Preserving Instructional Error for Appellate Review[1]

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Instructional issues are a fruitful ground for appeal and the California Judicial Council's adoption of the CALCRIM model jury instructions does not change that. Nor does the adoption of CALCRIM alter the principles governing preserving instructional errors for appellate review. These materials will address waiver, invited error, and federalizing of instructional errors. But, first, a cautionary, pinpoint, and limiting instruction of our own is required:

Beyond the very most crucial of instructions (e.g. reasonable doubt and elements of an offense), the rules regarding when a request is required for an instruction are quite nuanced and not necessarily intuitive. For that reason, the better practice, by far, is to assume a request or objection is required in order to preserve any instructional issue for appellate review.

Issues arising from the adoption of CALCRIM and its differences with CALJIC will likely be in the nature of clarifying or pinpoint instructions, rather than flat misstatements of substantive law, such as the omission-of-an-element. Preservation of such issues would undoubtedly require a trial court request or objection.

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[1] Adapted from *Elusive Exceptions to Waiver & Forfeiture Bars*, by J. Bradley O'Connell & Paula Rudman, FDAP Staff Attorneys, Jan. 2004 and *Preserving the Record - Quick Reference "Cheat Sheet"* by J. Bradley O'Connell, Feb. 1999 (updated by Jonathan D. Soglin in 2005 and 2006), both of which can found on the FDAP Web site: http://www.fdap.org/r-criminal.html#AP.

I. Sua Sponte Duty: Most Crucial Instructions Required Without a Request

A. Statutory and Case Law Authority

1. "Substantial Rights Affected": "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Pen. Code § 1259.

2. "General Principles of Law": "It is settled that in criminal cases, even in the absence of a request, **the trial court must instruct on the general principles of law relevant to the issues raised by the evidence**. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." *People v. Breverman* (1998) 19 Cal.4th 142, 154 (emphasis added; internal quotation marks and citations omitted).

B. Examples of Instructions Required Without Request

1. Reasonable doubt (CALCRIM 220; CALJIC 2.90).

2. Elements of the charges offenses. *People v. Flood* (1998) 18 Cal.4th 470.

3. Lesser included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present." *Breverman*, 19 Cal.4th at 154 .

4. Target offense for "natural and probable consequences" theory of liability. *People v. Prettyman* (1996) 14 Cal.4th 248.

5. Unanimity (CALCRIM 3500; CALJIC 17.01). Required two or more distinct incidents could support a count and jurors would potentially convict without agreeing on basis for conviction. *People v. Beardslee* (1991) 53 Cal.3d 68, 93.

6. Incorrect or misleading instructions. Defendant may challenge incorrect or misleading instructions, regardless of whether those instructions otherwise would have come within sua sponte duties. *People v. Castillo* (1997) 16 Cal.4th 1009, 1015; *People v. Prettyman* (1996) 14 Cal.4th 248, 270. "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." *Castillo*, 16 Cal.4th at 1015.

II. Request Required (e.g. cautionary and limiting instructions).

A. Cautionary & Limiting Instructions (Examples)

1. Admonition to view jailhouse informant's testimony with caution. Pen. Code § 1127a.

2. Instructions limiting purposes for which jurors may consider particular evidence (Evid. Code § 355):

a. limitation on use of other offenses (*People v. Padilla* (1995) 11 Cal.4th 891, 950);

b. limitation of un-Mirandized statement to impeachment (*People* v. *Torrez* (1995) 31 Cal.App.4th 1084, 1088-1091).

B. Pinpoint instructions. Instructions which relate the general legal concepts (such as elements of the offense or affirmative defenses) to particular categories of evidence or otherwise highlight types of circumstances which may give rise to a reasonable doubt. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

1. Many instructions which state theories of defense or other crucial matters are considered mere "pinpoint instructions," which it is up to defense counsel to request;

2. Alibi (*People v. Freeman* (1978) 22 Cal.3d 434);

3. Identification, including reliability factors (CALCRIM 315; CALJIC 2.91, 2.92) (*People v. Wright* (1988) 45 Cal.3d 1126);

4. Relevance of intoxication to specific intent or other mental state (CALJCRIM 625, 3426; CALJIC 4.21) (*People v. Saille* (1991) 54 Cal.3d 1103, 1120);

5. Relevance of provocation to premeditation and deliberation (choice between 1st and 2d degree murder), even when provocation insufficient to reduce to manslaughter (CALCRIM 522; CALJIC 8.73) (*People* v. *Middleton* (1997) 52 Cal.App.4th 19);

6. Bearing of victim's prior threats or violence on self-defense issues (*People v. Pena* (1984) 151 Cal.App.3d 462, 474- 478; *People v. Moore* (1954) 43 Cal.2d 517, 527-529);

7. "After-formed intent" rule in robbery cases (*People v. Webster* (1991) 54 Cal.3d 411, 443-444).

C. **"Clarifying" or "amplifying" instructions:** "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." *People v. Guerra* (Mar. 2, 2006, S036864) ___ Cal.4th, ____, 2006 WL 488528, *43, slip op. at 80; see also *People v. Andrews* (1989) 49 Cal.3d 200, 218; *People v. Guiuan* (1998) 18 Cal.4th 558, 570. *Guerra* involved three distinct challenges to motive instruction: burden-shifting and burden-relieving challenges were cognizable without objection because affected substantial rights; challenge based on failure of model instruction to state "motive alone was not sufficient to establish guilt" was merely clarifying and thus waived in the absence of objection.

