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STANDARDS OF REVIEW AND PREJUDICE FOR INSTRUCTIONAL ERROR

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APPELLATE STANDARDS OF REVIEW AND PREJUDICE FOR INSTRUCTIONAL ERROR

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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.

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 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 rigorous *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

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[1] Portions of this article have been adapted and updated from several previous sets of training materials on instructional issues, including a similarly-titled article, by J. Bradley O'Connell, as updated by Fran Ternus in 2008.

error (e.g., omission or misstatement of an element) are subject to a more rigorous form of *Chapman* review than common formulations of that standard in other contexts.

Second, "federalizing" the claimed error throughout the state appellate process is essential 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. That is, if an instruction is within a court's duty to instruct "sua sponte" (on its own), then a defendant may raise the issue on appeal, even if there was no request or objection on that ground in the trial court. 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.

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]

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[2] For a more comprehensive treatment of a trial court's sua sponte instructional duties (and, conversely, of pinpoint instructions, required only upon request), see O'Connell & Soglin, "Preserving Instructional Error for Appellate Review" (Mar. 2006): www.fdap.org/downloads/seminar-criminal/PreservingInstructionalErrorforAppellateReview.pdf

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; accord, e.g., *People v. Ngo* (2014) 225 Cal.App.4th 126, 149; *People v. Mason* (2013) 218 Cal.App.4th 818, 824.

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, e.g., *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 *separate* instructions on more specialized points. Sometimes the latter instructions would be considered either "pinpoint" or "amplifying" instructions required only on request. In contrast, CALCRIM often incorporates 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).)

Because the typical CALCRIM instruction is more comprehensive than its CALJIC counterpart, it should often be possible to frame the argument as a challenge to the validity of the instruction actually delivered, rather than as a complaint regarding the omission of some supplemental instruction. CALCRIM's approach tends to present more "decision points" *within* the form instructions – in the form of bracketed paragraphs tailored to different circumstances. Thus, while the CALJIC model usually involved questions of *which instructions* to give, use of CALCRIM often presents questions of *which portion of a form instruction* to deliver.

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. Generally, if the basic instructions are otherwise correct, the onus is on the defense to request any "amplifying" or "clarifying" instructions.[3] "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

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[3] Consider, for example, instructions intended to convey the *Dewberry* principle on the applicability of the reasonable doubt standard to the choice between degrees of a crime and other lesser offense choices. *People v. Dewberry* (1959) 51 Cal.2d 548. CALCRIM addresses that principle in the final paragraph of a multi-page instruction defining the various forms of first-degree murder: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." CALCRIM 521; see also CALCRIM 570, 571 (comparable paragraphs re murder and voluntary manslaughter grounds). CALJIC, however, put the matter more crisply in a separate instruction: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed ..., but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, *you must give the defendant the benefit of that doubt* and return a verdict fixing the murder as of the second degree...." CALJIC 8.71, emphasis added; see also CALJIC 8.72 (comparable instruction on murder/manslaughter choice). However, because the less powerful CALCRIM instructions are correct as far as they go, any argument that a court should have given the CALJIC version instead, would require a specific request below.

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.

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. 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.

Application of those principles can sometimes 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 has required sua sponte definition of the element 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 statutes "require markings *in addition* to the presence of a red light and a siren." *Hudson,* 38 Cal.4th at 1012, emphasis in original.

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).

C. Pinpoint Instructions – Recent Developments

The principal focus of these materials is standards of review and prejudice, rather than cognizability rules. However, we will note two very recent developments in the area of pinpoint instructions.

1. Cautionary instruction on oral admissions no longer sua sponte.

For decades, the California Supreme Court had treated cautionary instructions on a defendant's oral admissions as coming within a trial court's sua sponte duties. E.g., CALCRIM 358; CALJIC 2.70. However, in *People v. Diaz* (2015) 60 Cal.4th 1176, the Court overruled those decisions and held that (like most other limiting or cautionary instructions on particular forms of evidence), these are "pinpoint" instructions and are required only if specifically requested. "The cautionary instruction regarding a defendant's statements stands in contrast to instructions that convey a legal principle with which jurors would be unfamiliar in the absence of instruction from the court." *Id*. at 1191.

The Supreme Court found it unnecessary to resolve whether its abrogation of the sua sponte duty to deliver the oral admission instruction should apply retroactively, because it found the omission of the cautionary instruction harmless in any event. *Diaz*, 60 Cal.4th at 1195. However, because *Diaz* effectively imposes a new requirement on defense counsel to take affirmative steps to obtain such instructions, there are strong grounds that this holding should not apply to any trial conducted before the *Diaz* opinion. In numerous other contexts, the Court has given prospective-only application to opinions which imposed new requirements in order to preserve issues for review. E.g., *People v. Scott* (1994) 9 Cal.4th 331, 357 (duty to object to omissions in sentencing reasons); see also, e.g., *People v. Nunez* (2013) 57 Cal.4th 1, 23 (duty to raise *Witherspoon* objection to excusal of juror based on capital punishment views).

2. Pinpoint instruction on *Beltran* principle: heat-of-passion/provocation does not require that reasonable person would kill.

In *People v. Beltran* (2013) 56 Cal.4th 934, the California Supreme Court repudiated the common prosecutorial assertion that provocation will support a reduction to voluntary manslaughter only if it would cause "an ordinary person of average disposition" to *kill*. *Beltran* affirmed the longstanding California formulation requiring only that the provocation would cause an ordinary person to react "rashly"

and without "judgment" or "reflection."

The California Supreme Court has subsequently held that *a defendant is entitled, on request, to a pinpoint instruction clarifying "that the jury need not find a provocation sufficient to rouse a reasonable person to kill, but only a provocation sufficient to trigger actions out of passion rather than judgment.*" *People v. Trinh* (2014) 59 Cal.4th 216. The proposed instruction was substantively correct and was not duplicative of the standard instructions. *Trinh* at 231-233.

