Law Revision Committee to the Senate of the State of Missouri Sixty-seventh General Assembly, vol. 1, appendix II: Recommendations of the Missouri Crime Survey of 1926 with Notations of any action Taken Thereon to Date, p. 5 said: "3. Amend statute relating to instructions in criminal cases so as to require Defendant's counsel to point out any errors in form or substance of the instructions immediately after they are read to the jury." This would make the Missouri rule essentially the same as FED. R. CRIM. P. 31.

the maximum information about the applicable law, for the trial judge would be under the duty to instruct on all possible issues raised by the evidence. This rule, however, would impose several burdens on the trial court: (1) the trial judge would have to recall which issues are supported by some evidence, and determine whether that evidence is sufficient; (2) he would have to formulate a correct statement of the law on that issue; (3) the probability of error and reversal due to omission to instruct as well as to misdirection would increase; (4) that trial judge, or another judge in the same circuit, might be required to re-try the case in the event the prosecutor recommences prosecution.[167]

If, on the other hand, the court adopted a rule which placed the trial court under no duty to instruct at all except upon request, those burdens would be substantially reduced or eliminated. However, it is not unlikely that the goal of maximization of information on the law to the jury would be seriously jeopardized. Further, if this rule were to include the requirement for a *correct* request, the burden on the trial court would be further reduced with a concomitant increase in the probability that the jury would not be informed of all the law in the case.

Missouri, of course, has taken a middle ground: some instructions must be given whether requested or not, some need be only erroneously requested, others must be correctly requested, and some do not have to be given in any event. The court impliedly perceives a descending amount of prejudicial error potentially present in the omission to instruct in those various categories and has correspondingly required ascending participation of the defense, manifested by a request. It has, therefore, in the collateral and converse categories,

167. With the exception of the last "burden" the Supreme Court adverted to these problems in the *Chaney* case:

> As to any question collateral to the main issue, it is reasonable and logical to require submission of an instruction on the subject by counsel for defendant who has prepared and conducted the defense. Otherwise, too great a burden would be placed on the trial judge by requiring him to try to think of all possible collateral issues and prepare instructions on them. The duty rests on counsel for the defendant to aid and not ambush the court. . . . However, once the question is thus called to the court's attention, it is imposing no undue burden on the court to give the instruction on it as requested or if not correctly stated to modify the instruction to correctly submit the question. Fairness to the defendant, who may not be able to employ counsel of his own choice, would seem to require the court to do this. However, the defendant should not be permitted to take advantage of the trial judge by making no request that the jury be instructed on a collateral issue, thereby concealing any interest in it, and thereafter seeking to profit by raising on appeal the court's failure to give an instruction on such a question. Undoubtedly these are the considerations upon which the established rule is based and we believe them to be sound. State v. Chaney, 349 S.W.2d 238, 245 (Mo. 1961).

The burden on the system caused by new trials was impliedly recognized in the opinion, however, for the case itself was reversed and remanded for new trial.

placed upon the defense the determination of what is necessary for the information of the jury in that particular case with respect to that issue. Viewed in this way, the categories are a predetermination by the court of the likelihood of prejudice resulting from an omission. Those issues included in law of the case are predetermined to be prejudicial to the accused if not instructed upon; those in the cautionary class are never prejudicial; and those in the collateral and converse categories are left for the judgment of the defense counsel in individual cases.

B. THE ISSUES WITHIN THE CATEGORIES.

The problem remains, conceding the validity of the categories, are the right results reached in determining which instructions belong to which category? In large part, the answer depends upon the critic's view of the amount of prejudice inherent in the failure to instruct on any particular issue. Criteria for an objective analysis are lacking, except for analogies one may draw from issues consistently placed in one category or another. Such reasoning, however, begs the question. At most it could result in logical consistency; it still would not provide an answer. Insofar as the case law allowed, those problems were discussed in the section involved.

C. A SUGGESTED MODIFICATION IN THE CURRENT RULE.

The amount of litigation in this relatively narrow area of criminal procedural law has been vast. There is no indication that it is becoming smaller. Unless the strain on the judicial system caused by this litigation is to be allowed to continue, a change in the rules alleviating the present situation would seem to be in order. For this reason, the following proposal is made.

It is suggested that the Missouri rule relating to the giving of instructions in felony cases be modified to provide: (1) the trial court must instruct upon the law of the case whether requested or not; (2) the trial court must instruct on all other matters put into issue by the evidence, or by presumptions of law, if the defense submits a draft of the instruction along with a request that it be given; if the submitted draft is incorrect, the trial court must correct it.

This modification of the apparent existing rule is based upon the following considerations:

(1) The rule would be greatly simplified, consisting of only two categories, which would reduce the chance of error for omissions of instructions.

(2) The effect of being placed in the cautionary category, whether an instruction must be given if correctly requested, is not clear, and

clarification would require litigation. The suggested rule would abolish the necessity for that litigation by requiring that the instruction be given if erroneously requested.

(3) It was suggested earlier that criteria could not readily be developed for determining what particular instructions *should* be placed in one category or another under the present rules. This undoubtedly is due to the fact that there is little logical distinction between the collateral and cautionary categories. Absorption of the latter category would resolve this problem without the need for extensive litigation. Such litigation has not proved itself in the past to be very productive of certainty and reasonableness in the law.