D. Defenses - Limited Sua Sponte Duty

1. "A trial court's duty to instruct, sua sponte, on particular defenses arises only if it appears that the defendant is relying

on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." *People v. Maury* (2003) 30 Cal.4th 342, 424 (citing, among other cases, *People v. Sedeno* (1974) 10 Cal.3d 703, 716; additional citations and quotation marks omitted).

2. In contrast, a lesser included offense instruction must be given, even over a defense objection. See *People v. Barton* (1995) 12 Cal.4th 186.

III. Invited Error

A. Purpose: "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest." *People v. Wickersham* (1982) 32 Cal.3d 307, 330.

B. Components

1. Defendant intentionally caused trial court to err.

2. Defense counsel acted for tactical reasons, not out of ignorance or mistake.

a. Affirmative action taken by counsel - error is invited. Example: error in failing to instruct on express malice was invited when defense counsel proposed omitting definition of express malice from CALJIC 8.11. *People v. Catlin* (2001) 26 Cal.4th 81, 150.

b. Mere acquiescence by defense counsel - error is not invited. Example: no invited error where counsel answered "That's correct" when court stated "... I assume both attorneys are jointly requesting I give these instructions." *People v. Moon* (2005) 37 Cal.4th 1, 28.

c. Cautionary note: use great care in checking off requested CALCRIM instructions on a list submitted to the trial court.

IV. Federalizing

A. What? Preserving a claim made under the federal constitution (or a federal statute).

B. Why?

1. Prevent a default. Relying only on state law may not be sufficient to preserve a federal claim, based on the same error as the state law claim, for state appellate court review (e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1119 fn. 54) and to prevent a default of the federal claim in federal habeas proceedings (see *Baldwin v. Reese* (2004) 541 U.S. 27).

2. More favorable prejudice standard on direct review. *Chapman* standard (harmless beyond a reasonable doubt) applies to federal constitutional claims; *Watson* standard (reasonable probability of more favorable result in absence of the error) applies to state law claims. *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320-321.

C. How?

1. Cite federal constitutional provision, U.S. Supreme Court case, or other *federal* case law. Most potential federal constitutional claims involving jury instructions rest upon a combination of the right to jury trial (6th Amend.) and due process (5th & 14th Amends.) The federal constitutional magnitude of an instructional defect is most clear where it concerns the elements of the offense, the theories of criminal liability, or defense theories such as affirmative defenses and lesser included offenses.

2. Don't assume citing a state case is adequate to federalize, even if the state case, in turn, cites federal authorities. Avoid the "daisy chain". *Howell v. Mississippi* (2005) 543 U.S. 440 (2005).

   a. In U.S. Supreme Court: claimed 8th amend violation for failure to give jury instruction on LIO in capital case.

   b. In state supreme court, did not cite Constitution, but did cite state cases, some of which cited both state and federal authorities.

   c. holding on preservation of federal claim: "petitioner's daisy chain---which depends upon a case that was cited by one of the cases that was cited by one of the cases that petitioner cited---is too lengthy …."

3. Consult the federalizing chart:

Error	Federal Claim
Errors and omissions in elements of the offense or theories of liability.	*Neder v. United States* (1999) 527 U.S. 1; *United States v. Gaudin* (1995) 515 U.S. 506.
Other errors that remove elements from the jury, including instructions or judicial comments that a particular element is established "as a matter of law."	*Powell v. Galaza* (9th Cir. 2003) 328 F.3d 558 (judge's comment that defendant's testimony established an element of offense tantamount to a directed verdict or "mandatory presumption").
Submission of unauthorized theories of liability (e.g., improper predicate offense for felony-murder liability).	E.g., *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053.
Errors in the definition of the "reasonable doubt" standard or other instructions that dilute the "reasonable doubt" requirement.	*Sullivan v. Louisiana* (1993) 508 U.S. 275.
Improper "presumptions" and other errors that relax the prosecution's burden to establish each element beyond a reasonable doubt.	*Yates v. Evatt* (1991) 500 U.S. 391.

Erroneous omission of lesser included offense instructions or misstatement of the grounds for lesser offenses.	**Theory (1)**: denial of adequate instructions on elements of *charged offense.* E.g. failure to instruct on a ground that negates malice or some other element of the charged offense (e.g., heat-of-passion, imperfect self-defense). *Mullaney v. Wilbur* (1975) 421 U.S. 684; see Justice Kennard's dissent in *People v. Breverman* (1998) 19 Cal.4th 142 (note: *Breverman* majority did not reach *Mullaney* issue). **Theory (2)**: as denial of instructions on defense theory. *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734.
Denial of instructions on affirmative defenses (e.g., self-defense) or misstatement of those defenses.	Right to adequate instructions on the "defense theory" of the case. *Mathews v. United States* 485 U.S. 58; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091; e.g., *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867.
Other "defense theories"?	Right to instructions on"defense theory" is not restricted to formal "affirmative defenses," but should also apply to other theories, like third-party culpability, alibi, etc. But see *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734 (though 9th Cir. requires specific alibi instructions in *federal criminal trials*, denial of alibi instruction in state trial didn't violate due process, where overall instructions adequately communicated prosecution's duty to prove defendant's presence at the scene).
Instructions on "other offenses" evidence.	Due process. See *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775-776, rev'd on other grounds (2003) 538 U.S. 202 (use of "other offenses" evidence as proof of criminal propensity violated due process) and *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822.