APPELLATE STANDARDS OF REVIEW AND PREJUDICE FOR INSTRUCTIONAL ERROR:
Tools for Litigating Instructional Issues in the CALCRIM Era

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I. INTRODUCTION

"[F]rom our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions." *People v. Thompkins* (1987) 195 Cal.App.3d 244, 252. Generally, any appellate claim must clear three hurdles – (1) establishing that it's cognizable on appeal (i..e., that it's not barred by waiver), (2) establishing that error occurred, and (3) establishing that the error requires reversal. On each of these subjects, the appellate standards governing instructional claims are generally more favorable to the defense than those for other kinds of appellate claims. These materials will touch very briefly on cognizability concerns and will focus primarily on the second and third topics – the standard of review for determining whether an instruction (or the omission or refusal of an instruction) was erroneous and the standard for determining whether an instructional error was prejudicial or harmless.

Most of the topics in these materials are already quite familiar to appellate practitioners. The primary purpose of these materials is to highlight instructional standards which may be especially relevant to review of issues surrounding the CALCRIM instructions.

As with any type of issue, it is essential that, whenever possible, appellate counsel characterize an instructional defect as a *federal constitutional claim*, rather than just state law error. First, even in the context of the direct state appeal, recognition of the instructional defect as federal constitutional error will trigger a much more favorable prejudice/harmless error standard. State law errors are reviewed under the *Watson* test: Reversal is required only if it is "reasonably probable" a result more favorable

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[1] Portions of this article have been adapted and updated from "Standards of Review and Prejudice for Instructional Error" by J. Bradley O'Connell & Renée E. Torres (Jan. 1995), "Standards of Reversal on Appeal in Criminal Cases" by Renée E. Torres (May 2000), and "Preserving Instructional Error for Appellate Review," by J. Bradley O'Connell & Jonathan Soglin (March 2006).

to the defendant would have been reached had the error not occurred. *People v. Watson* (1956) 46 Cal.2d 818. But most federal constitutional errors are subject to the less forgiving *Chapman* test – the burden is on state to show "beyond a reasonable doubt" that the error had no effect on the verdict. *Chapman v. California* (1967) 386 U.S. 18. Additionally, as discussed further in Part IV, some categories of instructional error are reviewed under even more rigorous tests than the traditional *Chapman* formulation.

Second, "federalizing" the claimed error throughout the state appellate process is necessary to "exhaustion" of the claim for purposes of any future federal habeas corpus petition. Even assuming the appellate briefs otherwise thoroughly identify the problems with an instruction, a failure to specify that the error also infringed a *federal* constitutional right may forfeit the defendant's opportunity to obtain federal habeas review of that claim. See *Baldwin v. Reese* (2004) 541 U.S. 27.

II. COGNIZABILITY OF INSTRUCTIONAL ISSUES.

In California appellate practice, the cognizability of an instructional issue can be viewed as the flip side of the substantive question of the scope of the trial court's instructional duties. A trial court must instruct sua sponte on the legal "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. Breverman* (1998) 19 Cal.4th 142, 154. These include the reasonable doubt standard (CALJIC 2.90, CALCRIM 220), the elements of the charged offense, the definition of any "target offense" necessary to a theory of liability (e.g. "natural and probable consequences," *People v. Prettyman* (1996) 14 Cal.4th 248), jury unanimity as to the incident on which the conviction is based (CALJIC 17.01; CALCRIM 3500), and lesser included offenses supported by substantial evidence. If an instruction comes within that sua sponte category, the defendant may challenge the adequacy of the instructions on appeal, regardless of whether he objected to the instruction given, requested an instruction, or otherwise raised the issue below.

Conversely, if the instruction is deemed a "pinpoint" or "amplifying" instruction, the court is only required to deliver it upon request, and the absence of a request will bar raising the issue on appeal. Most cautionary or limiting instructions are deemed "pinpoint," as are many more substantive instructions which relate more general instructions to crucial types of evidence (e.g., alibi, factors relevant to eyewitness identification, materiality of prior threats and violence to self-defense, relevance of

intoxication to specific intent, etc.)[2]

A. Instructions Given.

As a practical matter, it is usually possible to challenge the validity of any instruction given by virtue of Pen. Code § 1259: "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." Although § 1259 only authorizes review of instructions affecting "substantial rights," that determination "necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." *People* v. *Andersen* (1994) 26 Cal.App.4th 1241, 1249.

Moreover, an instruction actually given by the trial court is generally reviewable on appeal, even if that instruction ordinarily would not come within the court's sua sponte duties. "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; accord *People v. Hudson* (2006) 38 Cal.4th 1002, 1012.

These principles may prove especially important to the review of issues surrounding CALCRIM instructions. In CALJIC, the basic instruction listing the elements of an offense would often be followed by several instructions on more specialized points; sometimes the latter instructions would be considered either "pinpoint" or "amplifying" instructions required only on request. In contrast, CALCRIM's approach seems to be to draw all the principles applicable to a particular offense into a single omnibus instruction. For example, CALCRIM's basic robbery instruction, No. 1600, covers points spread over four CALJIC instructions (CALJIC 9.40, 9.40.2, 9.40.3, 9.41). In some instances, this structure should make it easier to raise instructional claims: Because the typical CALCRIM instruction is more comprehensive than its CALJIC counterpart, it should often be possible to frame the

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[2] The primary purpose of these materials is to focus on principles especially relevant to issues surrounding the adequacy of the CALCRIM instructions, rather than to serve as a primer on instructional duties generally. For a more comprehensive treatment of the scope of a trial court's sua sponte instructional duties (and, conversely, of the categories of "pinpoint" instructions, required only upon request), see O'Connell & Soglin, "Preserving Instructional Error for Appellate Review" (Mar. 2006), available on FDAP web site: www.fdap.org/downloads/seminar-criminal/PreservingInstructionalErrorforAppellateReview.pdf

argument as a challenge to the validity of the instruction actually delivered, rather than as a complaint regarding the omission of some supplemental instruction.

B. "Amplifying" Instructions vs. Terms Requiring Definition

Another oft-stated principle of instructional review may pose headaches for challenges to CALCRIM instructions. In many instances, the controversy surrounding the adequacy of a particular CALCRIM instruction will not involve any genuine debate over substantive law. That is, there will not be any disagreement between the prosecution and the defense as to what the elements of a particular offense are. Instead, many arguments will focus on the adequacy of the CALCRIM instructions to communicate these sometimes-arcane legal principles to lay jurors – that is, how the jurors will likely interpret the language of particular CALCRIM instructions. See Part III-B, *infra* (discussing the "reasonable likelihood" standard of review).

The problem is this: If an instruction misstates the law, the issue should be cognizable under § 1259 and *People v. Castillo*, as discussed above. But it may be more difficult to challenge an instruction which is "correct as far as it goes," but should have been more clear or should have fleshed out a point particularly important to the issues at trial. Such arguments may run afoul of the rule that, if the basic instructions are otherwise correct, the onus is on the defense to request any "amplifying" or "clarifying" instructions. "Generally, 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. Guiuan* (1998) 18 Cal.4th 558, 570; see also, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Andrews* (1989) 49 Cal.3d 200, 218;.

But a trial court does have a sua sponte duty to clarify the meaning of a term which has a technical or specialized legal meaning which may not be known to lay jurors. Significantly, that definitional duty applies not only to legal terms of art, such as "assault," but also to more common terms which may have specialized meanings for purposes of a particular criminal statute: "'That obligation comes into play when a statutory term "does not have a plain, unambiguous meaning," has a "particular and restricted meaning" [citation], or has a technical meaning peculiar to the law or an area of law [citation].' [Citation.] '"A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning.' [Citations.]" *People v. Hudson* (2006) 38 Cal.4th 1002, 1012, emphasis in original.

