Jury Instructions From A to B

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Introduction:

Instructional issues are among the most common and important issues raised on appeal. Although jurors rely heavily on their senses and common sense when resolving factual issues, instructions provide the only information the jurors receive about the law establishing the legal framework for those facts. Instructions therefore are the essential guides to jury deliberation and decision making. They are the framework for the prosecution's case in proving the offense elements beyond a reasonable doubt. They are an important tool in constructing and understanding the defense.

None of this can be communicated casually. As we know too well,"[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (Carter v. Kentucky (1981) 450 U.S. 288, 302.) These are not concepts that can be delegated to the advocates: "arguments of counsel cannot substitute for instructions by the Court." (Id. at 304; *see also* People v. Mathews (1994) 25 Cal.App.4th 89, 99 ("[I]nstruction by the trial court would weigh more than a thousand words from the most eloquent defense counsel.")

Because instructions are essential to the jury, an understanding of the legal principles related to instructions is essential to appellate practitioners. As one court noted, "from our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions." (People v. Thompkins (1987) 195 Cal.App.3d 244, 252.) This quotation conveys an important, clear and unmistakable message – knowledge of the general legal principles related to instructions is an essential tool for the appellate practitioner and the most likely route to appellate success, and one cannot overstate the importance of a careful review of the instructions given and a knowledge about those which should have been given but were not.

Writing a short paper on jury instructions is a little like trying to write a history of the world in a single volume. It can be done, but surely more will be missed than included. We

are comforted that despite our omissions, there are extant comprehensive jury instruction resources to consult in every case such as FORECITE and CalCrim.

(A handy CALCRIM Checklist can be found in various formats at: http://www.capcentral.org/criminal/calcrim/checklist.asp and at the end of this paper.)

A. JURY INSTRUCTION BASICS

All instructions should be carefully reviewed to determine:

1) *what is missing*, including instructions not given which the court has a sua sponte duty to give, or a duty arising upon defense request;[1]

2) *what is inapplicable to the case and harmful*, including adding a burden on the defense or removing one from the prosecution;[2] and

3) *what instructions were given but were erroneous*, including instructions with missing elements, or presumptions or missing burdens.[3]

The law loves to categorize and differentiate. If it did not, people who write on the subject might have to practice law. Instructions are planted thick with categories and

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1 *E.g.,* People v. Dewberry (1959) 51 Cal.2d 548, 557 (instruction on the effect of reasonable doubt between first and second degree murder, and between involuntary manslaughter and justifiable homicide, but not as between murder and manslaughter, left jury with clearly erroneous implication that the rule did not apply to latter situation); and People v. Salas (1976) 58 Cal.App.3d 460, 478 (when a generally applicable instruction is specifically stated with respect to one aspect of the charge and not repeated with respect to another, the inconsistency may be prejudicial error.)

2 *E.g.,* in People v. Torres (2005) 127 Cal.App.4th 1391, the trial court committed reversible error by adding to the legal definition of insanity that the "term 'wrong' refers to both legal wrong and moral wrong. The concept of moral wrong refers to society's generally accepted standards, and not to the subjective standards of the defendant." The instruction incorrectly required the defendant to prove two separate types of wrongness (legal and moral) when the law required that he prove only one (moral).

3 *E.g.,* in Stark v. Hickman, 455 F.3d 1070 (9th Cir. 2006), federal due process was violated at the California murder trial when trial court instructed jury during the guilt phase of a bifurcated guilt/insanity trial that the defendant was to be presumed "conclusively sane." The defendant put his mental state at issue during the guilt phase, and the instruction lowered prosecution's burden of proof, violating Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985).

distinctions. There are requested instructions and instructions the trial court must give sua sponte. There are instructions whose origin is in principles of state law and those whose origin is in federal constitutional law. There are instructions on the elements of the crime, on defenses, on presumptions, and on "pinpoint" legal doctrines. There are curative and limiting instructions that seek to minimize prejudice when a witness or an attorney blurts out or leisurely discusses matters that are inadmissible and prejudicial or to assure that evidence admissible for a particular purpose or purposes is not used for other, prejudicial purposes. There are a rules related to forfeiture, such as invited error, the failure to request a pinpoint instruction, the failure to seek clarification of an instruction that is otherwise legally correct, and the failure to request a limiting instruction. There are rules related to the nature of the evidentiary support for an instruction. There are rules related to the standard of review – de novo or deferential. And there are rules related to harmless error – *Watson* (for instructional errors based on state law), *Chapman* (for instructional errors based on federal constitutional law), reversal per se (for some errors that are grody to the max), and *Sedeno* (reverse unless the factual issue in an omitted instruction was *necessarily* resolved adversely to the defendant under other instructions, a rule which used to apply to failure to instruct on a lesser included offense but which now appears only to apply to failure to instruct on a defense).

This is a lot to master. It takes years of practice and the briefing of dozens of instructional issues to feel comfortable briefing instructional issues. The authors of this outline have practiced law for decades (perhaps centuries) and are only beginning to get the hang of it. This outline is a starter kit. We hope it helps.

1. Statutes

A number of California statutes concern jury instructions.[4] Four of the most

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4 Pen. Code, § 1127a-h has a series of instructional requirements on specific topics. It covers in (a) "in-custody informant" cautionary instructions (see also Pen. Code §1111.5); (b) on expert witnesses testimony; (c) flight instruction; (d) prior sexual conduct in rape cases; (e) prohibition on the term "unchaste character;" (f) proceedings in which a child 10 years of age or younger testifies as a witness; (g) proceedings in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness; (h) on (continued...)

important are:

Pen. Code § 1138 states:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

Pen. Code § 1259 states:

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

Pen. Code § 1093 states:

> (f) The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

Penal Code §1093.5 states:

4(...continued)
bias, sympathy, prejudice, or public opinion not to impact jury deliberations. Pen. Code §1122 provides general instructions; Pen. Code § 1096, generally restates the CALCRIM instruction on reasonable doubt and the presumption of innocence.

> In any criminal case which is being tried before the court with a jury, all requests for instructions on points of law must be made to the court and all proposed instructions must be delivered to the court before commencement of argument. Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given. However, if, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof.

With the basic frame of reference in mind, here are some handy rules pertaining jury instructions:

2. The Court Must Instruct on the Law.

"A trial judge's duty is to give instructions sufficient to explain the law...." (Kelley v. South Carolina (2002) 534 U.S. 246, 256.) The instructions the court gives must be correct regardless of the precise nature of the instruction. As the California Supreme Court put it: "Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (People v. Castillo (1997) 16 Cal.4th 1009, 1015, quoted with approval in People v. Najera (2008) 43 Cal.4th 1132, 1141.)

It is settled in criminal cases, even in the absence of a request, that trial courts must instruct on the general principles of law relevant to the issues raised by the evidence. (People v. Edwards (1985) 39 Cal.3d 107, 117.) General principles of law are those closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (People v. Sedeno (1974) 10 Cal.3d 703, 715, *overruled o.g.,* People v. Breverman (1998) 19 Cal.4th 142.) "It is settled that in a criminal case, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (People v. St. Martin (70) 1 Cal.3d 524, 531; *see also* People v. Montoya (1994) 7 Cal.4th 1027, 1050 [*sua sponte* duty applies to theories which the evidence "strongly illuminates"].)

As the reader will see, the duty to instruct sua sponte on general legal principles covers instructions on a number of topics, including the elements of the crime, defenses, and the definitions of terms that have a legal meaning that differ from their common meaning. Thus, for example, case law provides: "The trial court must instruct even without request on the general principles of law relevant to and governing the case. That obligation includes instructions on all of the elements of a charged offense." (People v. Cummings (1993) 4 Cal.4th 1223, 1311, citations omitted, accord People v. Iverson (1972) 26 Cal.App.3d 598, 604 ["At a minimum, it is the court's duty to ensure the jury is adequately instructed on the law governing all elements of the case ...."].) Also, because due process protects the accused against conviction except upon proof beyond a reasonable doubt of every element of the crime, any instruction that circumvents the requirement that the state prove every element beyond a reasonable doubt would be a denial of due process. (People v. Runnion (1994) 30 Cal.App.4th 852, 855-856; *accord* People v. Mil (2012) 53 Cal. 4th 400, 419 ["omission of the element concerning defendant's state of mind was prejudicial']].)

A court must instruct sua sponte on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present. (People v. Barton (1995) 12 Cal.4th 186, 194-195.) This duty is part of a broader duty of the trial court to instruct sua sponte on the general principles of law relevant to the issues raised by the evidence, i.e., those principles of law closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (People v. Breverman (1998) 19 Cal.4th 142, 154.) The duty to instruct sua sponte on a lesser included offense also is based on the broader interests in avoiding having the jury face unwarranted all-or-nothing choices, in encouraging verdicts that are no more harsh or lenient than the evidence merits, and in protecting the jury's truth-ascertaining function. (Id. at p. 155.) In light of these policies, not only every lesser included offense, but also every theory of a single lesser included offense which is supported by the evidence, must be presented to the jury. (Ibid.) Accordingly, "a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (Id. at p. 162; see also p.

160, stating that California law "requires sua sponte instruction on any and all lesser included offenses, or theories thereof, which are supported by the evidence." Italics omitted.) As the Supreme Court has stated, "the duty to instruct sua sponte on lesser included offenses is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence. This obligation exists even when the defendant does not request the instruction or objects to its being given." (People v. Lee (1999) 20 Cal.4th 47, 61.)

A court also must instruct sua sponte on a defense. This duty arises when "'it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (People v. Barton (1995) 12 Cal.4th 186, 195, quoting People v. Sedeno (1974) 10 Cal.3d 703, 716.)[5] This test "is disjunctive, not conjunctive." (People v. May (1989) 213 Cal.App.3d 118, 125.) Where, however, the defense expressly requests an instruction on the defense, the court asks only whether substantial evidence supports the instruction. (People v. Mentch (2008) 45 Cal.4th 274, 288.) The distinction between the duties to instruct on a defense sua sponte and on request is that when the defendant requests the instruction, the court must give it if there is substantial evidence supporting it, even if the defense is inconsistent with the defendant's theory of the case. (People v. Villanueva (2008) 169 Cal.App.4th 41, 49; People v. Elize (1999) 71 Cal.App.4th 605, 610, 615-616; People v. Smith (1986) 187 Cal.App.3d 666, 678, fn. 6, overruled on other grounds in People v. Bacigalupo (1991) 1 Cal.4th 103, 126, fn. 4.)

3. In Evaluating Proffered Instructions, a Court Must View the Supporting Evidence in a Light Most Favorable to the Party Requesting the Instruction.

This rule is determinative. For the purposes of deciding whether the instructions proffered by defense counsel should have been given, "[d]oubts as to the sufficiency of the

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5. It has been held that the first prong of the above-quoted test has been modified to the extent it suggests that there is a duty to instruct sua sponte on a defense simply because it appears the defendant is relying on it. (People v. Shelmire (2005) 130 Cal.App.4th 1044, 1058.) Shelmire holds that in addition to such reliance by the defendant, the record also must contain substantial evidence supporting the defense. (Id. at pp. 1058-1059.)

evidence to warrant instructions should be resolved in favor of the accused." (People v. Wilson (1967) 66 Cal.2d 749, 763; People v. Ramirez (1990) 50 Cal.3d 1158, 1180; People v. Flannel (1979) 25 Cal.3d 668, 684 ["trial court should not... measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task exclusively relegated to the jury"].)