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 *does not entail any deference to the trial court*. 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 an 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. 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 that infringes constitutional rights (for example, by diluting the prosecution's burden to prove each 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]; see also, e.g., *Waddington v. Sarausad* (2009) 555 U.S. 179, 190-191.

This "reasonable likelihood" test is probably the least-understood of the standards

relevant to instructional issues. 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, many of these challenges will involve debates over how jurors will likely interpret the CALCRIM formulations. Consequently, much of the litigation over the adequacy of particular instructions will require understanding the nuances and limits of the "reasonable likelihood" test (including recognizing the errors to which it should not 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 *state law* instructional issues as well 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, Not 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, emphasis added. In *Coleman,* the Ninth Circuit had reversed a death penalty upon finding a "reasonable likelihood" of juror misunderstanding. The Supreme Court held that the "reasonable likelihood" determination merely represented a finding of constitutional error, but was not enough, by itself, to require reversal. It remanded and directed the Circuit to separately assess whether that error was

prejudicial under the applicable standard.[4]

Coleman offers a clear lesson for appellate briefing. Counsel must first show that there is a "reasonable likelihood" that an ambiguous 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*, such as *Chapman*.

E. Limitation of "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. *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, e.g., *Wade v. Calderon* (9th Cir.1994) 29 F.3d 1312, 1321; *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" 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.

<u>Consideration of Instructions as a Whole</u>. 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 subsequent Supreme Court case has muddied the waters further. Even the threshold

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[4] 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.

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." There was no dispute that 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 III-F), it allowed the reviewing court to consider *counsel's arguments* (which correctly stated the unreasonable belief rule) as clearing up the instructions.

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).

Conflicting instructions. A correct instruction on a point does *not* automatically cure a misinstruction elsewhere in the charge. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to resolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin* (1985) 471 U.S. 307, 322.

The Supreme Court decided *Francis* 30 years ago – before its adoption of the "reasonable likelihood" test in *Boyde* and before such decisions as *Middleton v. McNeil*. As discussed above, under *McNeil*, "internally inconsistent" instructions are not necessarily fatal, where the instructions and arguments as a whole have "repeatedly informed the jury" of the correct standard. Nonetheless, the U.S. Supreme Court has never overruled or disapproved its admonition in *Francis* that a correct instruction "that merely contradicts" an incorrect instruction does not cure the

error where the record does not allow the reviewing court to determine "which of the two irreconcilable instructions the jurors applied."

Perhaps most importantly for our purposes, the California Supreme Court still regards *Francis*'s holding on that point as good law, even after *Middleton v. McNeil*. The Court relied on that principle to reverse a death penalty in a post-*McNeil* opinion. *People v. Gay* (2008) 42 Cal.4th 1195, 1225-1226. In *Gay*, an instruction allowing jurors "to consider in mitigation any lingering doubt" as to the defendant's guilt of the underlying murder did not cure a more specific instruction that explicitly told the jurors that the verdict in the original trial had "conclusively" resolved that the defendant personally shot and killed the victim. The prosecutor had emphasized the incorrect instruction in argument, and the trial court had responded inadequately to a juror query on the apparent inconsistency in the instructions. The Court found that, as in *Francis v. Franklin*, it had "no way of knowing which of the two irreconcilable instructions" the jurors followed.[5]

A recent California appellate opinion found it unnecessary to resolve "which standard of review applies" where "the jurors were given two starkly conflicting instructions, one of which was erroneous on its face." Even assuming that "the instructions as a whole could be characterized as ambiguous," the court found a reasonable likelihood the error "confused or misled the jury," where the "the jury was exposed to the error in several ways," including through the court's repetition of the erroneous instruction and the prosecutor's argument exacerbating the error. *People v. Ngo* (2014) 225 Cal.App.4th 126, 153.

As such cases as *Gay* and *Ngo* reflect, regardless of whether they are explicitly employing the "reasonable likelihood" test, reviewing courts look to many of the same factors in assessing whether the instructions resulted in constitutional error and, if so, whether the error was prejudicial. These include the prominence of any incorrect or misleading statement in the overall instructions, the clarity and specificity of correct instructions elsewhere in the charge, the arguments of counsel (especially any prosecutorial arguments which emphasize or exacerbate the misleading instruction), and any indicia of the jurors' confusion on the subject, such as requests for clarification. Moreover, where there is uncertainty over the standard, the reviewing

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[5] The *Gay* opinion does not explicitly mention the "reasonable likelihood" test for "ambiguous" instructions. It's not clear whether the California Supreme Court viewed the *Francis* principle on "irreconcilable" instructions principally as part of its threshold determination of error or as a key component of its prejudice analysis.

court will often add that it would reach the same disposition under either analysis, as in *Ngo*. As Justice Stevens observed in a different context (formulation of the harmless error test for federal habeas review): "The way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." *Brecht v. Abrahamson* (199) 507 U.S. 619, 643 (Stevens, J., concur. opn.).

F. The Role of Counsel's Arguments

As the U.S. Supreme Court observed in *Boyde* (the opinion which 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 v. California* (1990) 494 U.S. 370, 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.

Correct statements of law in counsel's arguments. 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 is 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 (discussed above in Part III-B). In considering 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* 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. 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.

People v. Morgan (2007) 42 Cal.4th 593, 607-613, presents a vivid example of how otherwise correct jury instructions may, nonetheless, mislead the jurors when considered in conjunction with a prosecutor's arguments. The instructions defining the asportation element of kidnapping as a "substantial distance ... more than slight or trivial" were "proper," but provided little "guidance." The prosecutor, however, argued that a movement of as little as 37 feet could satisfy that element – contrary to then-extant law. Together, the vague instruction and the prosecutor's argument resulted in submission of a legally invalid theory.

Conversely, however, where the court's instructions are clear and correct, a misstatement of the law in the prosecutor's argument will rarely provide a basis for relief. 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* (9th Cir. 2002) 309 F.3d 1095, 1111.