Recent cases illustrate that application of those principles can yield counter-intuitive holdings regarding which terms require sua sponte definitions. For example, the Supreme Court has required sua sponte definition of the term "likely" in Sexually Violent Predator (SVP) trials, because "'likely' may be used flexibly to cover a range of expectability from possible to probable" and "[n]ot all of these dictionary definitions of 'likely' are consistent with the particular and technical meaning the SVPA assigns that term." *People v. Roberge* (2003) 29 Cal.4th 979, 988. Similarly, the Court recently required sua sponte definition of the requirement of Vehicle Code § 2800.1 and related statutes requiring that the pursuing police car be "distinctively marked." In "common parlance," such "distinguishing features as a red light or a siren" might be considered sufficient, but under the Court's construction, these statues "require markings *in addition* to the presence of a red light and a siren." *Hudson, supra*, 38 Cal.4th at 1012. Conversely, however, other recent cases have held that certain seemingly technical terms did not require further elaboration. For example, in a prosecution for misappropriation of public funds (Pen. Code § 424), the terms "authority of law" and "not authorized by law" did not require sua sponte definitions, and the absence of a request for "clarifying" instructions waived the issue. *People v. Bradley* (2006) 142 Cal.App.4th 247, 259-260; see also, e.g., *People v. Horning* (2004) 34 Cal.4th 871, 908-909 (no sua sponte duty for further definition of term "immediate presence" in standard robbery instruction).

III. STANDARDS OF REVIEW – DETERMINING INSTRUCTIONAL ERROR

A. De Novo Review

In contrast to many kinds of common appellate issues, appellate review of an instructional issue <u>does not entail any deference to the trial court</u>. Instructional claims are subject to an "independent" or "de novo standard of review." *People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584. "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." *People v. Waidla* (2000) 22 Cal.4th 690, 733.

B. "Reasonable Likelihood" Standard of Review for Ambiguous Instructions

Frequently, the controversy over a particular instruction does not involve any genuine dispute over the relevant substantive criminal law. Instead, the challenge often focuses on the adequacy of the instruction's language to communicate the substantive rule to jurors. Consequently, appellate review of an instruction's validity turns on expectations of how the jurors are likely to interpret the text and on the risks that

jurors may construe the instruction in a way which infringes constitutional rights (for example, by diluting the prosecution's burden to prove every element beyond a reasonable doubt). The U.S. Supreme Court has fashioned the following test:

> [I]n reviewing an *ambiguous* instruction..., we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. *Estelle v. McGuire* (1991) 502 U.S. 62, 72, emphasis added [quoting *Boyde v. California* (1990) 494 U.S. 370, 380].

This "reasonable likelihood" test is probably the least-understood of the standards relevant to instructional issues. As discussed in the following subsections, there has often been confusion over which types of instructional issues are subject to this test and where exactly the "reasonable likelihood" inquiry fits into the overall presentation and analysis of an instructional claim. But it is an essential subject for criminal defense attorneys to master. Defense attorneys critical of particular CALCRIM instructions will rarely be in a position to say that the instruction flatly misstates the law. Instead, most of these challenges will involve debates over how jurors will likely interpret the CALCRIM formulations. Consequently, **most of the litigation over the adequacy of particular CALCRIM instructions will require understanding the nuances and limits of the "reasonable likelihood" test (including recognizing the errors to which it should <u>not</u> apply).**

C. Applicability of "Reasonable Likelihood" Test to State, As Well as Federal Constitutional, Claims.

The U.S. Supreme Court originally fashioned the "reasonable likelihood" test for the determination of federal constitutional claims. But the California Supreme Court has also elected to adopt the "reasonable likelihood" test for review of <u>state law</u> instructional issues and even for review of alleged prosecutorial misstatements of the law: "We believe that the new test is proper for examining instructions under California law. We also deem it fit for use against prosecutorial remarks generally." *People v. Clair* (1992) 2 Cal.4th 629, 663 [applying the test to claimed *Griffin* error].

D. Nature of the "Reasonable Likelihood" Test – A Standard of Review for Determining Error, <u>Not</u> a Prejudice Test.

The *Boyde-Estelle* formulation – "'a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution" – sounds very much like a test for whether a defective instruction requires reversal. But it isn't.

"The *Boyde* test ... is not a harmless-error test at all. It is, rather, the test for determining, in the first instance, whether constitutional error occurred when the jury was given an ambiguous instruction...." *Calderon v. Coleman* (1998) 525 U.S. 141, 146. In *Coleman,* the Court remanded a capital case to the Ninth Circuit because that court had reversed the penalty upon finding a "reasonable likelihood" of juror misunderstanding, but had neglected to take the next step of assessing prejudice. The Supreme Court did not overturn the Ninth Circuit's finding of a "reasonable likelihood" of juror misunderstanding. But it held that the reviewing court must then separately analyze whether that constitutional error required reversal under the applicable prejudice standard.[3]

Coleman offers a clear lesson for appellate briefing. Counsel must first show that there is a "reasonable likelihood" an instruction misled the jurors on the relevant point, but counsel cannot end the argument there. *Counsel must then separately address prejudice/harmless error under the appropriate standard*. (As discussed in Part III, in most instances, which standard of prejudice applies will depend on the nature of the instructional error.)

E. Limitation of the "Reasonable Likelihood" Test to <u>Ambiguous</u> Instructions

<u>Ambiguous vs. Clearly Erroneous Instructions.</u> The state tends to invoke the "reasonable likelihood" test in response to almost any claim of instructional error. But the U.S. Supreme Court has repeatedly described "reasonable likelihood" as the standard for reviewing an "ambiguous instruction." *Estelle v. McGuire*, *supra*, 502 U.S. at 72; accord, e.g., *Calderon v. Coleman* (1998) 525 U.S. 141, 146. Consequently, as the Ninth Circuit has cautioned on several occasions, the "reasonable likelihood" test has no application where the instruction was "clearly erroneous" or "facially incorrect": "This court is not required to use the 'reasonable likelihood' standard employed for ambiguous jury instructions 'when the disputed instruction is erroneous on its face.'" *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 592; accord *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321 (cited in *Ho*); *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 967-968. For example, an instruction which omits an element of the offense (*Ho*) or which allows the jury to "convict based on legally impermissible grounds" (*Murtishaw*) is "flatly" or "clearly"

[3] Because *Coleman* arose on a federal habeas petition, it was governed by the *Brecht* standard, requiring a "substantial and injurious influence" on the verdict, rather than the *Chapman* standard applicable on direct appeal. Cf. *Brecht v. Abrahamson* (1993) 507 U.S. 619.

erroneous. In that instance, the reviewing court should skip any "reasonable likelihood" analysis and proceed immediately to determination of whether the clearly erroneous instruction requires reversal under the applicable prejudice standard.

Omitted instructions. At least one California case has found the "reasonable likelihood" test inapplicable to *omission* of an instruction. *People v. Elguera* (1992) 8 Cal.App.4th 1214 (omission of CALJIC 2.90, the definition of reasonable doubt). But (without specifically discussing *Elguera*) several subsequent California cases have applied "reasonable likelihood" analysis to omission of a portion of a particular CALJIC instruction or to omission of one instruction among a series of instructions on a subject. E.g., *People v. Catlin* (2001) 26 Cal.4th 81, 151; *People v. Snead* (1993) 20 Cal.App.4th 1088.

F. Consideration of Instructions as a Whole

Unfortunately, the distinction between "clearly erroneous" and "merely ambiguous" instructions is itself ambiguous. "[A] single instruction to a jury may not be judged in artificial isolation, but *must be viewed in the context of the overall charge*." *Boyde v. California* (1990) 494 U.S. 370, 378, emphasis added.