As stated in People v. King (1978) 22 Cal. 3d 12, 15-16:

> Because the right to instructions on self-defense is the central issue in this appeal,[n2] our recital of the evidence introduced at trial is necessarily one emphasizing matters which would justify such instructions, rather than the customary summary of evidence supporting the judgment. (See, e.g., People v. Holt (1944) 25 Cal.2d 59, 62 [153 P.2d 21]; People v. Jackson (1965) 233 Cal.App.2d 639, 640 [43 Cal.Rptr. 817].)

The appellate court thus focuses on the evidence that would justify the giving of instructions favorable to the defense. (People v. Mathews (1994) 25 Cal.App.4th 89, 94, n. 1; accord, People v. Mentch (2008) 45 Cal.4th 274, 290 (2008) [the trial court must determine "whether the evidence presented, considered in the light most favorable to the defendant, could establish [the] affirmative defense [in issue]...."]; People v. Turk (2008)164 Cal.App.4th 1361, 1368, n. 5.) The United States Supreme Court also views the evidence in the light most favorable to the defendant when reviewing instructional errors. (United States v. Bailey (1980) 444 U.S. 394, 398.)

The defendant must "proffer[] evidence enough to deserve consideration by the jury, i.e., evidence from which a jury composed of reasonable men could have [reached a conclusion favorable to the defendant]." (People v. Flannel (1979) 25 Cal.3d 668, 684.) This rule applies in the context of lesser included offenses and requires an instruction on the lesser included offense "so long as the record contain[s] substantial evidence *from which a jury could reasonably conclude* that defendant was not guilty of [the greater offense] but only of [the lesser offense]." (People v. Barton (1995) 12 Cal.4th 186, 201; emphasis added.)

4. Court Must Instruct on Supported Defense Theories.

The court has "an affirmative duty to give, *sua sponte,* a correctly phrased instruction on defendant's theory." (People v. Stewart (1976) 16 Cal.3d 133, 140). This includes an

"obligation to instruct on defenses...and on the relationship of these defenses to the elements of the charged offense.... [Citations]." (Ibid.) If the court has such a *sua sponte* duty, its duty should be even greater (or at least more obvious) when the instructions are requested. *E.g.,* People v. Elize (1999) 71 Cal.App.4th 605, 616 (reversing because "[t]he trial court should have allowed the jury to determine the self-defense issue by instructing upon it when requested.")

A related concept in this area is the "Sears" (People v. Sears (1970) 2 Cal.3d 180) instruction. In Sears, the court held that a defendant has a right to instructions which direct the jury's attention to evidence which might engender a reasonable doubt, and to instructions which "[relate] particular facts to any legal issue." (Id. at 190.) A "[Sears] instruction may, in appropriate circumstances, relate the reasonable doubt standard for proof of guilt to particular elements of the crime charged [citation] or may 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi." (People v. Rincon-Pineda (1975) 14 Cal.3d 864, 885.) "What is pinpointed is not specific evidence as such, but the theory of the defendant's case. It is the specific evidence on which the theory of defense 'focuses' which is related to reasonable doubt." (People v. Adrian (1982) 135 Cal.App.3d 335, 338.)

5. The Test for Giving Requested Instructions.

A *requested* instruction must be given if the accused presents evidence sufficient to "deserve consideration by the jury, *i.e.,* evidence from which a jury composed of reasonable men could have concluded" the particular facts underlying the instruction existed. (People v. Flannel (1979) 25 Cal.3d 668, 684.) Note that People v. Sedeno, *supra* "expressly states that when evidence supports a defense and the defendant 'relies' on that defense and requests an instruction on it, the instruction should be given." (People v. Elize (1999) 71 Cal. App. 4th 605, 614.) And in making this assessment, the court must view the evidence in a light most favorable to the instruction. (*See* Rule 2 above.)

6. A Defendant Need Not Testify to Be Entitled to Instructions.

The test is not whether the defendant testifies, but whether the record shows substantial evidence to support the requested instruction. For example, "[t]he element of

intent is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence." (People v. Kuykendall (1955) 134 Cal.App.2d 642, 645; *see also* People v. Anderson (1983) 144 Cal.App.3d 55, 62 ["It is elementary that a defendant's state of mind is most often shown through circumstantial evidence which often prevails over the direct testimony of the defendant to the contrary"].) If the circumstantial evidence supports the instruction, the fact that the defendant did not testify is irrelevant. Thus the testimony of the victim can constitute substantial evidence supporting a defense. (People v. Castillo (1987) 193 Cal.App.3d 119, 126; see also People v. DeLeon (1992) 10 Cal.App.4th 815, 824 ["Substantial evidence of the defendant's state of mind, including an 'honest but unreasonable belief in the necessity to defend against imminent peril to life', may be present without defendant testimony."][citations and italics omitted]; People v. Anderson supra, 144 Cal.App.3d at 61-62 [the defendant need not testify for there to be substantial evidence supporting the defense]; People v. Brooks (1986) 185 Cal.App.3d 687, 696 [defense theory can be based on evidence presented by either the prosecution or the defense].)

What if the defendant testifies? "Even if it does not inspire confidence, a defendant's testimony constitutes substantial evidence." (People v. Mejia-Lenares (2006) 135 Cal.App.4th 1437, 1446.)

7. Proffered Instructions Can Be Inconsistent: a Defendant Is Entitled to Inconsistent Defenses.

A trial court has a duty to instruct *sua sponte* on particular defenses "if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Barton (1995) 12 Cal.4th 186, 195.) Under Barton, the court has a duty to give the requested instructions on defenses because the defendant explicitly relies on them. But "[i]nconsistent defenses are normally permitted in criminal as well as civil cases; *e.g.,* not guilty and insanity; denial of act and self-defense. [Citations.]." (People v. Atchison (1978) 22 Cal.3d 181, 183 [quoting 1 Witkin, Cal. Crimes, § 177, subd. (1).])

8. Theory of Defense Instructions Are Required to be Given as a Constitutional Mandate.[6]

The right to present witnesses in support of the defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (Tyson v. Trigg (7th Cir. 1995) 50 F.3d 436, 448.) Based on the United States Constitution, a "trial court has a duty to instruct on all applicable principles of law, including defenses." (People v. Woodward (2004) 116 Cal.App.4th 821, 834.) Whether the issue is considered as part of the right to present a defense, the right to pursue a defense theory of the case, or to better inform the jury of the elements of the charge, the issue is of federal constitutional magnitude. (*See* Beardslee v. Woodford (9th Cir. 2003) 358 F.3d 560, 577 ["Failure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable"]; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [federal constitutional error for failure to instruct on the entrapment defense]; Davis v. Strick (2d Cir. 2001) 270 F.3d. 111, 123 [under New York homicide law, a defendant is entitled to have the jury instructed on justification and withholding of the instructions denies the opportunity to present his defense and constitutes a denial of 14th Amendment due process]; Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-740 [federal constitutional error to fail to instruct, with respect to a count charging kidnapping for robbery, on the lesser included offense of simple kidnaping, as the defense was lack of intent to rob]; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867, 875-76 [instructional error on the state law of justification is of constitutional dimension]; U.S. v. Douglas (7th Cir. 1987) 818 F.2d 1317, 1321 ["failure to include an instruction on the defendant's theory of the case [that he was a mere purchaser of drugs and not a conspirator] ... would deny the defendant a fair trial. (Citation.)]"; U.S. v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1201 [giving instructions on the defense theory is basic to a fair trial].)

An interesting issue in the context of a defense instruction being federal constitutional

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6 In other words, federalize the issue.

error arises in the context of lesser included offenses. The California Supreme Court has held that there is no federal constitutional right to an instruction on an lesser included offense. (People v. Breverman (1998) 19 Cal.4th 142, 165 ["the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility."].) The United States Supreme Court has held that the failure to instruct on a lesser included offense in the noncapital context is not federal constitutional error. (See, e.g., Beck v. Alabama (1980) 447 U.S. 625, 637 ["we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process."].) But what if the defense is: "I committed a crime, but it was a lesser included offense of the charged crime." Does this fall under the rule that failure to instruct on a defense is federal constitutional error, or under the rule that failure to instruct on a lesser included offense is not federal constitutional error?

There is case law holding that the trial court must give "adequate instructions on the defense theory of the case." (Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739.) Conde makes clear that the failure to instruct on a lesser included offense constitutes federal constitutional error when one of the defense theories is that the defendant is guilty of a lesser included offense of a charged crime, rather than being not guilty of any crime.[7]

In Conde, the defendant was convicted in a California state court of kidnapping for the purpose of robbery, residential burglary and commercial burglary. In the Ninth Circuit, he challenged only the conviction of kidnapping for the purpose of robbery. (Conde v. Henry, *supra*, 198 F.3d at 737.) At trial, he advanced two theories of defense: (1) the victim misidentified him as the abductor, and (2) the prosecution failed to prove kidnapping for robbery because it could not show he intended to rob the victim. (*Ibid.*) The Ninth Circuit found three separate errors. One was that the trial court erred when it denied the defendant's

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7. It is important to note that for more than a century, California law has recognized that a defense can consist of circumstances that mitigate and reduce a homicide from murder to manslaughter, not just circumstances that justify or excuse the act. (*See, e.g.,* People v. Bushton (1889) 80 Cal. 160, 164-165.)

request for an instruction on simple kidnapping as a lesser included offense of kidnapping for robbery, which undermined the second theory of defense. (*Id*. at 739-740.) As to this error, the district court ruled that even if such an instruction should have been given, it did not amount to a constitutional violation. The Ninth Circuit disagreed, holding that it was constitutional error to deny the defendant's request for an instruction on simple kidnapping. (*Id*. at 740.)

9. Harmless Error in the Context of Denial of a Defendant's Federal Constitutional Rights Due to Failure to Instruct upon a Defendant's Theory of the Case Supported by Substantial Evidence.

The right to present a defense is guaranteed by the Sixth Amendment right to trial by jury, the Fourteenth Amendment right to due process of law, and state constitutional due process and jury trial protections. (Cal. Const., art. I, section 7, and 15). Take the example of a court failing to instruct on the required element. Obviously, this is constitutional error. (Neder v. United States (1999) 527 U.S. 1, 19: "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.") Neder stated the appropriate review standard when the element of the offense is missing from the jury instructions:

> Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflect a denigration of the constitutional rights involved." Rose [infra] 478 U.S. at 577.

(Id. at 19-20.) Thus, where the defendant contests the omitted element and introduced evidence sufficient to support a contrary finding, the constitutional error cannot not be deemed harmless. Neder holds, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless." (Id., at 19.)