(4) The jury would be better informed on the applicable law than it is under the present rules since the trial court could no longer, for example, refuse with impunity to inform the jury that the prosecutor's remarks are not evidence, a "cautionary" instruction.

(5) In terms of burden, the rationale relied upon in *Chaney* for the division of instructions into categories, the only additional burden placed on the trial court would be the duty to correct the instruction if it were not already correct in substance. And *Chaney* itself added this burden on the trial courts with respect to collateral issues.[168] The rule suggested would add but little more. Further, this additional burden must be balanced against many advantages to be gained by the rule, *inter alia,* lessening the burden on the entire system including the Supreme Court.

In summary, the rule would save a large amount of litigation and retrial of cases, and would better inform the jury. These considerations are balanced only against the added burden of trial courts of correcting converse and cautionary instructions. Further, it is not unreasonable to expect the trial court or the prosecutor to have on hand model instructions which easily could be substituted for those submitted which are substantively wrong.[169]

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168. Respondent admits that at present the cases are in conflict on the question of the court's duty to correct and give erroneous collateral instructions presented by counsel. One view is expressed by State v. Sanders, . . . and State v. Lee . . . which hold to the theory that the court need not give instructions on collateral matters unless defendant tenders a correct instruction. The other view supported by such cases as State v. Warren . . . and State v. McNamara . . . wherein the doctrine stated is that where defendant offers an erroneous instruction on a collateral matter involved in a case, the court is under a duty to formulate and give a correct instruction.

Respondent respectfully submits, however, that the solution in resolving this conflict is not to be found in curtailing the discretion of the trial court in regard to instructions involving collateral matters, and thereby imposing an undue burden on the trial court, which has no limitations, but rather to rest the responsibility where it correctly belongs, i.e., on the shoulders of the defendant who necessarily creates the collateral matters involved . . . . Quoted from State's Supplemental Brief in State v. Chaney, 349 S.W.2d 238 (Mo. 1961).

169. There has, however, occasionally been manifested considerable judicial

But even within this frame work it may be expected that justice would be better served in some cases if the rule suggested were not rigidly applied. For the resolution of these problems, the court could rely *overtly* on the doctrine of non-prejudicial error. For example, suppose the trial court refuses a request that the jury be instructed that a rape charge is hard to defend. Should the case be reversed? The court could refuse to reverse because the defendant was not prejudiced by the refusal. Thus, the system would consist of two categories of instructions,[170] with the flexible rule of prejudicial error

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impatience with claims for increased responsibility of trial judges in this area. In State v. Hadley, 364 S.W.2d 514 (Mo. 1963), the defense contended that an instruction on malicious mischief should have been given as a lesser included offense in a charge of burglary second decree. The court rejected this and other similar contentions on the grounds that (1) they were not actually lesser included offenses; and (2) were not supported by the evidence. But the court further said:

> Nor do we believe that a trial court should be required to search the criminal statutes to find some offense which might possibly be included within the offense charged, in order to give an instruction upon it of his own motion. Defendant here declined to offer any instructions. This contention is denied. *Id.* at 518.

The objection to increased responsibility of trial judges expressed in this opinion, however, does not relate to the increased amount of work that the proposal would place on the court. Under the rule suggested, the only increased work is the writing of correct instructions if the requested one is incorrect. It is true on the other hand, that the court may have to rely on its own initiative in giving the instruction adverted to in the opinion because lesser included offenses are within the category of law of the case. The suggested change in the rule would add no new burden in those terms: the court must instruct on lesser included offenses under the present rule and that part of the rule would not be changed.

The opinion's concern with the amount of burden placed on the court in the law of the case category is apparently not shared by the whole court, and the opinion quoted is the divisional opinion of Judge Eager who dissented in the *Chaney* case. Furthermore it would not seem unduly hopeful to expect trial judges to have knowledge of what offenses are lesser included offenses in various charges. If Missouri statutes are in such a disorder that those lesser included offenses are not readily ascertainable, then the defense faces the same problem. As between the state and the defendant, there seems little question as to who should bear the responsibility for the state of the codification of the law.

170. A bipartite division of instructions has been used in the area of definition instructions. Principally, the court relies on the distinction between technical vis-à-vis non-technical words and the result of being in one or the other of those categories varies. That categorization could easily be adapted to the proposed rule, technical words being treated as law of the case, and non-technical words being treated as belonging to the other category. Thus, technical words would have to be defined without request, and non-technical words would have to be defined upon request, but only then. Most of the litigation in that area has been because of the uncertainty of what constitutes a technical word. While there is no easy solution to that problem, it may at least be noted that those problems do not inhere in determining what constitutes law of the case since the number of issues included in that category would be very limited under present case law.

superimposed upon them, achieving both certainty and reasonableness in the categories, while not at the same time being too rigid in application. This solution is better than what apparently has been done in the past. Rather than relying on the doctrine of non-prejudicial error, the court has often shuttled a particular instruction from one category to another to achieve the desired result. This method results in uncertainty in the law and consequent increase in litigation on that question.