A recent Supreme Court case has muddied the waters further. Even the threshold determination whether the instructions are "ambiguous" (rather than clearly erroneous) requires review of "the charge as a whole." *Middleton v. McNeil* (2004) 541 U.S. 433, 437. In *McNeil*, the trial court had misinstructed on an aspect of California's "imperfect self-defense" doctrine, by stating that the peril must appear imminent "to the slayer as a reasonable person." In the subsequent appellate and habeas proceedings, everyone agreed the reference to a "reasonable person" standard was incorrect, so that misinstruction would seem to fit within the category of clearly erroneous instructions, not subject to "reasonable likelihood" analysis. But the Supreme Court held otherwise in summarily reversing the Ninth Circuit's grant of habeas relief. The Supreme Court emphasized that the single "reasonable person" reference occurred in the midst of a series of instructions which clearly and "repeatedly informed the jury" that "an honest (or actual) but *unreasonable* belief in the need to act in self-defense" against imminent peril would require a conviction of manslaughter rather than murder. *Id*. at 434-436, emphasis in opinion. Consequently, the Supreme Court viewed the instructions as a whole as "at worst ambiguous because they were internally inconsistent." *Id*. at 438. That characterization of the defective instructions as merely "ambiguous" proved crucial in *McNeil* because, as discussed below (Part I-G), it allowed the reviewing court to consider *counsel's arguments* (which correctly stated the unreasonable belief rule) as clearing up the instructions.

Thus, the apparent import of *McNeil* is that even when a single instruction is plainly incorrect, *the reviewing court must consider the instructions as a whole* in determining whether they were "ambiguous" (requiring the court to apply the "reasonable likelihood" test of error) or clearly erroneous (allowing the court to skip "reasonable likelihood" and to proceed immediately to determination of prejudice).

G. The Role of Counsel's Arguments

As the U.S. Supreme Court observed in *Boyde* (the case in which it first articulated the "reasonable likelihood" test): "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court" and "are not to be judged as having the same force as an instruction from the court." *Boyde*, *supra*, 494 U.S. at 384-385. Indeed, under both CALJIC and CALCRIM, jurors are expressly admonished that they must follow the court's instructions on the governing legal standards and that they must disregard any statements by counsel that are inconsistent with the instructions. CALCRIM 200.

<u>Correct statements of law in counsel's arguments.</u> In light of the rule that the instructions take precedence over counsel's arguments, the courts (especially the Ninth Circuit) have repeatedly held, "Counsel's arguments alone cannot salvage a legally erroneous instruction." *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969; accord *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321; *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 594-595. Consequently, even when both the prosecutor's and defense counsel's arguments correctly state the law, they cannot cure a misstatement in the court's instructions, at least where the instructions were *clear* and erroneous.

However, the Supreme Court has held that it <u>is</u> appropriate to consider counsel's correct statements in determining whether there is a "reasonable likelihood" the jurors construed *ambiguous* instructions in an unconstitutional manner. *Middleton v. McNeil* (2004) 541 U.S. 433. (As noted above, *McNeil* was the imperfect self-defense case in which the Supreme Court considered the instructions as a whole merely "ambiguous" or "inconsistent" because, though one "reasonable person" instruction was incorrect, the rest of the instructions contained numerous correct statements of the unreasonable belief principle.) In approving the California appellate court's consideration of the attorneys' correct statements as clarifying the proper imperfect self-defense standard, the Supreme Court cautioned, "this is not a case where the jury charge clearly says one thing and the prosecutor says the opposite; the instructions were at worst ambiguous because they were internally inconsistent. Nothing in *Boyde* precludes a state court from assuming that counsel's arguments clarified an

ambiguous jury charge. This assumption is particularly apt when it is the *prosecutor's argument* that resolves an ambiguity in favor of the *defendant*." *McNeil*, *supra*, at 438, emphasis in original.

Incorrect statements in counsel's arguments. *McNeil* involved the question of reviewing courts looking to counsel's (especially the prosecutor's) correct statements as clarifying or curing misstatements in the instructions. Of course, even when the primary error lies in the instructions, prosecutors' arguments are sometimes a boon to appellate defenders, because frequently those arguments *exploit or exacerbate* the instructional error. Consequently, prosecutorial arguments which repeat or even magnify the erroneous point in the instructions are material both to the "reasonable likelihood" determination of whether an "ambiguous" instruction resulted in constitutional error and to assessment of the prejudicial impact of that error. E.g., *People v. Valentine* (2001) 93 Cal.App.4th 1241, 1246 ("instructional error, as compounded by the prosecutor's argument, was prejudicial"); *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1400. See also *People v. Morgan* (2007) 42 Cal. 4th 593 where prosecutor's argument based on a legally inadequate theory when combined with instructions considered susceptible to the same interpretation resulted in reversal.

Conversely, however, where the court's instructions are correct, a misstatement of the law in the prosecutor's argument will rarely provide a basis for relief. In that situation, reviewing courts will apply the usual presumption that the jurors followed the court's correct instructions and were not misled by any contrary statements in counsel's arguments. *Brown v. Payton* (2005) 544 U.S. 133, 146-147; accord, e.g. *Fields v. Woodford*, 309 F.3d 1095, 1111 (9th Cir. 2002).

H. Other Critical Rules for Construction of Instructions

Specific prevails over general. Reviewing courts assume that jurors will bring some common sense principles to bear in interpreting the instructions as a whole. Much as with contracts and statutes, "our well-settled rule of construction [is] that *the specific controls over the general*. [Citations.]" *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 823, emphasis added; accord, e.g., *People* v. *Stewart* (1983) 145 Cal.App.3d 967, 975; *LeMons* v. *Regents of the University of California* (1978) 21 Cal.3d 869, 878 & fn. 8. As the U.S. Supreme Court observed in the leading case, "If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." *Bollenbach v. United States* (1946) 326 U.S. 607, 612. For example, in *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740, a correct statement of the "immediate presence" requirement in the "background definitions" introduction to a pattern robbery instruction could not cure an erroneous modification

of that definition in the portion of the instruction which specifically set out the elements of the charged offense.

Mid-deliberations instructions carry particular weight. Another common sense principle recognized in *Bollenbach* is that a judge's supplemental instructions during deliberations carry exceptional weight, especially when the jurors have specifically requested guidance on a point. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Id*. at 612. "And if jury instructions are important in general, there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." *People v. Thompkins* (1987) 195 Cal.App.3d 244, 252 -253.

IV. STANDARDS OF PREJUDICE AND HARMLESS ERROR

In *Arizona v. Fulminante* (1991) 499 U.S. 279, the Supreme Court disavowed decades of prior cases which had treated admission of an involuntary confession as an error so egregious that it could never be deemed harmless. Instead, the *Fulminante* majority held that admission of an involuntary confession, like most "trial errors," was subject to the *Chapman* standard. That is, a reviewing court could still deem an involuntary confession "harmless error" if the state sustained its burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. (A differently-composed majority concluded that the admission of the confession was *not* harmless under the *Chapman* standard and reversed Fulminante's murder conviction.)

Though *Fulminante* did not involve instructional error, it is a crucial opinion because the Court adopted a new terminology to distinguish "trial errors" from the narrow category of constitutional violations which are exempt from harmless error analysis. Under *Fulminante* and its progeny, only "structural defects" are deemed reversible per se. "[S]tructural defects in the constitution of the trial mechanism" are errors that "defy analysis by 'harmless-error' standards" and "transcend[] the criminal process." *Fulminante*, *supra*, 499 U.S. at 309-311.