Too often, appellate courts divert from Neder's two-pronged approach: *1.* was the issue contested, and *2.* was there evidence a rational jury could have used to reject the

element. Instead, they misapply or fail to apply Neder at all. They do this by taking on the role of a trial jury in assessing the facts of the case to hold harmless errors by finding "overwhelming evidence." This is the danger Justice Scalia, joined by Justices Souter and Ginsburg, dissenting in Neder, predicted, that is, that the remedy for the constitutional violation by the trial court is now a repetition of the same violation by judges sitting on the appellate court. (527 U.S. at 30-40.) *See* Justice Steven's Neder concurrence stating that harmless error doctrine "may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot constitutionally supplement those findings." (Neder, *supra* at 27.) Neder cannot be allowed to morph the standard of review of this issue into a broad talisman for appellate courts to affirm convictions based on appellate redeterminations of evidentiary weight. (*See* Davis, 25 T. Marshall L. Rev. 45, 77, "Harmless Error in Federal Criminal and Habeas Jurisprudence: the Beast That Swallowed the Constitution" ["reviewing judges may be tempted merely to affirm the action below by relying on their feeling that, having considered the whole record, the end result below was probably justified, and any errors in the process of reaching the end result therefore must have been harmless"].)

10. Failure To Give an Lesser Included Offense Instruction Can Be Reversible.

Although a reasonable inference of guilt will support sustaining a conviction against an insufficiency of evidence contention even if there are alternative and opposite inferences that could be drawn from the evidence, that is not the review standard for instructing on a lesser included offense (or, for that matter, defense instructional error). In People v. Breverman (1998) 19 Cal.4th 142, 178, on the prejudice assessment for denying an instruction on the lesser included offense of voluntary manslaughter in a case charging the defendant with murder, the court said:

> Application of the Watson standard of appellate review may disclose that, though error occurred, it was harmless. [n25]
>
> - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -
>
> [n25] On the other hand, we disagree with Justice Mosk's assertion that if the defendant was convicted of the charged offense on substantial evidence, any error in failing to instruct on a lesser included offense must be harmless per se. Justice Mosk's premise is that such error affects only the lesser offense of

which the defendant was not convicted. *But the very purpose of the rule is to allow the jurors to convict of either the greater or the lesser offense where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, "after an examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice. Depending on the circumstances of an individual case, such an examination may reveal a reasonable probability that the error affected the outcome in this way.* (Italics added.)

Accord People v. Lee (1999) 20 Cal.4th 47, 62-63 (error in not giving involuntary manslaughter instructions held harmless where other involuntary manslaughter instructions were given and: "It is not likely that had it been properly instructed the jury would have returned an involuntary manslaughter verdict".)

In People v. Ramirez (2010) 189 Cal.App.4th 1483, the trial court erred prejudicially by failing to instruct the jury on voluntary manslaughter based on a heat of passion theory that defendant shot victim after the latter provoked him by punching him. Even in the absence of request, trial court must instruct on general principles of law relevant to issues raised by the evidence. This obligation includes giving lesser included offenses instructions. Voluntary manslaughter based on "sudden quarrel or heat of passion" is lesser and necessarily included offense of intentional murder. (People v. Breverman (1998) 19 Cal.4th 142, 153-155.)

11. Evolving Application of People v. Sedeno (1973) 10 Cal.3d 703.

In Sedeno, the defendant was convicted of murdering a police officer who was attempting to apprehend him. The defendant testified that the officer's gun, which he grabbed in a struggle, went off by accident and that he did not intend to shoot him. On appeal, he argued inter alia that the trial court should have instructed sua sponte on imperfect self-defense and heat of passion manslaughter. In holding there was no sua sponte duty to instruct on such defenses, the Court relied on the state of the evidence and particularly the defendant's testimony that the shooting was an accident. (Id. at 717-718.) "Since there was no evidence that defendant believed he was acting in self-defense, there was likewise no

basis for an instruction on the effect of an unreasonable belief that deadly force was necessary in defense of self." (Id. at 718.)

Sedeno also holds (in one of its many rulings) that an error in failing to instruct the jury on a lesser included offense (or a defense) is harmless *when the jury necessarily decided the factual questions posed by the omitted instructions adversely* to defendant. (Id. at 721.) As it is now phrased:

> In determining whether instructional error was harmless, relevant inquiries are whether "the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions" [citation] and whether the "defendant effectively conceded the issue." [citation.] A reviewing court considers "the specific language challenged, the instructions as a whole[,] the jury's findings" [citation], and counsel's closing arguments to determine whether the instructional error "would have misled a reasonable jury...."

(People v. Eid (2010) 187 Cal.App.4th 859, 883.)[8]

In People v. Stewart (1976) 16 Cal.3d 133, a defendant's conviction on nine counts of grand theft was reversed because the failure to give a good faith instruction "might well have led the jury to conclude that the existence of defendant's subjective belief was irrelevant." (Id. at 142.) As to the harmless error analysis, the court stated:

> [T]he People urge that even if the court erred in failing adequately to instruct the jury on defendant's theory, such error was not prejudicial since, under the instructions given which defined embezzlement and the requisite intent, the jury must necessarily have determined the issue of intent against the defendant. We must reject the argument. ". . . [A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence, . . ." (People v. Sedeno, supra, 10 Cal.3d, at p. 720.) An erroneous failure to instruct on an affirmative defense relied upon by the defendant constitutes a denial of this right which "is in itself a miscarriage of justice...."

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8 Eid was a kidnapping for ransom case reversed because the instructions were incomplete in failing to inform the jury of the People's burden to prove that the victim did not consent to being confined (or another predicate act) and that the defendant did not actually and reasonably believe the victim consented.

> (People v. St. Martin, supra, 1 Cal.3d 524, 532; and see People v. Oehler (1970) 7 Cal.App.3d 685, 688-689 [86 Cal.Rptr. 703], in which a conviction was reversed for failure to instruct on the defense theory in an embezzlement prosecution.) ". . . *[Such] error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would . . ." not have convicted the defendant*. (People v. Sedeno, supra, at p. 720 [Italics added.])
>
> It is true that a failure to instruct where there is a duty to do so can be cured *if it is shown that "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant* under other, properly given instructions." (People v. Sedeno, *supra*, 10 Cal.3d, at p. 721[Italics added].) In the instant case, under the general instructions defining fraudulent intent, we conclude the jury did not necessarily find that defendant lacked a good faith belief that he was acting in a manner authorized by his employer.

(Id. at pp. 141-142, italics added.)

The test in Sedeno does not apply as broadly as it once did. Originally, Sedeno applied to failure to instruct on a lesser included offense. (People v. Sedeno, supra, 10 Cal.3d at 719-721.) People v. Breverman (1998) 19 Cal.4th 142, 164-179, held that the failure to instruct on a lesser included offense is an error of state law subject to the Watson "reasonable probability of a more favorable result" standard for determining prejudice. Stewart, however, is a case involving an error in instructing on a defense, rather than an error in instructing on a lesser included offense. As noted above, the failure to instruct on a defense is federal constitutional error. (Harris v. Alexander (2d Cir. 2008) 548 F.3d 200, 203-206; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1098-1099; Davis v. Strack (2d Cir. 2001) 270 F.3d 111, 131-132; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867, 874-876.)

Although this entitles a defendant to application of the Chapman standard, the Sedeno standard actually is more favorable to a defendant. It applies when the failure to instruct on a defense that is supported by substantial evidence requires reversal unless the factual issue posed by the omitted instruction *necessarily* (as opposed to possibly or probably) was decided adversely to the defendant under other, properly given, instructions. (People v.

Stewart (1976) 16 Cal.3d 133, 141; People v. Mayberry (1975) 15 Cal.3d 143, 157-158; People v. May (1989) 213 Cal.App.3d 118, 128; People v. Lucero (1988) 203 Cal.App.3d 1011, 1018-1019; People v. Lemus (1988) 203 Cal.App.3d 470, 478-480; People v. Rivera (1984) 157 Cal.App.3d 736, 743; People v. Anderson (1983) 144 Cal.App.3d 55, 62-63.) It is rare for the other instructions to cover the factual issue central to the defense.

More importantly, although the California Supreme Court held in Breverman that Sedeno does not apply to the failure to instruct on a lesser included offense, it has not held that Sedeno does not apply to the failure to instruct on a defense. Accordingly, under binding California Supreme Court case law, such as Stewart and Mayberry, the test in Sedeno applies to the failure to instruct on a defense.

B. SPECIFIC RULES AND CASE NUGGETS

1. Fox News Rule: Instructions Must Be Fair and Balanced

People v. Moore (1954) 43 Cal.2d 517, 526-27 (reversing where refusal to give defense requested instructions on self-defense resulted in rules of law being stated exclusively from the viewpoint of the prosecution.) Thus, telling a jury to use as evidence against a defendant the fact that his attorney was late in producing reciprocal discovery can be reversible error. (People v. Cabral (2004) 121 Cal. App. 4th 748; People v. Bell (2004) 118 Cal.App.4th 249.)

2. Instructions Must Be Accurate

People v. Lucero, 44 Cal. 3d 1006, 1020-1021 (1988); Kelly v. South Carolina (2002) 534 US 246 ["A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part"].) "[W]hen a trial court does undertake to give a limiting instruction specifically calling attention to the significance of the substantially prejudicial evidence of prior bad acts, it should do so accurately." (People v. Nottingham (1985) 172 Cal.App.3d 484, 497.)

3. Requesting Pinpoint Instructions

In People v. Cash (2002) 28 Cal.4th 703, 740, Balestri testified that at a 1998 hearing defendant made a gesture with his hand formed like a gun pointed at her and mouthed "pow, pow." The trial court gave the following instruction pertaining to Balestri's testimony: "If you find that defendant attempted to suppress evidence against him in any manner, such as by intimidation of a witness, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt.... The intimidation referred to is the defendant's alleged gesture of simulating a gun with his hand which was made at a court proceeding." On appeal, the defendant contended the trial court's specific reference to defendant's alleged gesture made the instruction improperly argumentative. In People v. Johnson (1992) 3 Cal.4th 1183, the court upheld a similar reference by the trial court to the conduct of the defendant. Adding specific facts to your pinpoint instruction does not make it unduly argumentative.

The prosecution does not have a right to an instruction pinpointing the defense theory over the objections of the defense, or favoring the prosecution. (People v. Hunter (2011) 202 Cal.App.4th 261, 275.)

4. Using CALJIC Is Not Error.

In People v. Thomas (2007) 150 Cal.App.4th 461, 465-467, the court used CALJIC instructions at time when (former) California Rules of Court, rule 855(e) (now Rule 2.1050) provided that use of CALCRIM was "strongly encouraged." The Court of Appeal held that using CALJIC instructions instead of CALCRIM instructions was not error, even though the organization and wording of the CALCRIM instruction was superior to the CALJIC instructions, especially since neither side suggested use of CALCRIM. The court noted that the CALJIC instructions were legally valid and concluded that even if there was error, it was not structural.