For example, the Supreme Court held that a Washington prosecutor's misleading "hypothetical" on accomplice liability – "in for a dime, in for a dollar" – did not render the correct jury instructions on the subject ambiguous. It continued that, even if they were deemed ambiguous, there was no reasonable likelihood of juror confusion in light of the entirety of the instructions and both attorneys' arguments. *Waddington v. Sarausad* (2009) 555 U.S. 179.[6]

[6] Because *Sarausad* arose on federal habeas, the petitioner faced the additional hurdle of establishing that the Washington courts' rejection of the "reasonable likelihood" claim was objectively unreasonable under the AEDPA standard, 28 U.S.C. § 2254(d)(1).

G. 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 substantive body of the instruction on the elements of the 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; accord, e.g., *People v. Gay* (2008) 42 Cal.4th 1195, 1226. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* 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.[7]

Though *Fulminante* did not involve instructional error, it is a crucial opinion because the Court devised a new nomenclature 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.[8]

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[7] A differently-composed majority concluded that the admission of the confession was *not* harmless under the *Chapman* standard and reversed Fulminante's murder conviction.

[8] If the issue arises on federal habeas review, prejudice will usually be governed by the *Brecht* test – whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson* (1993) 507 U.S. 619. The *Brecht* standard requires habeas relief where the federal court has "grave doubt" as to the effect of the error – such that "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the effect of the error." *O'Neal v. McAninch* (1995) 513 U.S. 432, 435. *Brecht* is plainly "a more forgiving" harmless error standard than *Chapman*. *Fry v. Pliler* (2007) 551 U.S. 112, 116. That is, it is more difficult to establish prejudice under *Brecht*. However, federal opinions are inconsistent on where exactly *Brecht* falls in relation to the *Strickland* "reasonable probability" prejudice test for ineffective assistance of counsel. *Strickland v. Washington* (1984) 466 U.S. 668. Some cases describe *Brecht* as equivalent to *Strickland* (e.g., *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 726), while others view *Brecht* as a lower – i.e., easier to satisfy – prejudice standard than *Strickland* (*Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, 1173 fn. 8). The California Supreme Court, in turn, views the similarly-phrased "reasonable probability" tests of *Strickland* and *Watson* as the same. *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.

Because the focus of these materials is on state appellate practice, we will not

A. "Structural Defects" (Reversible Per Se) vs. "Trial Errors"

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 instructional errors infringing constitution rights (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.

Contrast: failure to define "reasonable doubt" *not* structural. Although an *erroneous* definition of "reasonable doubt" is a "structural defect" and thus reversible per se (*Sullivan v. Louisiana*), *omission of the definition* of "reasonable doubt" (CALCRIM 220; CALJIC 2.90; Pen. Code § 1096) is not structural.

State law requires the court to instruct sua sponte on that definition. However, the California Supreme Court has held that the failure to *define* the term "reasonable doubt" does not necessarily represent federal constitutional error – provided that the instructions convey the necessity that the prosecution prove each charge beyond a reasonable doubt. *People v. Aranda* (2012) 55 Cal.4th 342. "[T]he omission of the standard reasonable doubt definition will amount to a federal due process violation when the instructions ... failed to explain that the defendant could not be convicted 'unless each element of the crimes charged was proved to the jurors' satisfaction beyond the reasonable doubt.' [Citation.] When the trial court's instructions otherwise cover this constitutional principle, the failure to instruct with the standard reasonable doubt definition does not constitute federal constitutional error." *Id* at 358.

As *Aranda* illustrates, that inquiry requires a charge-by-charge dissection of the instructions. The Supreme Court found no constitutional error as to the voluntary manslaughter conviction, where the many references to reasonable doubt in the murder and lesser offense instructions "clearly connected the reasonable doubt

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elaborate further on the *Brecht* federal habeas standard, except to say this: When relying on federal habeas cases, counsel should be careful *not* to suggest that the *Brecht* standard has any application on direct appeal. Where a misinstruction represents federal constitutional error and the issue arises on direct appeal, prejudice is governed by *Chapman*, not the more forgiving *Brecht* harmless error test.

standard to the voluntary manslaughter offense." *Aranda*, 55 Cal.4th at 361. But the Court continued that "the same cannot be said" of the instructions on a gang participation offense (§ 186.22(a)), "because neither the instructions on the elements of that offense nor any other instruction ... connected the reasonable doubt standard of proof to that offense." *Ibid*. However, though the failure did represent federal error as to the § 186.22(a) count, it still did not amount to a structural defect and was subject to review under the *Chapman* standard. *Id*. at 362-367.

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. *Sullivan v. Louisiana*, 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. The Ninth Circuit has 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.[9]

B. 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. 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. *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 *the omitted element 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

[9] *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.

the instructional error harmless under *Chapman*.

We should not 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. The *Neder* opinion demonstrates that **a more rigorous form of *Chapman* analysis applies to omission of an element**:

> [S]afeguarding 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*. *Neder*, 527 U.S. at 19, emphasis added.[10]

Under a faithful reading of *Neder*, a reviewing court should find omission of an element harmless *only* in cases such as *Flood* and *Neder*, *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.

Fortunately, the California Supreme Court appears to "get" this aspect of *Neder*. In *People v. Mil* (2012) 53 Cal.4th 400, 409, the instructions omitted two elements essential to felony-murder special circumstance liability for an aider in the felony who did not personally kill: that he had (1) "been a major participant in the commission of the burglary or robbery" and (2) "acted with reckless indifference to human life." The Court found the omission of the "reckless indifference" element was susceptible to dispute, such that "a rational juror ... could have had a reasonable doubt whether defendant was subjectively aware of a grave risk of death when he participated in this burglary and robbery." *Mil* at 419. In so holding, the Court emphasized that the

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[10] As the Court elaborated, the harmless error inquiry does *not* permit the reviewing court to "become ... a second jury" and to reweigh the evidence "to determine whether the defendant is guilty." Instead, "in typical appellate court fashion," the reviewing court "asks whether the record contains *evidence that could rationally lead to a contrary finding* with respect to the omitted element." *Neder*, 527 U.S. at 19, emphasis added.