The California Supreme Court (in another involuntary confession case) has adopted a similar distinction between "trial errors," susceptible to harmless error analysis and those few "structural" errors considered reversible per se. *People v. Cahill* (1993) 5 Cal.4th 478. In the wake of *Fulminante* and *Cahill*, most errors – including most instructional errors – will be subject to some form of harmless error analysis. Usually that will require application of the *Chapman* standard ("harmless beyond a reasonable

doubt"), if the error can be characterized as a federal constitutional violation, or the California *Watson* standard ("reasonable probability" of a more favorable outcome), if it is deemed a state law error only.

A. "Structural Defects" (Reversible Per Se)

Erroneous definition of "reasonable doubt." In the 15 years since its *Fulminante* opinion, the U.S. Supreme Court has addressed only one instructional error which it has deemed a "structural defect": delivery of a constitutionally deficient definition of the reasonable doubt standard. *Sullivan v. Louisiana* (1993) 508 U.S. 275. Unlike other constitutional instructional errors (including errors diluting the reasonable doubt burden as to particular elements), a defective definition of "reasonable doubt" permeates the jurors' entire consideration of the case and cannot be salvaged through harmless error review. "There is no *object,* so to speak, upon which harmless-error scrutiny can operate." *Id*. at 280, emphasis in original.

Omission of "reasonable doubt" definition. While *Sullivan* involved an instruction *misstating* the "reasonable doubt" test, California case law has applied the same logic to *omission* of the definition of reasonable doubt (CALJIC 2.90; see also CALCRIM 220). *People v. Crawford* (1997) 58 Cal.App.4th 815.

Error tantamount to directing verdict on only contested issue. *Sullivan* and previous Supreme Court opinions have listed directing a verdict for the prosecution as another example of an structural error which so vitiates the jury's factfinding function that it can never be redeemed through harmless error analysis. See *Sullivan*, *supra*, 508 U.S. at 280. But the error need not take the form of a literal "directed verdict" (i.e., the judge directing the jurors to return a guilty verdict) to come within that category. A recent Ninth Circuit case found a structural defect where the judge's mid-trial comments were tantamount to a directed verdict because those comments effectively *removed the only contested issue* in the case. *Powell v. Galaza* (9th Cir. 2003) 328 F.3d 558. (*Powell* arose from a prosecution for failure-to-appear. The judge told the jurors that the defendant's testimony amounted to an admission of an intent to evade the processes of the court.)

B. Submission of Invalid Alternative Legal Theory

Unauthorized legal theory. Appellate practitioners frequently confront situations in which a charge went to the jury on a combination of valid and invalid alternative theories – for example, a legally unauthorized felony-murder theory based on a non-qualifying predicate felony, as well as valid alternative theories of express and

implied malice. Under both federal and state authorities, submission of a legally unauthorized theory requires reversal where it is impossible to determine whether the jurors relied upon that invalid theory or on an alternative legally permissible ground. *Yates v. United States* (1957) 354 U.S. 298, 312; *Stromberg v. California* (1931) 283 U.S. 359, 369-370; *Zant v. Stephens* (1983) 462 U.S. 862, 880-882. In California, this is generally known as the "*Green-Guiton* rule," after *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129, and *People v. Green* (1980) 27 Cal.3d 1, 69. Under this analysis, a reviewing court may affirm only where the record affirmatively establishes that the jurors necessarily relied on a valid theory – for example, the jury's verdict on some other count, enhancement or special circumstance may establish that the jurors made all the findings necessary to the valid theory of liability (e.g., a valid felony-murder predicate).

Interestingly, although federal and state cases applying seemingly similar rules – requiring reversal whenever it is impossible to determine which legal theory was the basis for the jury's verdict – they describe those rules' relationship to harmless error analysis differently. Recent California opinions have tended to harmonize the *Guiton-Green* rule with *Chapman* harmless error analysis. As one case said of submission of an invalid felony-murder predicate:

> The trial court's misinstructions on the elements of second degree felony murder require reversal of defendant's murder conviction unless it appears beyond a reasonable doubt that the instructional error did not contribute to the jury's verdict. [Citations] "*Such a reasonable doubt arises where, although the jury was instructed on alternate theories, there is no basis in the record for concluding that the verdict was based on a valid ground*. [Citations.]" *People v. Sanchez* (2001) 86 Cal.App.4th 970, 980, emphasis added; accord, *People v. Smith* (1998) 62 Cal.App.4th 1233, 1238; *People* v. *Jones* (2000) 82 Cal.App.4th 663, 670-671; *People* v. *Baker* (1999) 74 Cal.App.4th 243, 253; see also *People v. Swain* (1996) 12 Cal.4th 593, 607.

Under this approach, submission of an invalid alternative legal theory is still subject to harmless error analysis. But, when the record does not reveal which ground was the basis for the verdict, *there is a reasonable doubt that the verdict may have rested upon the improper ground*. See *Swain*, *supra*, 12 Cal.4th at 607.

However, the recent California Supreme Court case of *People v. Morgan* (2007) 42 Cal. 4th 593, surprisingly revived the *Green* principle that submission of a "legally inadequate" theory of conviction can occur through the prosecutor's argument, when

combined with instructions which could be susceptible to the same interpretation. Here, the Supreme Court reversed a kidnaping conviction, relying in part on the fact the prosecutor argued an incorrect legal theory.

In contrast, *the Ninth Circuit views submission of an unauthorized or legally "non-existent" theory of liability as a form of "structural defect,"* which is not subject to conventional harmless error analysis. *Lara v. Ryan* (9th Cir. 2006) 455 F.3d 1080, 1086; *Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034, 1039; *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664. For example, in *Martinez v. Garcia*, the Circuit found that an invalid transferred intent theory "amount[ed] to *structural error*," because "the erroneous jury instructions made it impossible to determine whether the jury convicted Martinez of the attempted murder ... on a premeditation theory, which was legally permissible, or on a transferred intent theory, which was legally impermissible." *Martinez*, *supra*, at 1040, 1041, emphasis added.[4]

Notwithstanding the "structural defect" categorization, the Ninth Circuit too recognizes that submission of an invalid legal theory is harmless if the jury actually relied on a valid alternative theory. But – consistent with the Circuit's view that this is not ordinary "trial error" subject to *Chapman* analysis – the Ninth Circuit case law adds an important gloss to a reviewing court's determination of whether some other verdict or instruction establishes the jurors' reliance on a valid ground. "'[R]eversal may not be required if 'it is *absolutely certain*' that the jury relied upon the legally correct theory to convict the defendant.'" *Lara v. Ryan*, 455 F.3d at 1085, quoting *Keating v. Hood,* 191 F.3d 1053, 1063 (9th Cir. 1999); & *Ficklin v. Hatcher,* 177 F.3d 1147, 1152 (9th Cir.1999) (emphasis in all three cases).

"Absolute certainty" (*Lara* at 1086) of course, represents an even more rigorous standard than *Chapman*. That is, it requires a still greater degree of certitude before a reviewing court can declare the error harmless, because the common understanding is that a "reasonable doubt" burden of proof does *not* require "absolute certainty." Cf. *Victor v. Nebraska*, 511 U.S. 1, 12-13 (1994) ("absolute certainty is unattainable in human affairs").[5]

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[4]See the 9th Circuit's recent opinion in *Pulido v. Chrones,* 487 F.3d 669 (9th Cir. 2007), in which a cert petition is presently pending. (USSC 07-544.)

[5] *Lara v. Ryan* was one of those rare cases meeting that "absolute certainty" standard. Although the trial court had erroneously instructed on implied malice as an alternative ground for attempted murder, the jurors' separate premeditation finding conclusively established that they had relied upon the legally valid express malice theory. *Lara*, 455 F.3d

Distinction between "legal" and "factual" insufficiency. Both the U.S. Supreme and California Supreme Courts have drawn a distinction between theories which are invalid because they are legally unauthorized (e.g., a non-qualifying predicate felony for felony-murder) and those which are erroneous because they are lacking in factual support. *Griffin v. United States* (1991) 502 U.S. 46; *People v. Guiton* (1993) 4 Cal.4th 1116. The rule requiring reversal where the record does not reveal the actual basis for the jury's verdict applies *only where the defect was one of "legal insufficiency."* "`[T]he term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or factual import of the evidence.'" *Guiton, supra*, at 1125, quoting *Griffin, supra,* at 474.