5. But Caveat Using Lousy CALCRIMS

CALCRIM 1191, regarding other crimes evidence, begins with the court instructing the jury that the prosecution presented evidence appellant had committed the crime: "The

People presented evidence that the defendant committed the crime ____________ that was not charged in this case." Telling the jury the prosecution presented evidence the defendant *committed* a crime is obviously wrong and is akin to stating that an element of the offense has been proven. (*E.g.,* McCullough v. Commission on Judicial Performance (1989) 49 Cal.3d 186, 192 ["attempting to direct a jury to return a guilty verdict in a criminal action was beyond his judicial authority"].)

Although the offending instruction later states the evidence of the crime could be considered only if proved by a preponderance of evidence, it nevertheless begins with its bold assertion that the prosecution presented evidence appellant committed the crime. This type of language has been criticized. (*See* People v. Haslouer (1978) 79 Cal.App.3d 818, 831 n.5 ["the editors of CALJIC would be well-advised to reexamine instructions such as CALJIC Nos. 10.35, 10.12 and 10.54 each of which have the introductory phrase to the effect that evidence was received that the defendant had 'engaged' in some kind of misbehavior. In the meantime, judges faced with this situation could well avoid an issue on appeal by simply inserting the word 'alleged' when appropriate"].)

6. Neither CALCRIM/CALJIC Are Law

People v. Morales (2001) 25 Cal.4th 34, 48, fn. 7: "Though we cite CALJIC No. 12.00 for reference purposes, we caution that jury instructions, whether published or not, *are not themselves the law,* and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate, as the quoted portion was here, they restate the law."

Simply stated, the pattern instruction are not the law. (People v. Alvarez (1996) 14 Cal.4th 155, 217.) CALJIC instructions "are not sacrosanct." (People v. Vargas (1988) 204 Cal.App.3d 1455, 1464.)

7. *Caveat* Using Case Law for Instructions

> Indeed, this case illustrates the danger of assuming that a correct statement of substantive law will provide a sound basis for charging the jury. (See People v. Smith (1989) 214 Cal.App.3d 904, 912-913 [263 Cal.Rptr. 155]; People v.

> Adams (1987) 196 Cal.App.3d 201, 204-205 [241 Cal.Rptr. 684]; see also People v. Gibson (1965) 235 Cal.App.2d 667, 669 [45 Cal.Rptr. 382].) The discussion in an appellate decision is directed to the issue presented. The reviewing court generally does not contemplate a subsequent transmutation of its words into jury instructions and hence does not choose them with that end in mind. We therefore strongly caution that when evaluating special instructions, trial courts carefully consider whether such derivative application is consistent with their original usage. As the court in Burres, *supra*, 101 Cal.App.3d at page 348 aptly observed, "Lathus did not involve an instruction of law . . . ." Since the jury had already resolved the evidence against the defendant, the analysis did not risk invading the province of the trier of fact.

(People v. Colantuono (1994) 7 Cal.4th 206, 222.)

8. Curative Instructions Don't Always Cure the Harm

"[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (Bruton v. U.S., (1968) 391 U.S. 123, 135.)

In People v. Navarette (2010) 181 Cal.App.4th 828, the trial court suppressed a statement of the defendant on Miranda grounds, and ordered the detective not to mention the statement. Of course, he immediately did so. The detective had bragged to prosecutors that he disagreed with the judge and was going to show the judge. To his credit, the prosecutor disclosed this. The judge, of course, gave an admonition to the jury and it proceeded quickly to a conviction. The court of appeal was not amused and in a good opinion on when and why curatives don't work, reversed the conviction.

There are numerous cases holding that curative or limiting instructions were not effective in curing harm. As the Fifth Circuit once observed, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." (United States v. Garza (5th Cir. 1979) 608 F.2d 659, 666, internal quotation marks omitted.) "In other words, while we do presume the jury has endeavored to follow the court's instructions (citation), we cannot always assume that those instructions are sufficient to dispel the taint of prejudicial information. A limiting instruction warning jurors they should not think about the elephant in the room is not the

same thing as having no elephant in the room." (People v. Fritz (2007) 153 Cal.App.4th 949, 962. As Justice Jackson pointed out in Krulewitch v. United States (1949) 336 U.S. 440, 453 (conc. opn.): "The naive assumption that prejudicial effects can be overcome by instruction to the jury (citation), all practicing lawyers know to be unmitigated fiction." This assessment has received support from the most ambitious empirical study of jury behavior ever attempted. (Kalven & Zeisel, The American Jury (1966) at pp. 127-130, 177-180.)

Among the California cases holding that curative or limiting instructions were inefficacious are People v. Coleman (1985) 38 Cal.3d 65, 93; People v. Guerrero (1976) 16 Cal.3d 719, 730; People v. Antick (1975) 15 Cal.3d 79, 98; People v. Pitts (1990) 223 Cal.App.3d 606, 837; People v. Dellinger (1984) 163 Cal.App.3d 284, 299-300; People v. Bracamonte (1981) 119 Cal.App.3d 644, 650; People v. Gibson (1976) 56 Cal.App.3d 119, 130; People v. Roof (1963) 216 Cal.App.2d 222, 225-226; People v. Ozuna (1963) 213 Cal.App.2d 338, 342; People v. Carr (1958) 163 Cal.App.2d 568, 575-576; see also People v. Cook (1983) 33 Cal.3d 400, 410, fn. 9; People v. Disbrow (1976) 16 Cal.3d 101, 112.) Other jurisdictions also have recognized circumstances under which a limiting instruction does not obviate the prejudice inherent in the stricken evidence. (E.g., United States v. Bland (9th Cir. 1990) 908 F.2d 471, 473; Ex parte Sparks (Ala. 1998) 730 So.2d 113, 115-116; Smith v. State (Miss. 1986) 499 So.2d 750, 757.) As one of California's leading commentators on the law of evidence, Justice Bernard Jefferson, has observed: "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. . . . We live in a dream world if be believe that jurors are capable of hearing such prejudicial evidence and not applying it in an improper manner." (People v. Gibson, supra, 56 Cal.App.3d at p. 130.)

9. Bad Instructions Aren't Cured by Contrary General Instructions

Francis v. Franklin, 471 U.S. 307 (1985), supports application of this principle to jury instructions. There, the Supreme Court held that the use of a contrary general instruction does not automatically cure a deficient specific instruction. (Id. at 320.) Francis involved

conflicting instructions in a murder trial informing the jury both that once the state had proven the predicate facts that it had created a presumption of intent and that the presumption "may be rebutted." (Id. at 309.) In holding that the general instructions regarding the government's burden of proof did not cure the specific defects in the language that allowed the government to impermissibly shift the burden of proof to the defendant, the Court stated:

> "Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. *Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict*." (Id. at 322; emphasis added).

10. Misuse of Burdens and Presumptions Can Be Reversible Per Se

See Sullivan v. Louisiana (1993) 508 U.S. 275, 279-281 (an instructional error which misadvises the jury regarding the reasonable doubt standard compels reversal per se.) However, failing to instruct on the State's burden of proof can be harmless. (People v. Aranda (2012) 55 Cal.4th 342 [court failed to instruct that the defendant could only be convicted of the charged gang offense if the jury found it beyond a reasonable doubt. This is federal constitutional error, but not structural, and thus subject to a harmless error test].)

11. Clarification Instructions: Duty of Counsel to Request Them

"'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (People v. Hart (1999) 20 Cal.4th 546, 622; *see* People v. Guerra (2006) 37 Cal.4th 1067, 1134.) This rule does not apply if the court's instructions were incorrect. (People v. Hallock (1989) 208 Cal.App.3d 595, 610.)

12. Did Trial Counsel Invite the Error? If So, Was that IAC?

Generally, a trial court must instruct *sua sponte* on those general principles of law which are closely and openly connected with the facts that are necessary for a jury's understanding of the case. Defense counsel's assent to instructions does not preclude review

of a judicial error in giving them. (People v. Smith (1992) 9 Cal.App.4th 196, 207, fn. 20.) If any instruction was not the subject of a specific defense objection, the errors discussed may be reviewed under Penal Code §1259. (*E.g.,* People v. Rodriques (1994) 8 Cal.4th 1060, 1132 (issue addressed under §1259 because it involved a "substantial right" even though counsel told the trial court the instruction was inapplicable).)

"It is hard to imagine a case in which such an instructional error could have caused more damage." (Lankford v. Arave, 468 F.3d 578, 586 (9th Cir. 2006), reversal where counsel submitted erroneous instruction. People v. Asbury (1985) 173 Cal.App.3d 362, 365-366 ("The fact that counsel objected to the felony-murder instructions at all, however, refutes any inference that he was pursuing some tactical advantage by withholding the collateral estoppel argument".)

Unobjected to instructions may also reviewed as IAC under the Sixth Amendment right to the effective assistance of counsel. Trial counsel has a duty to request proper jury instructions. (*See* People v. Sedeno (1974) 10 Cal.3d 703, 717, n, 7, *overruled on other grounds* in People v. Breverman (1998) 19 Cal.4th 142; *see also* In re Cordero (1988) 46 Cal.3d 161, 189-91, J. Mosk, conc.; United States v. Span (9th Cir. 1996) 75 F.3d 1383 (failure to request instruction on available defense was IAC).) (People v. Rodriques (1994) 8 Cal.4th 1060, 1132 [issue addressed under PC §1259 because it involved a "substantial right"].) But counsel also has the constitutional duty to offer defense instructions. (U.S. v. Alferahin (9th Cir. 2006) 433 F.3d 1148; U.S. v. Span (9th Cir. 1996) 75 F.3d 1383; People v. Sedeno (1974) 10 Cal.3d 703, 717, n, 7, *overruled on other grounds* in People v. Breverman (1998) 19 Cal.4th 142; see In re Cordero (1988) 46 Cal.3d 161, 189-91 (J. Mosk, conc.)) When a defendant's objection to the expert's **testimony** at the outset of the trial is deemed inadequate, it is reviewable through IAC as counsel has a duty to object to inadmissible, prejudicial evidence. (People v. Sundlee (1977) 70 Cal.App.3d 477, 482.)

In U.S. v. Alferahin (9th Cir. 2006) 433 F.3d 1148, the defendant made an application for permanent resident status, but failed to disclose he had been previously married and had been convicted for knowingly procuring naturalization. He appealed arguing that the trial

court erred in failing to instruct on materiality, as there was contention regarding whether his previous marriage was a material fact. Alferahin also argued that his attorney's failure to obtain such a jury instruction was IAC. The Circuit found materiality to be an element of the crime of knowingly procuring naturalization contrary to law. Failure to instruct on this element was plain error and prejudicial because the government failed to introduce evidence showing the invalidity of Alferahin's second marriage. It also was IAC for counsel not seeking the jury instruction which would have provided a promising defense.

Note: there is no "invited error" by failing to object.

People v. Dunkle (2005) 36 Cal.4th 841: "Although defendant did not object to this preinstruction or request clarification, we do not deem forfeited any claim of instructional error affecting a defendant's substantial rights. (§ 1259; People v. Coffman and Marlow, supra, 34 Cal.4th at p. 104, fn. 34.)" Trial counsel found not to have invited error even though he joined in prosecutor's request for jury instruction later challenged on appeal. Trial counsel did not "intentionally cause the trial court to err" for "tactical reasons." (People v. Dunkle (2005) 36 Cal.4th 841, 924.)