Chapman-Neder review of harmlessness is *the converse of the ordinary deferential appellate review of the sufficiency of evidence* to support a conviction. "Although we agree that this evidence would be sufficient to sustain a finding of reckless indifference on appellate review ..., our task in analyzing the prejudice from the instructional error is whether any rational factfinder could have come to the *opposite* conclusion." *Mil* at 418, emphasis in original.

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 finding the error reversible per se, 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* at 1315, emphasis added.[11]

However, recently in *People v. Mil* (2012) 53 Cal.4th 400 (the special circumstance case discussed above), the California Supreme Court refused to extend *Cummings*' reversible-per-se analysis to the omission of *two* elements of the charge ("major participant" in the felony and "reckless indifference to life"). While acknowledging *Cummings'* holding regarding omission of "substantially all" elements, the Court held that omission of multiple elements does not "'categorically "'vitiate *all* the jury's findings'"'" and thus does not preclude harmless error review.

The Court in *Mil* cautioned, "it may prove more difficult, as a practical matter, to establish harmlessness in the context of multiple omissions." Such error "will be deemed harmless only in unusual circumstances, such as where each element was undisputed, the defense was not prevented from contesting any of the omitted elements, and overwhelming evidence supports the omitted element." *Mil*, 53 Cal.4th at 412, 414. (As noted earlier, the Court went on to find the omission of the "reckless indifference" prejudicial because that element was contested.) Thus, as matters stand now, omission of "multiple elements" is generally deemed susceptible to harmless

[11] Similarly, in another pre-*Neder* case, the Ninth Circuit found a structural defect where the trial court entirely failed to instruct on any of the elements of a charge. *Harmon v. Marshall* (9th Cir.1995) 69 F.3d 963, 966.

error review (though under the rigorous *Neder* framework (*Mil*)). But omission of "substantially all" elements may be reversible per se (*Cummings*).

C. Submission of Invalid Alternative Legal Theory

Unauthorized legal theory. Appellate practitioners frequently confront trials 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; see also Cal. authorities discussed below ("*Green-Guiton* rule").

In *Hedgpeth v. Pulido* (2008) 555 U.S. 57, the Supreme Court clarified that submission of an invalid alternative theory does *not* represent a form of structural defect and is not reversible per se. "An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted," as in *Neder*. *Pulido* at 61, emphasis in original. Consequently, it is susceptible to harmless error review.

In California, the "*Green-Guiton* rule" has long provided the framework for assessment of submission of an invalid legal theory. See *People v. Green* (1980) 27 Cal.3d 1, 69; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129. 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 or enhancement may establish that the jurors made all the findings necessary to the valid theory of liability (e.g., a valid felony-murder predicate).

Until recently, there was a tendency among some appellate courts and practitioners to view the *Green-Guiton* framework as a standard unto itself, somehow distinct from traditional harmless error review under *Chapman* or *Watson*. However, recent California Supreme Court opinions have clarified that the *Green-Guiton* analysis simply represents *how Chapman applies to this specific form of instructional error*:

> When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless

> there is a basis in the record to find that the verdict was based on a valid ground. [Citing *Guiton* & *Green*.] Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury that the jury based its verdict on the legally valid theory.... *People v. Chiu* (2014) 59 Cal.4th 155, 167; accord *People v. Chun* (2009) 45 Cal.4th 1172, 1203.

In *Chun*, the California Supreme Court has added a gloss to *Guiton-Green*. Drawing from Justice Scalia's concurrence in a pre-*Neder* misstated element case, the Court held that submission of an invalid theory "'can be harmless only if the jury's verdict on other points effectively embraces [the correct finding] or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.'" *Chun*, 45 Cal.4th at 1204, quoting *California v. Roy* (1996) 519 U.S. 2, 7 (Scalia, J., concur. opn.) (emphasis in *Roy* & *Chun*). The *Chun* court applied that analysis in finding that, despite the submission of an invalid felony murder theory, the jurors necessarily made all the findings necessary for the valid theory of implied malice: "If other aspects of the verdict or 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." *Chun* at 1205.

Submission of invalid theory through prosecutor's arguments. The recent California Supreme Court case of *People v. Morgan* (2007) 42 Cal. 4th 593, 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. In *Morgan*, the Supreme Court reversed a kidnaping conviction, relying in part on the fact the prosecutor argued an incorrect legal theory. See further discussion of *Morgan* in Pt. III-F, *supra*.

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* at 1125, quoting *Griffin* 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,* 4 Cal.4th at 1129, emphasis added.[12]

D. Offenses vs. Enhancements

Apprendi – federal constitutional import of enhancements. The Sixth Amendment right to jury trial and the due process requirement of proof beyond a reasonable doubt apply to any additional factual finding (other than the "fact of a prior conviction"[13]) which increases the sentence above the maximum otherwise allowed for the conviction offense alone. *Apprendi v. New Jersey* (2000) 530 U.S. 466.

Apprendi represents one of the true "landmark" criminal justice opinions of the past two decades. *Apprendi's* effect on criminal trial procedure was not as dramatic in California as in some jurisdictions, because state law already provided for jury trial on non-recidivist enhancements. However, *Apprendi* has significantly affected appellate review of instructional errors on enhancements.

Prior to *Apprendi*, the California Supreme Court had taken the view that there was no federal constitutional right to jury trial on a sentence enhancement. It had held that failure to instruct or misinstruction on an enhancement represented state law error only and was subject to the *Watson* "reasonable probability" test of prejudice, rather than the federal *Chapman* standard. *People v. Wims* (1995) 10 Cal.4th 293. As the California Supreme Court has recognized, the *Wims* holding could not survive *Apprendi*. *People v. Sengpadychith* (2001) 26 Cal.4th 316. In the wake of *Apprendi*, *an instructional error concerning the elements of an enhancement is reviewed under the same federal constitutional principles*, including *Chapman-Neder* harmless error

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[12] *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.