Where the error is merely one of "factual insufficiency," the opposite analysis applies: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, *absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." Guiton, supra*, at 1129, emphasis added. (*Guiton* itself was a Health & Saf. Code § 11352 case, in which the instructions included "transportation" or "sale" of cocaine as grounds for conviction, but there was insufficient evidence of a completed sale. The Supreme Court agreed that submission of the "sale" alternative was error, but viewed it as one of "factual insufficiency." Because there was sufficient evidence that Guiton transported cocaine, but insufficient evidence that he sold it, the Supreme Court assumed that the jurors relied on the factually-supported transportation theory.)

C. Omission of Elements or Defects in Description of Elements

Due process requires the prosecution to prove each element of the offense beyond a reasonable doubt. Accordingly, any instruction which omits, misstates, or otherwise removes an element of the charge violates due process, as well as the Sixth Amendment right to jury trial. See generally *United States v. Gaudin* (1995) 515 U.S. 506. Most substantive errors in the instructions' definitions of charged offenses can be characterized as either omissions or misdescriptions of the elements.

Omission of an element. Both the U.S. and California Supreme Courts have held that *omission or removal of an element is not a structural defect and is subject to harmless error analysis under the Chapman standard. Neder v. United States* (1999) 527 U.S. 1; *People v. Flood* (1998) 18 Cal.4th 470. Both *Neder* and *Flood* were cases in which

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at 1087.

the instructions omitted an element which was not reasonably susceptible to dispute under the respective circumstances of the cases – in *Neder,* whether the failure to report over $5 million satisfied the "materiality" element of tax fraud; and, in *Flood*, whether the uniformed police officers from whom Flood was fleeing were "peace officers," as required for Veh. Code § 2800.3. Predictably, each opinion found the instructional error harmless under *Chapman*.

It is easy to relegate the holdings of *Neder* and *Flood* to the "sound bite" that *Chapman* applies to omission of an element and then to proceed with a traditional *Chapman* harmless error analysis. But the *Neder* opinion, in particular, deserves closer scrutiny for it indicates that a much more rigorous form of *Chapman* analysis applies to this category of error:

> In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee. [¶] Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error--*for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding--it should not find the error harmless*. [¶] A reviewing court making this harmless-error inquiry does not ... "become in effect a second jury to determine whether the defendant is guilty." [Citation.] 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. *Neder*, *supra,* 527 U.S. at 19, emphasis added.

Under a faithful reading of *Neder*, a reviewing court should find omission of an element harmless *only* in cases such as *Flood* and *Neder* itself, where the omitted element was not reasonably susceptible to dispute. But, if the evidence *does* pose a factual question concerning that element, the appellate court "should not find the error harmless." If there is conflicting evidence (or conflicting inferences from the evidence) concerning that element, that conflict should compel a finding of prejudice under the *Neder* form of *Chapman* review, and it will *not* suffice for the reviewing court to declare that "overwhelming" evidence supports the contested element.

Omission of "subtantially all" elements? *Neder* and *Flood* each involved omission of a single discrete element of the charge. Previously, in *People v. Cummings* (1993) 4 Cal.4th 1233, 1311-1315, the California Supreme Court had reversed robbery convictions where the robbery instructions were so deficient that they omitted "substantially all" (4 out of 5) of the elements of that offense. In spurning the state's invitation of "harmless error," the Court observed that "none [of the prior U.S. Supreme Court cases] suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." *Cummings, supra*, at 1315. Similarly, in another pre-*Neder* case, the Ninth Circuit found a structural defect where the trial court entirely failed to instruct on the elements of a charge. *Harmon v. Marshall* (9th Cir.1995) 69 F.3d 963, 966.

In its later *Flood* opinion permitting *Chapman* review of omission of a single element, the California Supreme Court was careful to distinguish both its own *Cummings* opinion and the Ninth Circuit's *Harmon* decision. "We have no occasion in this case to decide whether there may be some instances in which a trial court's instruction removing an issue from the jury's consideration will be the equivalent of failing to submit the entire case to the jury--an error that clearly would be a 'structural' rather than a 'trial' error. [Citation; footnote "comparing" *Cummings*, *Harmon*, and *Sullivan v. Louisiana*.]" *Flood*, *supra*, 18 Cal.4th at 503.

D. Offenses vs. Enhancements

Apprendi – federal constitutional significance of enhancements. In *People v. Wims* (1995) 10 Cal.4th 293, the California Supreme Court held that failure to instruct on a weapon enhancement was merely state law error, subject to the *Watson* "reasonable probability" test of prejudice, because there was no federal constitutional right to jury trial on a sentence enhancement. As the California Supreme Court has subsequently acknowledged, the *Wims* holding could not survive *Apprendi v. New Jersey* (2000) 530 U.S. 466, which held that the Sixth Amendment right to jury trial applied to any non-recidivist enhancement which increased the sentence above the maximum otherwise allowed for the conviction offense alone. See *People v. Sengpadychith* (2001) 26 Cal.4th 316.

In the wake of *Apprendi*, an instructional error concerning the elements of an enhancement will usually be reviewed under the same federal constitutional principles, including *Chapman-Neder* harmless error analysis, as a comparable error involving the elements of an offense. But there are several quirks which may take

some enhancements out of the scope of those protections, which flow from limitations or uncertainties in the U.S. Supreme Court's *Apprendi* jurisprudence.

<u>Relation of enhancement to maximum sentence for offense</u>. As the California Supreme Court observed in a post-*Apprendi* opinion, the applicability of the Sixth Amendment to a sentencing enhancement – and hence the applicability of *federal* constitutional principles (including *Chapman* review) to an instructional error on that charge – "depends on whether the enhancement provision increases the maximum possible penalty for the underlying crime." *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324. A conventional determinate sentence enhancement, which concerns the circumstances of the current offense (e.g., weapon use, infliction of great bodily injury, etc.) and consists of "an additional term of imprisonment added to the base term" (Cal. Rules of Court, rule 4.405(c) (enhancement definition)) plainly comes within *Apprendi* because it can result in a sentence in excess of the upper term for the underlying conviction.

To date, however, the U.S. Supreme Court has adhered to a distinction between *Apprendi*-type enhancements which *increase the maximum punishment* and "mandatory minimum" provisions which increase the *minimum* sentence available. At least under current law, the latter provisions do not implicate the Sixth Amendment because, though those findings may substantially elevate the low-end of the sentencing range for an offense, they do not increase the maximum term. See *Harris v. United States* (2002) 536 U.S. 545.

People v. Sengpadychith (2001) 26 Cal.4th 316, dramatically illustrates the anomalies flowing from this distinction, because the same instructional error regarding the gang enhancement (Pen. Code § 186.22) was subject to different standards of prejudice, depending on the relationship between the enhancement and the sentencing on the respective counts. With respect to most underlying offenses with determinate terms, section 186.22 functions as a conventional enhancement by adding an additional term, consecutive to the sentence on the offense itself. (Subd. (b)(1).) For another category of felonies, the statute authorizes an indeterminate term of "life" in lieu of the otherwise-applicable determinate upper term. (Subd. (b)(4).) Because both those provisions increased the maximum term for the underlying counts, the *Apprendi* jury right applied, so the *Chapman* standard of prejudice did as well. But, for crimes *already punishable by life*, the statute bars parole "until a minimum of 15 calendar years have been served." (Subd. (b)(5).) "[F]or these felonies, the gang enhancement provision does *not* increase the life term for the underlying offense. Consequently, in this category of cases instructional error on an element of the gang enhancement provision does not violate the federal Constitution [citing *Apprendi*], but only

California law, making the error reviewable under the standard we articulated in *Watson* [citation]." *Sengpadychith*, *supra*, 26 Cal.4th at 327, emphasis in original.