In People v. Boyette (2004) 29 Cal.4th 381, 438, defense counsel joined the prosecutor in requesting CALJIC 2.03. The court held that this was not invited error because there was no tactical reason for defense counsel to want the jury given an instruction that allowed them to find consciousness of guilt based on a false pretrial statement.

For the doctrine of invited error to apply it must be clear from the record that defense counsel agreed to the instruction, or no instruction, and withdrew their own requested instruction, all for tactical reasons. (People v. Wickersham (1982) 32 Cal.3d 307, 332; People v. Hernandez (1988) 47 Cal.3d 315, 353 (counsel's argument indicated a tactical purpose for requesting the instruction).) "Error is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness. [Citation.]" (People v. Tapia (1994) 25 Cal.App.4th 984, 1031; *see* People v. Maurer (1995) 32 Cal.App.4th 1121, 1127.) When it would have made "no

sense" for defense counsel to agree to a particular instruction it is likely that counsel's request for the instruction was made out of ignorance or mistake. (People v. Maurer (1995) 32 Cal.App.4th 1121, 1128; see also People v. Stitely (2005) 35 Cal. 4th 514, 553 ("There also seems to be no plausible tactical reason why defendant would forgo the chance to escape a first degree murder conviction based on his reasonable belief in consent as to rape. (See People v. Whitt (1990) 51 Cal.3d 620, 641 [274 Cal. Rptr. 252, 798 P.2d 849].) Thus, we reject the claim of invited error.")

In summary, invited error ordinarily applies when defense counsel makes a conscious, deliberate, tactical choice either to forego or to request a particular instruction. (People v. Wader (1993) 5 Cal.4th 610, 657-658.) "Invited error, however, will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (People v. Valdez (2004) 32 Cal.4th 73, 115.) Invited error will not be found when defense counsel acts out of ignorance or mistake, rather than for a tactical reason. (People v. Wickersham (1982) 32 Cal.3d 307, 330; People v. Maurer (1995) 32 Cal.App.4th 1121, 1127.) Defense counsel's mere acquiescence is not invited error when the records shows no tactical reason for such acquiescence. (People v. Moon (2005) 37 Cal.4th 1, 28; see also People v. Jones (1997) 58 Cal.App.4th 693, 708 [error is not invited when the trial court suggested the giving of an instruction and defense counsel replied: "I don't have any problem with it either way."].)

13. LIO's and the Statute of Limitations

Cowan v. Superior Court (1996) 14 Cal.4th 367, ruled a defendant has a right to plead guilty to a time-barred LIO. People v. Stanfill (1999) 76 Cal.App.4th 1137, then established the defendant has the right to an instruction on a time-barred LIO if it is specifically requested. However, People v. Williams (1999) 21 Cal.4th 335, reestablished the rule that, absent a defendant's clear acquiescence to proceeding on a time-barred offense in the trial court, a statute of limitations issue could be raised for the first time on appeal. (Id. at p. 338.)

14. Giving New Instructions after Final Argument

Where the court on its own motion recalls the jury and instructs it that, although the case was conducted on the theory of burglary, the defendant can be found guilty of grand larceny, there is a reversible error. (People v. Garnett (1866) 29 Cal. 622.)

It was a dangerous interference with right of defendant to fair trial for the court, after having learned of necessity of new instructions to instruct jury for first time that they might find defendant guilty of *attempt to commit offense and* give them new form of verdict to that effect. (People v. Stouter (1904) 142 Cal 146.)

15. Saying "Submitted"

For those instructions for which you don't have an objection, simply saying "submitted" is best when the court asks for the defense position. This avoids waiver arguments if the appellate attorney finds something to argue about on appeal. If the judge says at the beginning of an instruction conference, "if I hear no objection, then I'll take it as agreement to the instruction," don't accept that. Reply: "No judge, my silence means I submit on those instructions." (*See, e.g.,* In re Richard K. (1994) 25 Cal.App.4th 580, 589 [submitted means one "acquiesces as to the state of the evidence yet preserves the right to challenge it as insufficient to support a particular legal conclusion"].)

16. Jury Instructions Taken as a Whole

"The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (People v. Burgener (1986) 41 Cal.3d 505, 538, disapproved on another point in People v. Reyes (1998) 19 Cal.4th 743, 750-754, 756; People v. Holt (1997) 15 Cal.4th 619, 677 [instructions are not considered in isolation].)

17. But One Instruction May Undermine Another the Defense Relies On

> Defendant is correct to the extent he claims the court erred in giving these instructions together in this case. CALCRIM No. 362 allowed the jury to infer defendant's consciousness of guilt if the jury found that defendant made false or misleading statements about the crime, knowing the statements were false

> or intending to mislead. CALCRIM No. 3426, however, prohibited the jury from considering that those false or misleading statements were made without knowledge they were false or misleading because defendant was intoxicated at the time he made those statements. This is because CALCRIM No. 3426 prohibited the jury from considering defendant's voluntary intoxication for any purpose other than to decide whether he had the knowledge the victim was unconscious of the oral copulation at the time it occurred.

(People v. Wiidanen (2011) 201 Cal.App.4th 526, 533.)

18. Attorney Arguments Do Not Negate Instructional Error

"But arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-489 (1978).

Instructions carry more weight than do the arguments of counsel. (Boyde v. California (1990) 494 U.S. 370; United States v. Duncan (6th Cir. 1988) 850 F.2d 1104, 1118.) In Boyde, the Court said: ". . . arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence . . . and likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." (Id., at p. 384.) The same rule applies in California courts. (People v. Payton (1992) 3 Cal.4th 1050, 1070.)

As stated in People v. Brown (1988) 45 Cal.3d 1247, 1256:

> [W]hen the issue is not whether erroneous instructions have been cured by argument, but whether the interplay of argument with individually proper instructions produced a distorted meaning, it seems appropriate to evaluate the remarks of both counsel to determine whether the jury received adequate information.

"[I]nstruction by the trial court would weigh more than a thousand words from the most eloquent defense counsel." (People v. Mathews (1994) 25 Cal.App.4th 89, 99.) At any rate, "[t]he argument of counsel could not render the [instructional] error harmless." (United States v. Heyman (4th Cir.1977) 562 F.2d 316, 318.)

> The other trial instructions and arguments of counsel that the petitioner's jurors heard at the trial of this case were no substitute for the explicit instruction that the petitioner's lawyer requested. Although the jury was

> instructed that "[the] law presumes a defendant to be innocent," it may be doubted that this instruction contributed in a significant way to the jurors' proper understanding of the petitioner's failure to testify. Without question, the Fifth Amendment privilege and the presumption of innocence are closely aligned. But these principles serve different functions, and we cannot say that the jury would not have derived "significant additional guidance," Taylor v. Kentucky, 436 U.S. 478, 484, from the instruction requested. See United States v. Bain, 596 F.2d 120 (CA5); United States v. English, 409 F.2d 200, 201 (CA3). And most certainly, defense counsel's own argument that the petitioner "doesn't have to take the stand . . . [and] doesn't have to do anything" cannot have had the purging effect that an instruction from the judge would have had. "[Arguments] of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, supra, at 489.

Carter v. Ky., 450 U.S. 288, 304 (1981).

When making this argument in response to the State's claim that counsels' argument filled the jury instructional void, note that although the jury was given copies of the defective instructions to take with them into deliberations, they were not given written copies of the supposed curative arguments by counsel.

19. Getting Around the Guilty Verdict to Show Prejudice: (People v. Stewart (1976) 16 Cal.3d 133, 141-142; see also page 16 *supra*)

> The court instructed the jury that: "In the crime of embezzlement, there must exist in the mind of the perpetrator the specific intent to fraudulently appropriate property to one's own use, and unless such intent so exists that crime is not committed." (CALJIC No. 3.31) [para.] "Theft known as embezzlement consists of the fraudulent appropriation of money or other property by a [*142] person to whom it has been entrusted. The law prescribes that every trustee, broker, agent, or other person entrusted with or having in his control property of another, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of theft by embezzlement." (CALJIC No. 14.07.)
>
> The jury in the course of its deliberations asked for an instruction further defining "fraudulent intent" and was given the following definition: "Fraud is defined as any act that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another, and an act is declared to be fraudulent that is characterized by fraud."
>
> We think a jury could have determined that defendant's act was fraudulent under the

above definitions and still have found that, nevertheless, he believed in good faith that his actions were legal. Furthermore, the trial court did instruct the jury that, "if the defendant was in fact authorized to borrow the subject monies for his own personal use, said authorization is a complete defense to the offenses charged." Giving this instruction, albeit correct in itself, without the reading of an appropriate instruction relating to defendant's subjective good faith belief as a defense, might well have led the jury to conclude that the existence of defendant's subjective belief was irrelevant, thereby compounding the already existing error.

The failure to give proper instructions necessary for the jury's consideration of the proffered defense constituted prejudicial error.

20. With Inelegantly Expressed Proffered Instructions, the Court must Correct or Tailor Them

People v. Fudge (1994) 7 Cal.4th 1075, 1110; *see also* People v. Falsetta (1999) 21 Cal. 4th 903, 924 ["trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"].)

21. Inconsistent Instructions: Cannot Tell if the Jury Relied on the Right One

"[I]f the jury regarded the two instructions as inconsistent, it cannot be assumed that the jury ignored the improper instruction and based its verdict solely on the correct one." (LeMons v. Regents (1978) 21 Cal.3d 869, 878; *see also* People v. Rhoden (1972) 6 Cal.3d 519, 526; People v. Salas (1976) 58 Cal.App.3d 460, 474 (When an instruction is specifically made applicable to one aspect of the charge and not to another, the inconsistency may be prejudicial error.)