[13] The scope of the "prior conviction" exception to *Apprendi* and the prospects that the Supreme Court may repudiate or further curtail that exception are beyond the scope of these instructional materials and are subjects for another day.

analysis, *as a comparable error involving the elements of an offense*.

Apprendi applicable to mandatory minimums. *Apprendi* itself involved a finding that *increased the maximum punishment* available for an offense. Thus, it was comparable to the many California enhancements (weapon use, GBI, etc.) that either impose an additional term on top of the sentence for the base offense or otherwise establish an alternative sentencing scheme with a higher maximum. Similarly, such cases as *Blakely v. Washington* (2004) 542 U.S. 296, and *Cunningham v. California* (2007) 549 U.S. 270, also involved findings necessary to imposition of a maximum punishment. Until recently, however, U.S. Supreme Court precedents held that the Sixth Amendment jury trial right did *not* apply to "mandatory minimums" – i.e., findings that operate on the lower end of the available sentencing range by raising the *minimum* punishment. *Harris v. United States* (2002) 536 U.S. 545; see also *McMillan v. Pennsylvania* (1986) 477 U.S. 79.

That disconnect between constitutional status of maximum-increasing and minimum-raising findings resulted in anomalies such as the treatment of different applications of gang enhancement findings (§ 186.22) in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324. In most instances, a § 186.22 finding increases the maximum punishment either by adding an enhancement to the base term (subd. (b)(1)) or by providing some form of indeterminate life term for an offense that would otherwise be subject to a determinate fixed sentence (subd. (b)(4)). An instructional error on a § 186.22 allegation as to those kinds of applications is plainly a federal constitutional violation, subject to *Chapman* prejudice review, because it increases the sentence beyond the maximum otherwise allowed for the underlying offense. *Sengpadychith* at 326, 328. However, for crimes already subject to an indeterminate life term (e.g., attempted premeditated murder) a § 186.22 finding bars parole "until a minimum of 15 calendar years" (subd. (b)(5). Consequently, at the time of *Sengpadychith*, that same instructional error on an 186.22(b) allegation was recognized as federal error as to determinate term counts, but was deemed state law error only as to life term counts, because "for those felonies, the gang enhancement provision does *not* increase the life term for the underlying offense." *Sengpadychith* at 327 (emphasis in original). Thus, in *Sengpadychith*, the California Supreme Court assessed the prejudicial effect of the identical instructional error on the gang finding under *Chapman* as to some charges and other *Watson* as to others.

Fortunately, the U.S. Supreme Court has cured that anomaly. The Supreme Court has overruled *Harris v. United States* and has found that *Apprendi* principles apply equally to any findings that trigger "mandatory minimums" – i.e., any additional factual finding that elevates the minimum term above that otherwise available for the

base offense. "*Apprendi*'s definition of 'elements' necessarily includes *not only facts that increase the ceiling, but also those that increase the floor*.... Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." *Allelyne v. United States* (2013) __ U.S. __, 133 S.Ct. 2151, 2158, emphasis added.

Allelyne has effectively abrogated *Sengpadychith*'s holding that defective instructions on a finding elevating the minimum for a life term offense represent state law error only. After *Allelyne*, those errors too are federal constitutional violations, on a par with errors on conventional enhancements that increase the maximum term.

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) 548 U.S. 212.

E. Refusal to Instruct on Defenses

In the past, the California Supreme Court reviewed erroneous failure to instruct on a defense under the strict "*Sedeno* test," which required reversal unless the jury *necessarily* resolved the factual question posed by the omitted instruction. *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 subsequently 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) 18 Cal.4th 470 (state *Watson* review of omission of a lesser included offense).

Constitutional magnitude of denial of instructions on defense theory. The California courts have not resolved whether there is any *federal constitutional right* to instructions on an affirmative defense. The federal character of the error, of course, determines which prejudice standard applies, *Chapman* or *Watson*. As the California Supreme Court has 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.[14]

However, there appears to be no question in the federal circuits over the federal constitutional magnitude of an erroneous denial of instructions on a "defense theory." "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. *Mathews* was a direct appeal from a federal criminal conviction and did not explicitly couch its holding in constitutional terms. However, 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":

> [T]he 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;[15] see also, e.g., *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867; *Davis v. Strack* (2nd Cir. 2001) 270 F.3d 111.

Bradley v. Duncan involved a classic "affirmative defense" – entrapment. However, due to the uncertain state of California law as to the constitutional status of instructions on "affirmative defenses," where possible, counsel should also emphasize the relationship of the defense instruction *to the elements of the charged offense*. E.g., *People v. Eid* (2010) 187 Cal.App.4th 859 (finding victim's lack of consent and defendant's lack of good faith belief in consent are elements of kidnap for ransom); *People v. Andrews* (2015) 234 Cal.App.4th 590 (omission of *Mayberry* instruction of reasonable mistake as to victim's consent in sexual battery case). (The *Eid* and

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[14] See also, e.g., *People v. Eid* (2010) 187 Cal.App.4th 859, 883; *People v. Watt* (2014) 229 Cal.App.4th 1215, 1219 (each noting continuing uncertainty on applicable prejudice standard).

[15] 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, the Circuit found the state appellate court's affirmance of Bradley's conviction represented an "'unreasonable application' of clearly established federal law." *Bradley*, 315 F.3d at 1100-1101; see 28 U.S.C. § 2254(d)(1).

Andrews courts each found the respective instructional omissions prejudicial under either *Chapman* or *Watson*).[16]

Refusal of defense theory as reversible per se? 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.[17]

A number of 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. "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.[18]

However, *Escobar de Bright* and similar circuit cases generally pre-date *Neder v. United States* (1999) 527 U.S. 1. As previously discussed, *Neder* held that omission of an element of an offense was not a structural defect, but was susceptible to harmless error review – albeit under a very rigorous version of *Chapman*. As the Ninth Circuit has acknowledged, "[w]e have not revisited *Escobar de Bright* in light of *Neder*." *United States v. Kayser* (9th Cir. 2007) 488 F.3d 1070, 1077 fn. 7.[19]

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[16] But compare *People v. Larsen* (2012) 205 Cal.App.4th 810, 829-831 (refusal of "pinpoint instruction" on "mental impairment" represented only state law error, subject to *Watson*, where jurors received correct instructions on specific intent element).