The "Prior Conviction" Exception. *Apprendi* and its progeny apply only to sentencing provisions "*other than the fact of a prior conviction*" which increase the term beyond the statutory maximum prescribed for the underlying offense. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-489, emphasis added; *Blakely v. Washington* (2004) 542 U.S. 296, 301; *United States v. Booker* (2005) 543 U.S. 220, 244. This is known as the "*Almendarez-Torres* exception," after *Almendarez-Torres v. United States* (1998) 523 U.S. 224. Though there are clearly 5 votes to overrule *Almendarez-Torres* (see Justice Thomas' concurrence in *Apprendi*), the Supreme Court has so far declined invitations to take up the issue. Consequently, as matters stand now, a failure to require jury determination of such recidivist enhancements as "strikes," "serious felony" enhancements, and prior prison term enhancements generally does not pose a federal constitutional violation. But, even leaving aside whether the *Almendarez-Torres* exception will remain good law, there is considerable uncertainty over the scope of that exception – i.e., over the precise dividing line between *Apprendi* and *Almendarez-Torres*.

The California Supreme Court, however, has read the *Almendarez-Torres* exception broadly: When the least adjudicated elements of a prior offense do not automatically qualify it as a "serious" or "violent" felony, determination of the enhancement allegation frequently requires consideration of additional materials from the "record of conviction" showing the factual details of the prior offense. See generally *People v. Guerrero* (1988) 44 Cal.3d 343. But, despite the factual character of this inquiry, the California Supreme Court has held that there is no Sixth Amendment right to jury determination of whether the underlying circumstances of the prior satisfy the relevant enhancement definition (e.g., personal weapon use). *People v. McGee* (2006) 38 Cal.4th 682.

Complete removal of an enhancement from the jury. Under the *Apprendi-Blakely* line of cases, an enhancement or other sentencing factor which increases the maximum term is deemed equivalent to an *element* of the charged offense and must be submitted to the jury and determined under the reasonable doubt standard. However, by the same token, a complete failure to submit an enhancement to the jury is not viewed as a structural defect. Because the enhancement is viewed as an additional element of the charged offense (rather than as a separate criminal offense in its own right), the erroneous removal of that element from the jury is considered comparable to the omission of an element (as in *Neder v. U.S.*) and is subject to the *Chapman* standard. *Washington v. Recuenco* (2006) __ U.S. __, 126 S.Ct. 2546.

E. Refusal to Instruct on Defenses

As the California Supreme Court recently acknowledged, "We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense. [Citation]" *People v. Salas* (2006) 37 Cal.4th 967, 984; see also *People v. Simon* (1995) 9 Cal.4th 493, 507 fn. 11. In the past, that Court reviewed erroneous failure to instruct on a defense under the strict "*Sedeno* test," which required reversal unless the jury *necessarily* resolved the omitted question under other, correct instructions. *People v. Sedeno* (1974) 10 Cal.3d 703; see, e.g., *People v. Stewart* (1976) 16 Cal.3d 133, 141-142; *People v. Lemus* (1988) 203 Cal.App.3d 470, 478-480. However, the California Supreme Court has recently repudiated the *Sedeno* test in other contexts, and it is doubtful that it would preserve its use for omitted defenses. Cf. *People v. Flood* (1998) 18 Cal.4th 470 (federal *Chapman* review of omission of an element); *People v. Breverman* (1998) 19 Cal.4th 142 (state *Watson* review of omission of a lesser included offense).

The California courts have not resolved whether there is any *federal constitutional right* to instructions on an affirmative defense. However, there is no question over the matter in the federal circuits. "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. [Citations]" *Mathews* v. *United States* (1988) 485 U.S. 58, 63. Although *Mathews* was a direct appeal from a federal criminal conviction and did not explicitly couch its holding in constitutional terms, federal courts have read it (and other Supreme Court opinions) as recognizing a due process entitlement to instructions on the "defense theory of the case":

> Thus, the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. [Citations]. This is so because the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." [Citation.] *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099.

Indeed, in *Bradley*, the Ninth Circuit deemed the constitutional magnitude of the right to instructions on the defense theory of the case as so well-established that the defendant-petitioner was entitled to relief even under the AEDPA standard governing federal habeas review of a state conviction– that is, it found the state appellate court's affirmance of Bradley's conviction represented an "'unreasonable application' of clearly established federal law." *Bradley*, *supra*, at 1100-1101 (see 28 U.S.C. § 2254(d)(1)).

Assuming that there is a due process right to instructions on a defense theory supported by the evidence, an erroneous refusal of an instruction on an affirmative defense should at least be subject to *Chapman* prejudice review, when the error is raised on direct appeal.[6] However, many federal cases suggest that an even less-forgiving standard than *Chapman* applies. Under those cases, the denial of requested instructions on a defense theory which has evidentiary support is prejudicial error, unless other instructions adequately covered that defense. (E.g., *United States* v. *Ruiz* (11th Cir. 1995) 59 F.3d 1151, 1154-1155; *United States* v. *Allen* (2nd Cir. 1997) 127 F.3d 260, 265; *United States* v. *Montanez* (1st Cir. 1997) 105 F.3d 36, 39.) "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." *United States* v. *Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.

Although these circuit cases generally pre-date *Neder v. United States* (1999) 527 U.S. 1, they parallel the *Neder* opinion's cautionary notes on the limits of harmless error review of omitted elements. As *Neder* stated, omission of an element cannot be held harmless where that element was contested. *Neder*, *supra*, at 19. Because a trial court has a duty to instruct on all elements of the offense in every case, there will be cases, such as *Neder* itself, in which a omission of an element will be harmless because that element was not susceptible to dispute. However, since the duty to instruct on an affirmative defense only arises if there is evidentiary support for that defense, an erroneous refusal should rarely if ever be salvageable through harmless error analysis.

F. Omission or Refusal of Instructions on Lesser Included Offenses

<u>*Breverman*: abandonment of the state *Sedeno* standard</u>. Formerly California courts reviewed errors in the omission or the refusal of lesser included offense instructions under an especially rigorous prejudice standard known as the "*Sedeno* test." *People v. Sedeno* (1974) 10 Cal.3d 703, 721. *Sedeno* was essentially a reversal-per-se test with a narrowly drawn exception. Where *Sedeno* was applicable, an instructional error required reversal unless the question posed by the omitted instruction was necessarily resolved by the jury, adversely to the defense, under other, correct instructions and verdicts. *Sedeno* was principally grounded in the state constitutional

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[6] Because *Bradley* arose on a federal habeas petition, rather than direct appeal, it was instead governed by the *Brecht* standard, requiring a "substantial and injurious influence" on the verdict. Cf. *Brecht v. Abrahamson* (1993) 507 U.S. 619.

right to jury determination of every material fact (*People v. Modesto* (1963) 59 Cal.2d 722, 730) (though, prior to *People v. Flood* (1998) 18 Cal.4th 470, the California Supreme Court had also sometimes employed *Sedeno* as part of its review of such federal constitutional issues as defective instructions on elements).