22. Terms in Need of Instructional Definition

A trial court has a sua sponte duty to give amplifying or clarifying instructions when the terms used in an instruction have a technical meaning peculiar to the law, but not when the terms used in an instruction are commonly understood by those familiar with the English language. (People v. Richie (1994) 28 Cal.App.4th 1347, 1360.) Instructions providing definitions are required for technical terms words or phrases that may be beyond the jurors' knowledge and are dispositive on issues of culpability. The trial court has a *sua sponte* duty

to define terms which have a "technical meaning peculiar to the law." (People v. McElheny (1982) 137 Cal.App.3d 396, 403; People v. Hill (1983) 141 Cal.App. 661, 668.) The failure to define a technical term which is an essential element of the charge may be reviewed as reversible federal constitutional error because it precludes the jury from determining every material issue presented by the evidence. (*See* People v. Reynolds (1988) 205 Cal.App.3d 776, 779; People v. Black (1994) 23 Cal.App.4th 667, 670-672.)[9] The following are examples of terms the courts have required the trial courts to define for the jury in instructions:

1) "*accident*" (People v. Jimenez (1992) 11 Cal.App. 4th 1611, 1628);

2) "*aid*" *and* "*abet*" (People v. Ponce (1950) 96 Cal.App.2d 327, 331);

3) "*assault*"; "*assault with a deadly weapon*" (People v. Valenzuela (1985) 175 Cal.App. 3d 381, 393);

4) "*conspiracy*" (People v. Earnest (1975) 53 Cal.App.3d 734, 745);

5) "*efficient intervening cause*" (People v. Hebert (1964) 228 Cal.App.2d 514, 520-21);

6) "*opening or maintaining*" (People v. Shoals (1992) 8 Cal.App.4th 475, 489-91);

7) "*public place*" (People v. Belanger (1966) 243 Cal.App.2d 654, 657);

8) "*culpable negligence*" (People v. Thurmond (1985) 175 Cal.App.3d 865, 872-873);

9) "*traumatic condition*" (People v. Burns (1948) 88 Cal.App.2d 867, 874);

10) "*unconscious*" (People v. Clark (1993) 5 Cal.4th 950, 1020 (Supreme Court assumes without deciding that "unconscious" requires definition));

11) "*proximate causation*" (People v. Bland (2002) 28 Cal.4th 313, 335);

12) "*unlawful*" *killing in a second degree murder case* (People v. Lilliock (1968) 265

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9 Failure to define a legal term may mean the jury adopted the wrong meaning of the term. (*See* Buzgheia v. Leasco Sierra Grove (1997) 60 Cal.App.4th 374, 396 [reversing a judgment for instructional error even though the jury never asked questions about the instruction].)

Cal.App.2d 419, 428-429); *accord* Barouh v. Haberman (1994) 26 Cal.App.4th 40, 45);

13) "*mutual combat*" (People v. Ross (2007) 155 Cal.App.4th 1033, 1043);

14) "*force*" as used in Penal Code §288(b) has specialized meaning (People v. Pitmon (1985) 170 Cal.App.3d 38, 52, *overruled on other grounds* in People v. Soto (2011) 51 Cal.4th 229, 248 fn 12; *see* People v. Hudson (2006) 38 Cal.4th 1002, 1013 (citing Pitmon with approval).

15) "*under the influence*" as used in Health & Safety Code § 23125(a). (People v. Enriquez (1996) 42 Cal.App.4th 661, 665–666);

16) "*distinctively marked*" as used in Veh. Code §2800.1. (People v. Hudson (2006) 38 Cal.4th 1002, 1013.)

17) *"likely"* to engage in sexually violent criminal behavior (People v. Roberge (2003) 29 Cal.4th 979, 988);

18) *"official act"* for purposes of extortion and kidnapping for extortion (People v. Mayfield (1997) 14 Cal.4th 668, 773);

19) *"abandoned"* in the context of a parent who abandoned his or her child (People v. Ryan (1999) 76 Cal.App.4th 1304, 1319);

20) *"speeding"* (People v. Ellis (1999) 69 Cal.App.4th 1334, 1339);

21) *"dangerous fireworks"* (People v. Miller (1999) 69 Cal.App.4th 190, 207-208);

22) *"material"* in the context of perjury being the making of a false statement on a material matter (People v. Feinberg (1997) 51 Cal.App.4th 1566, 1575-1576);

23) *"privity"* (People v. Cortez (1994) 30 Cal.App.4th 143, 166);

24) *"viable"* in the context of murder of a viable fetus (People v. Smith (1987) 188 Cal.App.3d 1495, 1513-1514);

25) *"extortion"* in the context of kidnapping for extortion (People v. Hill (1983) 141

Cal.App.3d 661, 668).[10]

23. Instructions Must Be Given Orally and Not Just in Writing

Unless given orally, there is no assurance the jury read the written form of the instructions during deliberations. (*See* People v. Murillo (1996) 47 Cal.App.4th 1104, 1107 ("Because it is not possible to determine if the jurors actually read their written copy of CALJIC No. 2.21.2, we must assume they did not, and approach the case as though the instruction was not given at all.") "To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (People v. Wilson (2008) 44 Cal.4th 758, 803.)

24. Instructions During Deliberations: Answer the Question

People v. Thompkins (1987) 195 Cal.App.3d 244, 250 (jurors are "well meaning but temporary visitors in a foreign country attempting to comprehend a foreign language.... It is the trial judge's function to facilitate such an understanding by any available means.") "To perform their job properly and fairly, jurors must understand the legal principles they are

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10. Commonly understood phrases which a court need not amplify or clarify sua sponte include: (1) "recurring access" to a child (People v. Rodriguez (2002) 28 Cal.4th 543, 547); (2) "maturely and meaningfully reflected" (People v. Smithey (1999) 20 Cal.4th 936, 981); (3) "sexual intercourse" (People v. Holt (1997) 15 Cal.4th 619, 675-676); (4) "reckless indifference to human life" (People v. Estrada (1995) 11 Cal.4th 568, 577); (5) "fraud" and "specific intent to defraud" (People v. Hardy (1992) 2 Cal.4th 86, 153); (6) "perpetrate" (People v. Chavez (1951) 37 Cal.2d 656, 668); (7) "possession" (People v. Coryell (2003) 110 Cal.App.4th 1299, 1306); (8) "reward" (People v. Greenberger (1997) 58 Cal.App.4th 298, 367); (9) "residence" in the context of a statute requiring sex offenders to reregister when they change their residence address (People v. McCleod (1997) 55 Cal.App.4th 1205, 1209, 1216); (10) a "stranger" to the victim of a lewd act with a child (People v. Forbes (1996) 42 Cal.App.4th 599, 601, 605); (11) a "material" part of a witness's testimony (People v. Wade (1995) 39 Cal.App.4th 1487, 1495); (12) "willful" and "wanton" (People v. Richie, supra, 28 Cal.App.4th at pp. 1360-1361); (13) to "transport" and the "transportation" of narcotics (People v. Eastman (1993) 13 Cal.App.4th 668, 673-674); (14) "reasonable and good faith belief" in consent (People v. Trapps (1984) 158 Cal.App.3d 265, 268-269); (15) "impeach" (People v. Shannon (1956) 147 Cal.App.2d 300, 305); and (16) "solvent" and "insolvent" (People v. Roth (1934) 137 Cal.App. 592, 606).

charged with applying. It is the trial judge's function to facilitate such an understanding by any available means. The mere recitation of technically correct but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of facts. A jury's request for reinstruction or clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration. Why has the jury focused on this issue? Does it indicate the jurors by-and-large understand the applicable law or perhaps it suggests a source of confusion? If confusion is indicated, is it simply unfamiliarity with legal terms or is it more basically a misunderstanding of an important legal concept?" (Id. at 250.) In sum, "[i]t is hardly preferable for a judge to merely repeat for a jury the text of an instruction it has already indicated it doesn't understand." (Id. at 253.)

Also, "there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." (People v. Thompkins 195 Cal.App.3d at pp. 252-253.) (*See* People v. Loza (2012) 207 Cal.App.4th 332 (court erred and defense counsel provided ineffective assistance of counsel for not objecting to aid and abet instruction and jury questions); People v. Ross (2007) 155 Cal. App. 4th 1033, 1047 [The trial court erred by leaving the jury to suppose that "mutual combat" involved no particular legal requirement, but should be understood and applied in an ordinary, lay sense]; United States v. Southwell, 432 F.3d 1050, 1052-54 (9th Cir. 2005) [holding that a district court abused its discretion by providing the jury with a note that instructed the jury to refer to the jury instructions and return a unanimous verdict, but failed to include an additional clarifying instruction, when then jury inquired about a legitimate ambiguity in the original instructions].)

25. Nuggets of Wisdom From Bollenbach

> The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate

> court the jury's function of measuring the evidence by appropriate legal yardsticks.

Bollenbach v. United States, 326 U.S. 607, 613-614 (1946)

> When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be "quite cursory" in the circumstances in which the jury here asked for supplemental instruction. But he was not even "cursorily" accurate. He was simply wrong.

Bollenbach v. United States, 326 U.S. 607, 612-613 (1946)

> Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.

Bollenbach v. United States, 326 U.S. 607, 612 (1946)

Instructional error in response to a jury question is highly likely to be prejudicial and "[a] conviction ought not to rest on an equivocal direction to the jury on a basic issue...." Bollenbach v. U.S., 326 U.S. 607, 612 (1946). When a jury makes explicit its difficulties, "a trial judge should clear them away with concrete accuracy." (Id. at 612-613.)

26. More on Prejudice: Chun & the Two Theories of Guilt Instruction

In cases in which the jury is instructed on a legally proper theory and on a legally improper theory, reversal is required unless it is clear from the record that the jury based the verdict on the legally correct theory. (*E.g.*, People v. Smith (1984) 35 Cal.3d 798, 808 ["It was therefore error to give a felony-murder instruction in this case. The People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial."]; People v. Sanchez (2001) 86 Cal.App.4th 970 981 [despite overwhelming evidence showing the defendant was guilty of second degree murder, judgment reversed because there was no legitimate basis in the record for concluding that the verdict was based on the valid legal ground of implied malice rather than the invalid legal ground of felony murder]; People v. Smith (1998) 62 Cal.App.4th 1233, 1239 ["Since the prosecution argued three different theories to support a second degree murder conviction, including the erroneous theory of felony murder, and we cannot discern from the record which theory provided the basis for the jury's determination of guilt, the conviction cannot stand."].)

Under this test, a conviction would have to be reversed where there is nothing in the record indicating that the jury relied on the proper theory rather than the improper one. California law regarding the test for reversible error in this context changed. (People v. Chun (2009) 45 Cal.4th 1172.) Chun involves an error in instructing the jury on second degree felony murder based on an underlying felony that does not support the felony murder rule. (Id. at p. 1201.) Chun makes clear that this error involves an element of the offense and "requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (Ibid.) The Court noted that the Court of Appeal had reversed the conviction because the record did not show that the murder conviction was based on a valid legal theory. (Ibid.) This analysis and result are the same as those set forth in the cases in the previous paragraph.

The Supreme Court, however, used a different analysis. The Court began by noting that the jury had been instructed that murder can be based on express malice or on a death occurring during the commission of a dangerous felony, and also on implied malice. (People v. Chun, *supra,* 45 Cal.4th at p. 1202.) It held: "In this situation, to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory, *i.e.,* either express or conscious-disregard-for-life malice." (Id. at p. 1203.)

The Attorney General argued that the verdicts showed the jury did not base the murder verdict on the felony-murder rule and instead necessarily based it on a valid theory of murder. The Attorney General relied on the fact the jury acquitted the defendant of the underlying felony (shooting at an occupied vehicle), which had been separately charged. The Attorney General argued that a jury that based the verdict solely on felony murder would not acquit the defendant of the underlying felony. (People v. Chun, *supra,* 45 Cal.4th at p. 1203.) The defendant countered that the verdicts were internally inconsistent because there was no evidence showing that the murder occurred by any means other than shooting at an occupied vehicle. (Id. at p. 1203-1204.) The defendant posited the possibility that one or more jurors found him guilty of murder based on a felony-murder theory but then agreed to acquit him

of the underlying felony because of leniency, compromise, or confusion. (Id. at p. 1204.)