[17] Because *Bradley v. Duncan* arose on federal habeas review, 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. As noted earlier, state appellate counsel should rely on *Bradley* and other federal habeas cases only for their findings of federal constitutional error, *not* for their prejudice standards.

[18] Accord, 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.)

[19] The Circuit found it unnecessary to conduct that reassessment in *Kayser*, because the refusal of the defense instruction was also prejudicial under a *Chapman* analysis.

Even assuming that *Chapman* and *Neder* apply to erroneous refusal of a defense instruction, that form of error should rarely be deemed harmless. Under *Neder.* omission of an element cannot be held harmless where that element was contested. *Neder v. United States* (1999) 527 U.S. 1, 19. Because 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

Breverman: abandonment of the state *Sedeno* standard. 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. See Pt. IV-E, *supra*.

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 held that *there is no general federal constitutional right to lesser included offense instruction in non-capital cases*. Although 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), neither the U.S. nor the California Supreme Court has ever extended the *Beck* analysis to non-capital cases.[20]

Nonetheless, even assuming that there is no broad federal constitutional mandate for lesser offense instructions in non-capital cases, there are two other potential bases for federalizing the denial or omission of such instructions.

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[20] The Ninth Circuit has taken the same position on the inapplicability of *Beck* outside the capital context. See *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1106.

Unique relationship between voluntary manslaughter and malice. Under a recent First District opinion, **the erroneous refusal of instructions on the imperfect self-defense or heat of passion grounds for voluntary manslaughter represents federal constitutional error because it results in incomplete instructions on the malice element of murder.** *People v. Thomas* (2013) 218 Cal.App.4th 630.

The *Thomas* holding requires a bit of background. In her dissent in *People v. Breverman* (1998) 19 Cal.4th 142, Justice Kennard argued that an erroneous omission of heat of passion or imperfect self-defense instructions violates due process, due to "the unique relationship between murder and voluntary manslaughter." Under California law, heat-of-passion or imperfect self-defense *negates malice aforethought.* Consequently, a failure to instruct the jurors on those bases for manslaughter *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* at 187-191 (Kennard, J., dissenting opn.).

The *Breverman* majority, however, declined to consider that constitutional rationale because that issue assertedly was not presented in the briefing. *Breverman*, 19 Cal.4th at 170-171 & fns. 18 -19. Surprisingly, that issue remained unresolved for 15 years.[21]

In *People v. Thomas*, the briefing did squarely present the *Gaudin-Mullaney* rationale. However, in its initial opinion, the appellate panel majority failed to address the federal issue and found a refusal of heat-of-passion instructions harmless under *Watson*. The Supreme Court granted Thomas's petition for review and remanded the case to the First District with instructions to consider the federal constitutional issue. On remand, the appellate court unanimously found a federal due process violation on the same grounds laid out in Justice Kennard's *Breverman* dissent. Heat-of-passion negates malice under California law, within the meaning of *Mullaney v. Wilbur*. "*Mullaney* compels the conclusion that failing to so instruct the jury is an error of federal constitutional dimension," where there is sufficient evidence to support that ground. *People v. Thomas* (2013) 218 Cal.App.4th 630, 643.

The reasoning of *Thomas* should apply equally to imperfect self-defense, because it too negates malice. See *In re Christian S.* (1994) 7 Cal.4th 768, 778-780 & fn. 4

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[21] The Supreme Court again ducked that issue in *People v. Moye* (2009) 47 Cal.4th 547, 558 fn. 5 – again on the ground it was not presented in the briefing.

(relationship between imperfect self-defense and statutory definition of malice (§ 188)). Because heat-of-passion and imperfect self-defense also negate the malice element of attempted murder, the *Thomas* constitutional rationale also necessarily applies to denial of such instructions in an attempted murder trial. Finally, that holding should also apply to *defective instructions* on heat of passion or imperfect self-defense, as well as to an erroneous refusal to instruct on those grounds altogether.[22]

Two post-*Thomas* opinions have raised questions whether its federal rationale applies to an *erroneous failure to instruct sua sponte* on those manslaughter grounds, or only to an *erroneous refusal* of requested instructions. *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1145-1146 ["full import of *Thomas* is thus unclear"]; *People v. Peau* (2015) 236 Cal.App.4th 823, 830. However, neither of those cases found it necessary to resolve the matter.[23]

Even assuming that *Thomas*'s element-negating rationale applies to failure to instruct sua sponte on voluntary manslaughter grounds, as well as to erroneous refusals, it is doubtful that analysis will have any potential application to other lesser offenses. 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 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 discussed earlier (Pt. IV-E), 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

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[22] Note, however, that a *prosecutorial misstatement* of the grounds for heat of passion (or, presumably, imperfect self-defense) is not considered federal error, *provided that the jury instructions on that ground are correct*. *Thomas*, 218 Cal.App.4th at 643-644 (distinguishing *People v. Beltran* (2013) 56 Cal.4th 934).

[23] *Millibank* found the error there prejudicial under either *Chapman* or *Watson*, while *Peau* found the error harmless under either standard.

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.

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." The Court has acknowledged such federal "defense theory" opinions as *Conde v. Henry* and *Bradley v. Duncan*, but has viewed them as limited to requested instructions on defense theories, including lessers. "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.

G. Ex Post Facto and Due Process – Instructions Applying Intervening Statutory Amendments or Case Law Changes.

The Constitution requires the state to try an accused based on the state of substantive law *at the time of the charged conduct.* Especially where a defendant is tried several years after the underlying events, it is easy for a trial court (and counsel) to overlook that the current form instructions reflect intervening changes in the elements of an offense or other aspects of the governing substantive standards. Where those changes work to a defendant's detriment by reducing the showing necessary for a conviction, increasing the sentence range, or (less frequently) curtailing a defense, the Constitution bars retroactive application of the more punitive standard. Instructions based on either statutory amendments or intervening changes in judicial precedents may give rise to constitutional violations.