In *People v. Breverman* (1998) 19 Cal.4th 142, the California Supreme Court reaffirmed its longstanding rule that a trial court must instruct sua sponte on any lesser included offense supported by substantial evidence. But, *Breverman* substantially altered the prejudice analysis for that species of error by overruling the *Sedeno* standard. After *Breverman*, the state law error in omitting a lesser included offense instruction is merely subject to the *Watson* standard, requiring reversal only if there is a "reasonable probability" the outcome would have been different.

Federal constitutional implications of lesser offense instructions. The *Breverman* majority also held that there is no general right to lesser included offense instruction in *non-capital* cases. There is a limited federal constitutional right to a lesser included offense instruction under some circumstances in capital cases. *Beck v. Alabama* (1980) 447 U.S. 625. But the *Breverman* majority noted that the U.S. Supreme Court had given that right a very narrow construction even in the capital context (e.g., *Schad v. Arizona* (1991) 501 U.S. 624; *Hopkins v. Reeves* (1998) 524 U.S. 88) and has never extended the *Beck* analysis to non-capital cases. In this respect, the California Supreme Court's view is consistent with that of the Ninth Circuit. "Under the law of this circuit, the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question. [Citation.]" *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1106.

Nonetheless, *Breverman* does *not* rule out all potential grounds for "federalizing" the denial of lesser included offense instructions. *Breverman* specifically addressed – and rejected – an argument for extension of *Beck v. Alabama* to non-capital cases, and that is the only federal constitutional issue which the *Breverman* opinion decided. There are two other potential federal constitutional bases for such instructions:

Unique relationship between voluntary manslaughter and malice. The *Breverman* majority declined to decide whether the omission of imperfect self-defense instructions resulted in incomplete instructions on the charged offense of murder because the majority believed that issue was not presented in the briefing. *Breverman*, *supra*, 19 Cal.4th at 170-171 & fns. 18 -19. But Justice Kennard did address that issue in her dissent. She found that, due to "the unique relationship between murder and voluntary manslaughter," an erroneous failure to instruct on heat-of-passion or imperfect self-defense violated due process. Because, under California

law, heat-of-passion or imperfect self-defense *negates malice aforethought*, a failure to instruct the jurors on that doctrine *results in incomplete instructions on the malice element of the charged crime of murder*, contrary to *United States v. Gaudin* (1995) 515 U.S. 506. The error also relieves the prosecution of its burden, under *Mullaney v. Wilbur* (1975) 421 U.S. 684, of proving beyond a reasonable doubt that the defendant did not kill in the heat of passion or in imperfect self-defense. See *Breverman*, *supra* at 187-191 (Kennard, J., dissenting opn.). Justice Kennard's dissent provides a blueprint for this argument. Additionally, because the majority opinion did not address the *Gaudin-Mullaney* issue on the merits, the *Breverman* opinion should not bar raising that claim in a California court.[7]

Interestingly, the U.S. Supreme Court's opinion in *Middleton v. McNeil* (2004) 541 U.S. 433, appears to provide some implicit support for a due process argument along the lines sketched in Justice Kennard's *Breverman* dissent. As discussed earlier, in *McNeil*, the Supreme Court found that an error in the imperfect self-defense instructions did not require reversal because, considering the instructions as a whole and the attorneys' arguments, there was no "reasonable likelihood" the jurors misunderstood that doctrine. But the very fact that the Supreme Court was addressing the adequacy of those instructions in the first place reflects its apparent recognition that due process required correct instructions on imperfect self-defense. "In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." *McNeil*, *supra*, at 437.

Even assuming that Justice Kennard was correct in her *Breverman* dissent, the same "unique" characteristics of imperfect self-defense and heat-of-passion which support that due process analysis also effectively restrict that argument to omissions of those grounds for voluntary manslaughter. It is hard to think of any other context in which the omission of lesser offense instructions also results in incomplete instructions on the elements of the charged greater offense. (For example, assuming that the court instructs adequately on the definition of "deadly weapon," an erroneous failure to

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[7] Unfortunately, in a later opinion, the California Supreme Court stated, "Any error in failing to instruct on imperfect defense of others is state law error alone, and thus subject ... to the harmless error test articulated in" *Watson*. *People v. Randle* (2005) 35 Cal.4th 987, 1003. The *Randle* opinion did not mention the unresolved due process issue raised in Justice Kennard's *Breverman* dissent. But arguably the broad statement in *Randle* was dictum: Because the Court found the error in *Randle* prejudicial even under a *Watson* analysis, it was not necessary for the Court to address the federal constitutional question.

submit simple assault as a lesser included offense does not result in incomplete instructions on the elements of assault with a deadly weapon.)

Denial of instructions on "defense theory of the case." There is another, potentially broader, ground for federalizing some lesser included offense issues. As noted earlier, federal cases recognize a due process right to instructions on the "defense theory of the case." E.g., *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091. That concept is not limited to affirmative defenses like self-defense or entrapment. The Ninth Circuit has recognized that **the "defense theory of the case" may require instructions on a lesser included offense,** where the defense evidence and arguments are directed to a distinction between the charged and the lesser offense. *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734. *Conde* arose from a kidnap-for-robbery prosecution. The Ninth Circuit held that the denial of defense-requested instructions on the lesser offense of simple kidnaping deprived the defendant of his "well established" constitutional right "to adequate instructions on the defense theory of the case." *Id*. at 739. (To be sure, there were other closely-related errors in *Conde*, including a defect in the instructions on one element of robbery. But the structure of the opinion indicates that the Ninth Circuit viewed the denial of requested lesser offense instructions as a due process violation in its own right.)

The California Supreme Court has not ruled out the possibility that refusal of a *requested* lesser included offense instruction could violate due process as a denial of instructions on the "defense theory." *Breverman* involved a trial court's failure to deliver sua sponte instructions on a ground for a lesser offense verdict. The same was true of a claim rejected in a recent capital case. The Court acknowledged such federal "defense theory" opinions as *Conde v. Henry* and *Duncan v. Bradley*, but found them distinguishable. "In these cases, unlike the present one, the instruction at issue was requested by the defense. The cases do not support the proposition that a trial court's failure to instruct on a lesser included offense *sua sponte* denies due process." *People v. Rogers* (2006) 39 Cal.4th 826, 872.

While *Rogers* falls short of an explicit endorsement of the *Conde* "defense theory" view of requested lesser offense instructions, it does demonstrate that the issue remains open in California. Thus, contrary to the Attorney General's common refrain, *Breverman* is not the final word on the federal constitutional implications of refusal of lesser offense instructions. Especially in light of *Rogers*' discussion of *Conde* and other federal cases, *Breverman* does not foreclose a California appellate court from finding constitutional error and applying *Chapman* to a refusal of *requested* lesser offense instructions.

G. Evidence Evaluation Instructions Affecting Federal Constitutional Rights–*Chapman* Review

Instructions on the elements of crimes and theories of liability are not the only instructions (or instructional omissions) which may pose federal constitutional issues. Just as evidentiary rulings before and during trial frequently involve constitutional issues (e.g., unlawful search, self-incrimination, confrontation, etc.), the instructions relating to that evidence and its permissible uses may raise federal issues as well. Where the evidentiary ruling was erroneous, the related instructions may compound the error. Perhaps more importantly, even when damaging evidence is legitimately admissible on some legitimate ground (e.g., impeachment), there may still be an instructional issue if the jurors received incorrect or inadequate guidance on the purposes for which they could consider the evidence.