The Supreme Court found that the defendant's argument had "some force," concluding that the acquittal of the underlying felony strongly suggested the jury based its verdict on a valid theory of malice, but found that it did not establish this beyond a reasonable doubt. (People v. Chun, supra, 45 Cal.4th at p. 1204.)

Nevertheless, the Court found the error harmless for other reasons. These reasons were based on a concurring opinion by Justice Scalia in a case before the Supreme Court on *collateral review*, but which the California Supreme Court concluded is adaptable to the reasonable doubt standard on direct review. (Ibid.) The test is: ""The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." (Ibid., internal quotation mark and citation omitted.) The Court indicated that it was not holding that this was the only way to find such error harmless ("let me count the ways"), but it used only the test just quoted. (Id. at pp. 1204-1205.) When doing so, it re-stated the test as follows: " If other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless." (Id. at p. 1205.)

When stating that the Supreme Court's test for collateral review is applicable to direct review, the California Supreme Court failed to note that in cases on direct review involving the giving of instructions on a legally correct theory and a legally incorrect one, there is a long line of Supreme Court cases holding that reversal is required if it is not clear from the record that the jury based the verdict on the correct theory. This rule is the same as the pre-Chun rule in California dealing with such error, as described above. As the Supreme Court has stated: "With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." (Mills v. Maryland (1988) 486 U.S. 367, 376, citations omitted; accord Zant v. Stephens (1983) 462 U.S. 862,

881; Yates v. United States (1957) 354 U.S. 298, 312; Stromberg v. California (1931) 283 U.S. 359, 369-370. Chun thus appears to be inconsistent with Supreme Court precedent (state and U.S.), placing lower California courts in a *stare decisis* dilemma concerning which precedent to follow.

27. Application of Chapman to Failure to Instruct on an Element of an Offense

The failure to instruct on an element of an offense violates the federal constitutional right to due process. (People v. Runnion (1994) 30 Cal.App.4th 852, 855-856.) Federal constitutional error is subject to the harmless error test found in Chapman v. California (1966) 386 U.S. 18. An argument that the error was not harmless under Chapman might read like this:

Under Chapman the burden is on the People "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Chapman v. California, *supra*, 386 U.S. at p. 24.) "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (Yates v. Evatt (1991) 501 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432].) The inquiry under Chapman "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." (Sullivan v. Louisiana (1993) 508 U.S. 275, 279.) Here, it is clear the verdict was attributable to the error. The instruction told the jury they needed to find three elements beyond a reasonable doubt, when in fact they needed to find four. The verdict was thus based entirely on the elements set forth in the instruction and was surely attributable to the instruction that erroneously told the jury they had to make findings on only three elements.

Note that the above argument focuses on the effect of the error rather than the state of the evidence. Often, the Court of Appeal will find instructional error to be harmless because there was substantial evidence of guilt. This would be improper.

"There is, as former Chief Justice Roger Traynor has observed, 'a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.'" (People v. Arcega (1982) 32 Cal.3d 504, 524, quoting Traynor, *The Riddle of Harmless Error* (1970) at pp. 26-27.) "In appraising the prejudicial effect of trial court error, an appellate court does not halt on the rim of substantial evidence or ignore reasonable inferences favoring the appellant." (People v. Butts (1965) 236 Cal.App.2d 817, 832.) Reversal is warranted where evidence "is open to the interpretation" that defendant is not guilty of the charged offense. (People v. Arcega, *supra*, 32 Cal.3d at p. 524.)

The California Supreme Court recently reaffirmed the rule set forth in the cases cited in the previous paragraph. (People v. Mil (2012) 53 Cal.4th 400.) There, the Court noted that the Court of Appeal, when concluding that the instructional error was harmless, may have relied "on the less demanding standard of whether [the finding that was reached despite the instructional error] was supported by substantial evidence. The Court of Appeal's discussion focused exclusively on evidence that was favorable to the verdict." (*Id.* at p. 417.) The Supreme Court concluded that the Court of Appeal's approach was improper, stating: "Although we agree that this evidence would be sufficient to sustain a finding of reckless indifference on appellate review, under which we would view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of any facts the jury might reasonably infer from the evidence, our task in analyzing the prejudice from the instructional error is whether any rational fact finder could have come to the *opposite* conclusion." (*Id.* at p. 418, citation omitted, italics in original.)

28. Standard of Review

Issues related to the giving or failure to give an instruction entail the resolution of mixed questions of law and fact which are predominantly legal and are examined without deference. (People v. Waidla (2000) 22 Cal.4th 690, 733.) Accordingly, "assertions of instructional error are reviewed de novo." (People v. Shaw (2002) 97 Cal.App.4th 833, 838.) The standard of de novo or independent review applies to instructions on lesser included

offenses. (People v. Waidla (2000) 22 Cal.4th 690, 733, accord, People v. Manriquez (2005) 37 Cal.4th 547, 584; People v. Turk (2008) 164 Cal.App.4th 1361, 1367 [applying the standard to the failure to instruct on the lesser included offense of involuntary manslaughter]; People v. Oropeza (2007) 151 Cal.App.4th 73, 78.) In addition, "[t]he independent or de novo standard of review is applicable in assessing whether instructions correctly state the law...." (People v. Posey (2004) 32 Cal.4th 193, 218.)

29. No Evidence, No Instruction

A party is not entitled to an instruction on a theory for which there is no supporting evidence. (People v. Tufunga (1999) 21 Cal.4th 935, 944.) It therefore "is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (People v. Guiton (1993) 4 Cal.4th 1116, 1129; People v. Eggers (1947) 30 Cal.2d 676, 687; People v. Roe (1922) 189 Cal. 548, 558.) "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support he suggested inference." (People v. Hannon (1977) 19 Cal.3d 588, 597; People v. Saddler (1979) 24 Cal.3d 671, 681.) The reason for the rule is the giving of such an instruction "tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved." (People v. Jackson (1954) 42 Cal.2d 540, 547.)

30. Limiting/Curative Instructions – No Request, No Instruction, But Not Always

Something bad happened at trial. Evidence that is prejudicial or otherwise harmful to the defendant has come in. Trial counsel moved for a mistrial, which was denied. Does the trial court have a duty to ask for an instruction curing the prejudice or limiting the scope of the evidence. The answer is yes, in most cases.

Ordinarily, a trial court does not have a sua sponte duty to admonish the jury about the limited relevance of evidence that is prejudicial or harmful to the defense. (*See, e.g.*, People v. Collie (1981) 30 Cal.3d 43, 64.) However, if such evidence is a dominant part of the evidence against the defendant, and is both highly prejudicial and minimally relevant, the

evidence might be so obviously important to the case that a sua sponte instruction is needed to protect the defendant from his attorney's inadvertence. (Ibid.) Also, there are some narrowly defined situations in which the trial court must give such an instruction sua sponte. Courts have a duty to instruct sua sponte on the weight to be given expert testimony (Penal Code §1127b), and on the limitations on the use of evidence of child sexual abuse accommodation syndrome. (People v. Housley (1992) 6 Cal.App.4th 947, 957-959.)

31. Argumentative Instructions – What Up with That?

Trial courts must "refuse an argumentative instruction, that is, an instruction of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (People v. Mincey (1992) 2 Cal.4th 408, 437, citation and internal quotation marks omitted.) This is different than an instruction that pinpoints the theory of the defense, on which the defendant is entitled to an instruction. (People v. Gordon (1990) 50 Cal.3d 1223, 1276.) But what about this language from People v. Sears (1970) 2 Cal.3d 180, 190: "A defendant is entitled to an instruction relating particular facts to any legal issue." Has the Supreme Court removed with Mincey what it gave in Sears?

32. Federal Habeas Standard For Prejudice on Instructional & Other Errors

Once error is found on federal habeas review, the issue turns strictly to Brecht v. Abrahamson, 507 U.S. 619 (1993), and not whether the State unreasonably applied Brecht. As the Ninth Circuit recently restated the law on this issue:

> In Fry v. Pliler, [551 U.S. 112 (2007)] however, the Supreme Court squarely addressed the harmless error standard to be applied by a federal habeas court and held that Brecht is the applicable test. 551 U.S. at 121. In Pulido v. Chrones, we reaffirmed that under Fry, "we need not conduct an analysis under AEDPA of whether the state court's harmlessness determination on direct review . . . was contrary to or an unreasonable application of clearly established federal law," and held that "we apply the Brecht test without regard for the state court's harmlessness determination." 629 F.3d 1007, 1012 (9th Cir. 2010) (citing Fry, 551 U.S. at 119-22). In light of Fry and Pliler [*sic* Pulido], we hold that the Brecht "substantial and injurious effect" standard governs our harmless error review in this case.

(Merolillo v. Yates, 663 F.3d 444, 454-455 (9th Cir. 2011).

As the Supreme Court stated in Fry v. Pliler, 551 U.S. 112, 121-122 (2007), on habeas corpus review, a federal:

> court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in Brecht [v. Abrahamson, 507 U.S. 619 (1993)], *supra,* whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in Chapman, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967].

33. To Presume or Not to Presume, That Is the Question

"While we presume jurors follow the instructions they are given, we cannot equally assume they can sort out legal contradictions." (Doe v. Busby (9th Cir. 2011) 661 F.3d 1001, 1023.)

C. NEW CASES

The defendant was convicted of PC 288.5(a), lewd acts with a child under 14 with whom the defendant resided. CALCRIM 1120 says, "Lewd or lascivious conduct is any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. The touching need not be done in a lewd or sexual manner." The instruction applies People v. Martinez (11 Cal.4th 434), which said that any touching can qualify as a lewd touching if the defendant has lewd intent. Disagreeing with People v. Sigala (2011) 191 Cal.App.4th 695, 700, this court recognizes the second sentence of 1120 quoted above is wrong, and urges CALCRIM to revise 1120 so that it "simply states that the touching need not be made to an intimate part of the victim's body, so long as it is done with the required intent." (People v. Cuellar (2012) 208 Cal. App. 4th 1067.)

People v. Hunter (2011) 202 Cal.App.4th 261, 277 ("giving of an instruction declaring, in effect, that evidence received by the court and properly before the jury is, as a matter of law, insufficient to create reasonable doubt about an issue the district attorney was required to prove is manifestly impermissible.")

People v. Larsen (2012) 205 Cal.App. 4th 810 (trial court erred by refusing to give CALCRIM No. 3428 instruction on evidence of mental disorder and intent. The

instruction's request was proper in light of expert testimony that the defendant had Asperger's Syndrome and that the features of the disorder included lack of social or mental filters, an inclination to make inappropriate comments, inordinate desire to please others, susceptibility to manipulation, obsessive thinking, and compulsive fascination with fantasy role playing to the exclusion of reality. Harmless error however.)

People v. Diaz (2012) 208 Cal.App.4th 711 (failure to instruct jury to consider defendant's oral statements with caution is error even in criminal threats case, thus disagreeing with CALCRIM No. 358 and People v. Zichko (2004) 118 Cal.App.4th 1055, 1057, that a court has no sua sponte duty to give such a cautionary instruction in a criminal threats case. Harmless error however.)