1. Ex post facto.

"Any law that applies to events occurring before its enactment and which disadvantages the offender either by altering the definition of criminal conduct or increasing the punishment for a crime is prohibited as ex post facto. [Citation.]" *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1306. Obviously, a defendant cannot be convicted under a statute enacted after his commission of the charged conduct. But it is equally intolerable to allow a conviction under an amended version of a statute that lowers the threshold necessary for a conviction of that offense – such as by eliminating a previously-required element or loosening the standard for an element.

Counsel should always check the amendment history of a statute *and should ensure that the instructions conform to the version of the statute in effect at the time of the charged conduct*. There is obviously a heightened risk of a disconnect between the instructions and the statute in effect at the time of the conduct where the trial occurs years after the charged events. But, in view of the frequency of amendments to penal statutes, it is *always* essential to check for any intervening amendments.[24]

Counsel should be especially sensitive to potential ex post facto problems arising from *counts and instructions allowing a conviction based on conduct any time within a range of dates*. Especially in molestations cases in which the defendant had continuing or recurring access to the victim (as in "resident molester" cases), the instructions often allow a conviction if the jurors find the conduct occurred anytime within a specified range – sometimes spanning many months or even years. Several recent cases have found ex post facto violations, where the instructions corresponded to a newly-enacted or amended statute, *but the date range encompassed both pre- and post-enactment periods*. *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1306-1307; *People v. Hiscox* (2006) 136 Cal.App.4th 253. For example, in *Rojas*, the instructions on one molestation count allowed convictions for any conduct from August 12, 2005, through August 5, 2011. But, because the charged statute, Pen. Code § 288.7, only became effective on September 20, 2006, the instructions posed the risk that the jurors may have convicted based on conduct in the pre-enactment portion of the date range.

2. Due process – retroactive application of judicial decisions enlarging criminal liability.

Changes in the case law construing an offense may present due process/retroactivity issues, similar to the ex post facto problems posed by statutory amendments. On numerous occasions over the past 20-30 years, the California Supreme Court has overruled its own prior precedents and has effectively redefined particular elements of an offense, such as by altering the mens rea or by easing the standard governing an element.

Federal due process principles preclude retroactive application of an intervening

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[24] In assessing such issues, it is essential to focus on the *effective* date of the legislation. Where the Legislature enacts a statute on an "urgency" basis, it goes into effect immediately upon signature by the Governor and filing with the Secretary of State. Otherwise, new legislation does not become effective until January 1 of the following year. See Cal. Const., art. IV, § 8.

decision which represents an unforeseeable judicial enlargement of criminal liability. *Bouie v. City of Columbia* (1964) 378 U.S. 347. The California Supreme Court has frequently invoked that principle. "[A] state Supreme Court, no less than a state Legislature, is barred from making conduct criminal which was innocent when it occurred, through the process of judicial interpretation." *People v. Escobar* (1992) 3 Cal.4th 740, 752; *People v. Martinez* (1999) 20 Cal.4th 225, 238. When the Court has overruled prior precedents and adopted more punitive constructions of criminal statutes, it has generally given those holdings prospective-only effect and has evaluated the defendant's conviction under the case law standards extant at the time of his conduct. E.g., *Martinez* at 239 (prospective-only application of adoption of more flexible asportation standard for kidnapping); *People v. Blakeley* (2000) 23 Cal.4th 82, 91-92 (prospective application of holding that imperfect self-defense without specific intent to kill is voluntary rather than involuntary manslaughter).[25] Consequently, *it is always essential to ensure that the instructions correspond to the version of the statute and the case law in effect at the time of the defendant's underlying conduct.* See e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 44-45;[26] *People v. Fierro* (1991) 1 Cal.4th 173, 227; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1704-1709.

Also bear in mind that *state appellate opinions*, as well as California Supreme Court precedents, may give rise to reasonable expectations and reliance as to the state of substantive law. Thus, an opinion that overrules or disapproves one or more prior California Court of Appeal opinions may also represent an unforeseeable judicial enlargement of criminal liability, even when the new opinion does not overrule any prior Supreme Court precedent. The California Supreme Court has found "retroactive application improper when this court overturns consistent decisions by Courts of Appeal narrowly construing criminal statute." *People v. Blakeley* (2000) 23 Cal.4th 82, 92, citing *People v. Davis* (1997) 7 Cal.4th 797, 812. For example, in *Blakeley*, the Court gave prospective-only effect to its holding that an unintentional killing in imperfect self-defense is voluntary manslaughter, because "three decisions by the Courts of Appeal ... [had] held that such a killing was only voluntary manslaughter." See also *People v. Whitmer* (2014) 59 Cal.4th 733, 742 (barring retroactive application of new holding where "long uninterrupted series of Court of Appeal

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[25] See 1 Witkin & Epstein, California Criminal Law (4th ed. 2012), Introduction to Crimes § 26 (summarizing additional examples).

[26] Disapproved on different point, *People v. Rogers* (2006) 39 Cal.4th 826.

cases" have reached contrary result).[27]

However, California courts have rejected due process/retroactivity challenges where the new precedent clarifies a question that was "unsettled" at the time of the charged conduct. "Where the law is unsettled, we do not believe a defendant can be said to have reasonably relied on a particular outcome." *People v. Carr* (1988) 204 Cal.App.4th 774, 779; accord, e.g., *People v. Superior Court (Clark*) 22 Cal.App.4th 1541, 1551; *People v. James* (1998) 62 Cal.App.4th 244, 276; *People v. Rhoden* (1989) 216 Cal.App.3d 1242, 1256 fn. 21. For example, the California Supreme Court has found no bar to retroactive application of a holding where "there was no uniform appellate rule interpreting the pertinent statutory language contrary to our holding here" at the time of the conduct. *People v. Louen* (19970 17 Cal.4th 1, 11; *People v. Taylor* (2004) 32 Cal.4th 863, 871. Consequently, it would be difficult to prevail on a due process/retroactivity argument if there was already a split of authority on the subject at the time of the charged conduct.