Instructional errors which implicate federal constitutional rights are generally subject to the traditional *Chapman* test ("harmless beyond a reasonable doubt"). The examples listed below are simply illustrative. Any instructional error which allows jurors to use evidence (or other trial circumstances) for an unconstitutional purpose should be a candidate for Chapman prejudice review:

1. Instructions on “Other Offenses”

(a) In general, use of "other offenses" evidence as proof of a defendant's "character" or criminal propensity offends federal due process because of the historic common law proscriptions against such evidence. *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [evidentiary error]. In *People v. Garceau* (1993) 6 Cal.4th 140, 186-187, the California Supreme Court "assumed without deciding" that an instruction which explicitly authorized jurors to consider "other offenses" evidence as proof of the defendant's "character" was reviewable under the *Chapman* standard. But the California Supreme Court rejected a *McKinney*-type due process challenge to a new statute, Evid. Code § 1108, which expressly allows use of prior offenses as “propensity” evidence in *sex offense* cases. *People v. Falsetta* (1999) 21 Cal.4th 903. The California courts have applied similar reasoning in upholding a parallel statute allowing “propensity” evidence in domestic violence cases, Evid. Code § 1109. See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1312; *People v. Price* (2004) 120 Cal.App.4th 224, 240. However, outside the context of these discrete legislatively recognized categories of crimes – sex offenses and domestic violence – the law continues to prohibit use of “other offenses” evidence as proof of criminal propensity. Consequently, an instruction allowing consideration of “other offenses” for that purpose would still raise due process concerns, justifying *Chapman* review.

(b) Even in sex offense or domestic violence cases where consideration of "other offenses" as proof of propensity is permissible (under Evid. Code §§ 1108, 1109, and *Falsetta*), the instructions guiding the jurors' use of that evidence deserve especially close scrutiny. Both the Ninth Circuit and some California appellate courts found that the pre-1999 pattern instructions, CALJIC 2.50.01 and 2.50.1, violated due process because, read in combination, they effectively authorized a route to conviction on evidence falling short of the reasonable doubt standard. CALJIC 2.50.1 allowed proof of other offenses under a preponderance standard, and the pre-1999 version of 2.50.01, in turn, allowed jurors to infer the defendant's guilt of the currently-charged offense from the propensity shown by his prior conviction. "Therefore, the interplay of the two instructions allowed the jury to find that Gibson committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the *charged* acts based upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822, emphasis in original; see also *People v. Vichroy* (1999) 76 Cal.App.4th 92; *People v. Orellano* (2000) 79 Cal.App.4th 179; *People v. Frazier* (2001) 89 Cal.App.4th 30; but contrast, e.g., *People v. Van Winkle* (1999) 75 Cal.App.4th 133; *People v. Jeffries* (2000) 83 Cal.App.4th 15 (each upholding pre-1999 CALJIC 2.50.01 and related instructions, finding no reasonable likelihood jurors construed instructions as a whole to allow conviction of current crime on evidence short of proof beyond reasonable doubt). However, the 1999 revision of CALJIC 2.50.01 added a paragraph explaining that, even if jurors found by a preponderance that the defendant committed prior sexual offenses, "that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged crime[s]." The California Supreme Court held that this revised version of 2.50.01, when considered together with all the instructions, posed no risk of a construction allowing conviction on less than proof beyond a reasonable doubt. *People v. Reliford* (2003) 29 Cal.4th 1007.

(c) As always, counsel should be vigilant in reviewing any unusual modifications of the "other offense" pattern instructions or any use of those instructions beyond the specific purpose for which they were designed. One recent opinion held that Evid. Code §§ 1108, 1109, apply only to *uncharged* sex offenses or domestic violence incidents, not to *other charges in the current case*. *People v. Quintanilla* (2005) 132 Cal.App.4th 572, found error where the trial court modified CALJIC 2.50.02 and 2.50.1, to allow the jurors to use the various domestic violence charges as propensity evidence in considering the other domestic violence charges in the same case. (However, the *Quintanilla* court found the instructional error harmless under *Chapman*.)

2. Other limitations on Consideration of Evidence

(a) Necessity of instruction limiting use of unconstitutionally-obtained evidence for impeachment purposes only. See generally *People v. May* (1988) 44 Cal.3d 309 [adopting the federal rule allowing impeachment with an un-*Mirandized* statement]. Denial of a limiting instruction (such as CALJIC 2.13.1 or CALCRIM 356) is subject to the *Chapman* standard. *People v. Duncan* (1988) 204 Cal.App.3d 613, 620-622.

(b) Instructional *Bruton* error. A non-testifying co-defendant's extrajudicial statement is admissible in a joint trial, provided that the statement doesn't explicitly refer to the other defendant and the court clearly instructs the jurors to consider the statement as to the declarant co-defendant only and not as to the other defendant. *Richardson v. Marsh* (1987) 481 U.S. 200. Presumably, instructions which allowed the jurors to consider the extrajudicial statement against both defendants would trigger *Chapman* review, just as other forms of *Bruton* error do.

3. Inferences from other Circumstances at Trial

(a) Instructional *Griffin* error--an instruction authorizing an adverse inference from a defendant's exercise of his Fifth Amendment privilege not to take the stand. *People v. Vargas* (1973) 9 Cal.3d 470, 477-478; *People v. Diaz* (1989) 208 Cal.App.3d 338 [each applying *Chapman*].

(b) Presumably, the same goes for "*Carter* error"--refusal of a defense-requested instruction (such as CALJIC 2.60 & 2.61 or CALCRIM 355) explicitly admonishing jurors not to draw any such inference from the defendant's failure to take the stand. *Carter v. Kentucky* (1981) 450 U.S. 288; *James v. Kentucky* (1984) 466 U.S. 341 [leaving open question of harmless error].

(c) Where the defendant is shackled at trial and the restraints are visible to the jurors, the court must sua sponte deliver an instruction (such as CALJIC 1.04 or CALCRIM 202 & 337) admonishing them to "disregard this matter entirely." *People v. Duran* (1976) 16 Cal.3d 282, 291-292, 296 n. 15 [stating sua sponte rule, but not resolving applicable prejudice standard]; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1827-1830 [applying *Chapman*]; *People v. Jacla* (1978) 77 Cal.App.3d 878, 890-891 [same].

(d) Retroactive application of California Supreme Court cases overruling prior standards (e.g., *Carlos* error re: intent for felony-murder special circumstance) violative of due process as unforeseeable judicial enlargement of criminal liability.

People v. Johnson (1993) 6 Cal.4th 1, 44-45; *People v. Fierro* (1991) 1 Cal.4th 173, 227; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1704-1709; *In re Baert* (1988) 205 Cal.App.3d 514, 519-520.

H. Everything Else--the State *Watson* Standard

All instructional errors which don't fit into one of the categories above are subject to the state *Watson* test--the burden is on the appellant to show that it's reasonably probable that the outcome would have been more favorable without the error. *People v. Watson* (1956) 46 Cal.2d 818. Some of the more common instructional issues subject to *Watson* are listed below:

1. Accomplice instructions. E.g., *People v. Gordon* (1973) 10 Cal.3d 460, 470-473.

2. Cautionary instructions (e.g., oral admissions, CALJIC 2.70, 2.71,etc.; CALCRIM 358.). E.g., *People v. Heishman* (1988) 45 Cal.3d 147, 166.

3. Identification instructions (CALJIC 2.91, 2.92; CALCRIM 315) and most other defense-requested "pin-point instructions" drawing the jurors' attention to particular aspects of the evidence. *People v. Wright* (1988) 45 Cal.3d 1126.

4. "*Dewberry* error," failure to instruct specifically on the application of the reasonable doubt rule to the choice between greater and lesser offenses. *People v. Dewberry* (1959) 51 Cal.2d 548.

5. "*Kurtzman* error" – instructions which misinform jurors that they can't "consider" a lesser offense until they have actually returned a verdict of acquittal on the greater charge. *People v. Berryman* (1993) 6 Cal.4th 1048, 1076-1077 n. 7.

6. Most other evidence- and inference-related instructions, including consciousness-of-guilt from flight, suppression of evidence, etc.

7. Errors in "housekeeping" instructions (e.g., juror note-taking, etc.).