People v. Loza (2012) 207 Cal.App.4th 332 (court erred and defense counsel was IAC for not objecting to aid and abet instruction and jury questions; reversed; People v. Nero (2010) 181 Cal.App.4th 504 (aider and abettor instructions may be given when the defendant could be found guilty of lesser homicide-related offense than the homicide(s) the actual perpetrator committed; accord People v. Samaniego (2009) 172 Cal.App.4th 1148, 1164-5. " an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state." Both cases rely on People v. McCoy (2001) 25 Cal.4th 1111, where the Supreme Court held that an aider and abettor may be found guilty of greater homicide-related offenses than those the actual perpetrator committed where the facts permit.

D. CALCRIM INSTRUCTION WORKSHEET

This list is taken, with gratitude, from the one found on the CCAP website at http://www.capcentral.org/criminal/calcrim/checklist.asp. The worksheet does not include fact and crime-specific instructions.

"s"= sua sponte duty in every case; **"ss"**= sometimes sua sponte, depending on the facts; **"rec"**= not sua sponte, but recommended; **"r"**= must be given if requested

Pretrial General Instructions

☐ 100 trial process

☐s 101 cautionary admonition

☐ 102 note taking
☐s 103 reasonable doubt
☐ 104 evidence
☐s 105 witnesses
☐r 106 juror questions

Pretrial Admonitions

☐ss 120 service provider for disable juror (when one is used)
☐rec 121 duty to abide by ct translation
☐ss 122 corporation is a person (when defendant is a corporation)
☐ss 123 witness identified as J. Doe (when victim is id'd as such)
☐s 124 separation admonition

Post-Trial Introductory

☐s 200 duties of judge and jury
☐s 201 do not investigate
☐rec 202 note taking
☐ss 203 multiple defendants (when multiple D's are on trial)
☐ss/r 204 restrained defendant (if seen by jury)
☐ 205 charge removed from jury consideration
☐ 206 a defendant removed from the case
☐ 207 proof need not show actual date

General Legal Concepts

☐s 220 reasonable doubt
☐ss 221 reasonable doubt/bifurcated trial (when bifurcated proceedings)
☐ 222 evidence
☐s 223 direct & circumstantial evidence: defined
☐ss 224 circumstantial evidence: sufficiency of evidence (if DA substantially relies on it)
☐ss 225 circumstantial evidence: intent/ mental state (if DA subst. relies as evid. of intent)
☐s 226 witnesses

Causation

☐ss 240 causation (when it's at issue)

Union of Act and Intent

☐ss 250 union act & intent: general intent (when charged with general intent crime)

☐ss 251 union act & intent: specific intent (when charged with specific intent crime)

☐ss 252 union act & intent: general & specific together (when charged with both types)

☐rec 253 union act & intent: criminal negligence

☐ 254 union act & intent: strict liability

<u>General Evidentiary Instructions</u>

☐r 300 all available evidence

☐s 301 single witness's testimony

☐s 302 evaluating conflicting evidence (unless corroborating evidence is req.)

☐r 303 limited purpose of evidence

☐r 304 multiple defendants: ltd. admissibility of evidence

☐r 305 multiple defendants: ltd. admissibility D's statements

☐ 306 untimely disclosure of evidence

<u>Witnesses</u>

☐r 315 eyewitness identification

☐r 316 witness credibility, other conduct

☐ 317 prior testimony unavailable witness

☐ 318 prior statements as evidence

☐ 319 prior statements of unavailable witness

☐r 320 exercise of privilege by witness

☐r 330 testimony of child 10 yrs or less

☐r 331 testimony of witness with disabilities

☐ss 332 expert witness testimony (when expert testimony received at trial)

☐r 333 opinion testimony of lay witness

☐ss 334 accomplice testimony corroborated: (if evid. suggests witness can be accomplice)

☐ss 335 accomplice testimony: (when no dispute witness is an accomplice)

☐r 336 in-custody informant

☐ss 337 witness restrained (when seen by jury)

<u>Character Evidence</u>

☐r 350 character of defendant

☐r 351 cross-exam of character witness

Defendant's Testimony

☐r 355 defendant's right not to testify

☐r 356 Miranda-defective statements.

☐ss 357 adoptive admissions (when such evidence is admitted)

☐ss 358 evidence of defendant's statements (for out-of-court oral statements by D)

☐ss 359 corpus delicti (if 357 given & whenever stmts. form part of prosecution evid.)

☐ 360 statements to experts

☐ 361 failure to explain/deny adverse testimony

☐ss 362 consciousness guilt: false stmt. (when such inference can be drawn from D's stmt.)

Particular Types of Evidence

☐ 370 motive

☐ 371 consciousness guilt: suppress/fabricate evidence

☐ss 372 flight (when DA relies on it to show consciousness of guilt)

☐r 373 other perpetrator

☐ss 374 dog tracking evidence (when they are used to prove id of defendant)

☐r 375 1101(b) evidence

☐ss 376 possession of recently stolen property (if there is evid. of such property)

Aiding & Abetting & Related Doctrines

☐ss 400 aiding & abetting: general principles (when DA relied on it as theory of liability)

☐ss 401 aiding & abetting: intended crimes (when DA relied on it as theory of liability)

☐ss 402 natural & probable consequences (target and non-target offense charged)

☐ss 403 natural & probable consequences (only non-target offense charged)

☐r 404 intoxication

Defenses and Insanity

☐ 3400 alibi

☐r 3428 mental impairment as defense

Concluding Instructions

☐ss 3500 unanimity (if DA presents evid. of multiple acts to prove a single count)

☐ 3501 unanimity: generic test. presented

☐ss 3502 unanimity: election by prosecutor (if DA has picked a specific factual basis)

☐r	3515	multiple counts: separate offenses
☐ss	3516	multiple counts: alternative charges (if D alt. charged with mult. cts. for 1 event)
☐ss	3517	LIO's or degrees w/o Stone Instruction (where 1 or more LIO submitted to jury)
☐ss	3518	LIO's or degrees w/ Stone Instruction (where 1 or more LIO submitted to jury)
☐ss	3530	judge's comment on evidence (when the court comments)
☐ss	3531	service provider for disabled juror (when one is used)
☐s	3550	pre-deliberation instruction
☐ss	3575	substituting alternate juror during deliberations (when alt. juror is seated)
☐s	3590	final instruction on discharge of jury

ADDENDUM

DISTURBANCES IN THE FORCE

A. HARMLESS ERROR IN THE CONTEXT OF FAILURE TO INSTRUCT ON A LESSER INCLUDED OFFENSE AND ON A DEFENSE

In *People v. Modesto* (1963) 59 Cal.2d 722, 730-731, the California Supreme Court held that a defendant has a constitutional right to have the jury determine every material issue presented by the evidence and that an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. The court further held that (1) such error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would have convicted the defendant of the lesser included offense, and (2) the error cannot be cured by examining the verdict in the light of the instructions given and finding that the jury necessarily resolved, although in a different setting, the same factual question that would have been presented by the missing instruction. The court stated: "Regardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right cannot be cured by article VI, section 4 ½, of the California Constitution, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." *Id*. at p. 730.

In *People v. Sedeno* (1974) 10 Cal.3d 703, 721, the court reaffirmed the first holding but overruled the second. The court held that failure to instruct on a lesser included offense does not require reversal if "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions."

In *People v. Breverman* (1998) 19 Cal.4th 142, 164-178, the Supreme Court held that the test in *Sedeno* no longer applied to failure to instruct on a lesser included offense. The Supreme Court characterized the *Sedeno* standard as one of "near-automatic reversal." *Id*. at p. 175. Under the new standard, it must appear reasonably probable the defendant would have achieved a more favorable result had the error not occurred. *Id*. at p. 178. When applying this standard, the appellate court examines "the entire record, including the evidence." (*Ibid*.)

The trend in situations involving the failure to instruct on a lesser included offense is from automatic reversal, to near-automatic reversal, to straight up *Watson*. *Modesto* rejected two harmless error approaches. *Sedeno* reinstates one but keeps the other. *Breverman* reinstates the second, so neither now exists.

In *People v. Mayberry* (1975) 15 Cal.3d 143, 158, the Supreme Court applied

the test in *Sedeno* to the failure to instruct on a defense. The court has not overruled the application of the *Sedeno* test to the failure to instruct on a defense. But given the trend in errors involving lesser included offenses, what does the future hold for failure to instruct on defenses?

B. THE JURY IS INSTRUCTED ON TWO THEORIES, ONE OF WHICH IS EITHER LEGALLY IMPROPER OR FACTUALLY UNSUPPORTED

In *People v. Green* (1980) 27 Cal.3d 1, 67-74, the court held that when one theory of guilt on which the jury was instructed lacked factual support, and the record did not show that the verdict rested on a theory for which there was factual support, the judgment had to be reversed.

In *People v. Guiton* (1993) 4 Cal.4th 1116, 1129, the court limited *Green* to situations in which the jury is instructed on a theory of guilt that is incorrect as a matter of law rather than being inapplicable as a matter of fact. Under this rule, the error is prejudicial unless the people can show that no juror relied on the erroneous instruction as the sole basis for finding the defendant guilty. (*People v. Smith* (1984) 35 Cal.3d 798, 808.)

In *People v. Chun* (2009) 45 Cal.4th 1172, 1201, the court held that instructing the jury on an erroneous theory of the offense"requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict."

Here again, the rule begins as a broad one in favor of reversal for both factual insufficiency and legal mistake, gets narrowed so it applies only to legal mistake, and then gets narrowed further so it no longer exits.

C. SUA SPONTE VS. PINPOINT INSTRUCTIONS

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531, citations omitted.)

In *People v. Saille* (1991) 54 Cal.3d 1103, 1119, the court held that intoxication is not a defense and instead bears on the question of whether the defendant had the requisite intent. This makes it a pinpoint instruction. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of

a defendant's case, such as mistaken identification or alibi. They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*Ibid.*, citation omitted.)

Assume you have a case in which the defense is to attack the element of specific intent based on intoxication. Wouldn't this be a general principle of law related to an issue raised by the evidence and a principle closely and openly connected with the facts before the court which is necessary for the jury's understanding of the case?

Also, consider the rationale for the sua sponte instructional duty. "[T]he sua sponte rule seems undoubtedly designed to promote the ends of justice by providing some judicial safeguards for defendants from the possible vagaries of ineptness of counsel under the adversary system. Yet the trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. The judge need not fill in every time a litigant or his counsel fails to discover an abstruse but possible theory of the facts." (*People v. Flannel* (1979) 25 Cal.3d 668, 683, internal quotation marks omitted.) In *Flannel*, the court held that the trial court did not have a sua sponte duty to instruct on unreasonable self-defense because the rule did not at the time amount to a general principle of law. This is because it was obfuscated by infrequent reference and inadequate elucidation in the cases. (*Id*. at p. 681.) This is surely not true of intoxication.