Where the instructions violate either ex post facto or due process by allowing a conviction on more punitive legislative or judicial standards adopted after the underlying conduct, the instructional error is assessed in the same way as any other misinstruction on elements, theories of liability, or defenses. That is, because the Constitution requires that the defendant be tried on the standards extant at the time of his conduct, the reviewing court compares the instructions given with those required

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[27] Note, however, that a published state appellate opinion does not give rise to reasonable reliance triggering due process retroactivity principles until the opinion has become "final" for state law purposes. That is, even where an appellate court certifies its opinion for publication and it is printed in the official advance sheets, it does not go into effect and does not have "precedential" status until the California Supreme Court has denied review (without depublishing) or the time for the Court to grant review on its own motion has expired. *People v. Superior Court (Clark*) (1994) 22 Cal.App.4th 1541. In *Clark*, the relevant conduct occurred during the window between an appellate court's issuance of a favorable "published" opinion (*Yoshisato*) and the California Supreme Court's grant of review in that case. Although the Supreme Court had later reached the opposite conclusion as the prior appellate opinion in *Yoshisato*, the defendant in *Clark* maintained that due process entitled him to the benefit of that earlier opinion. The same appellate court that had decided *Yoshisato* rejected the due process claim on the ground that its prior opinion had never become the law. "The case was not final when the crimes were committed [] or when review was granted [citation], and thus our opinion never was the law, even though it could be found in the advance sheets. [Citations.]" *Clark* at 1548.

at the relevant time and applies *Chapman* and other prejudice principles accordingly.

H. 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) Propensity evidence. 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]. However, the California Supreme Court has rejected a due process challenge to 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 appellate courts have also upheld a parallel statute allowing "propensity" evidence in domestic violence cases, Evid. Code § 1109. E.g., *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1312; *People v. Price* (2004) 120 Cal.App.4th 224, 240. The prospects for federal habeas relief on this basic issue – the constitutionality of "propensity" evidence – are very poor: The Ninth Circuit has already upheld a similar federal rule allowing use of prior sexual offenses as propensity evidence. *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018.

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) Dilution of burden of proof. 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. Moreover, in *Gibson* and a subsequent case, the Ninth Circuit found *that combination of instructions amounted to a structural defect* because (like the erroneous reasonable doubt definition in *Sullivan v. Louisana* (1993) 508 U.S. 275) they lowered the standard of proof as to the overall case. *Gibson* at 824-825; accord *Doe v. Busby* (9th Cir. 2011) 661 F.3d 1001, 1016-1023.[28]

The 1999 revision of CALJIC 2.50.01 (and subsequent versions) added a paragraph explaining that, even if jurors found by a preponderance that the defendant committed

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[28] California appellate courts split in their assessments of the pre-1999 CALJIC instructions. Compare *People v. Vichroy* (1999) 76 Cal.App.4th 92; *People v. Orellano* (2000) 79 Cal.App.4th 179; *People v. James* (2000) 81 Cal.App.4th 1343; *People v. Frazier* (2001) 89 Cal.App.4th 30 (each finding constitutional error); but contrast *People v. Van Winkle* (1999) 75 Cal.App.4th 133; *People v. Jeffries* (2000) 83 Cal.App.4th 15 (each finding no reasonable likelihood jurors construed instructions as a whole to allow conviction of current crime on evidence short of proof beyond reasonable doubt). There was a further split within the subset of California opinions finding the instructions defective, with some courts finding the error reversible per se (e.g.,*Orellano*) and others applying the *Chapman* prejudice test (e.g, *Frazier*).

prior sexual offenses, "that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged crime[s]." The current CALCRIM instructions include similar qualifying language. CALCRIM 1191 (sex offenses), 852 (domestic violence). Both the California Supreme Court and the Ninth Circuit have upheld the revised CALJIC instructions on propensity evidence, finding that they did not allow a conviction on less than proof beyond a reasonable doubt. *People v. Reliford* (2003) 29 Cal.4th 1007; *Schultz v. Tilton* (9th Cir. 2011) 659 F.3d 941.

Because the form instructions found defective in such cases as *Gibson v. Ortiz* and *Doe v. Busby* have not been in use for over a decade, appellate counsel are unlikely to encounter that precise error in current appeals. Nonetheless, those opinions provide a valuable lesson on the necessity to evaluate the instructions in their entirety, in order to assess whether some combination of otherwise-correct instructions may lower the burden of proof, bypass the necessity of finding an element, or otherwise allow an unauthorized route to conviction on one or more counts.

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. *But the court must clearly instruct 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) Like prosecutorial *Griffin* error, an instruction authorizing an adverse inference from a defendant's failure to take the stand violates the Fifth Amendment. *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) 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 fn. 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).

I. Everything Else – the State *Watson* Standard

Instructional errors that do not rise to level of federal constitutional violations are subject to the state *Watson* test. The error is reversible where it is "reasonably probable" that the outcome would have been more favorable without the error. *People v. Watson* (1956) 46 Cal.2d 818.

Whenever it is necessary to argue an instructional error (or any other issue) under *Watson*, counsel should be sure to frame the inquiry in terms of the California Supreme Court's clarification of that standard in *College Hospital* and subsequent cases. "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*" *College Hospital v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original; accord, e.g., *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 68.

Some of the more common instructional issues subject to *Watson/College Hospital* 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, CALCRIM 358.). E.g., *People v. Heishman* (1988) 45 Cal.3d 147, 166; *People v. Diaz* (2015) 60 Cal.4th 1176, 1195.

3. Identification instructions (CALJIC 2.91, 2.92; CALCRIM 315) and most other defense-requested "pinpoint 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 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.).