

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 less forgiving *Chapman* test – the burden is on the state to show “beyond a reasonable doubt” that the error had no effect on the verdict. *Chapman v. California* (1967) 386

¹ A previous version of this article was updated by Fran Ternus in January 2008. Prior iterations of this article were adapted and updated from “Standards of Review and Prejudice for Instructional Error” by J. Bradley O’Connell & Renée E. Torres (Jan. 1995), “Standards of Reversal on Appeal in Criminal Cases” by Renée E. Torres (May 2000), and “Preserving Instructional Error for Appellate Review,” by J. Bradley O’Connell & Jonathan Soglin (March 2006).

U.S. 18. Additionally, as discussed further in Part IV, some categories of instructional error are reviewed under even more rigorous tests than the traditional *Chapman* formulation.

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

II. COGNIZABILITY OF INSTRUCTIONAL ISSUES.

In California appellate practice, the cognizability of an instructional issue can be viewed as the flip side of the substantive question of the scope of the trial court’s instructional duties. A trial court must instruct sua sponte on the legal “principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” *People v. Breverman* (1998) 19 Cal.4th 142, 154. These include (but are not limited to):

- the reasonable doubt standard. CALJIC 2.90, CALCRIM 220; *People v. Aranda* (2012) 55 Cal.4th 342, 357; *Victor v. Nebraska* (1994) 511 U.S. 1, 5.
- the elements of the charged offense, including all facts which increase the statutory maximum or the mandatory minimum punishment. *Neder v. United States* (1999) 527 U.S. 1, 19; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Alleyne v. United States* (June 17, 2013) __ U.S. __, 133 S.Ct. 2151.
- 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.
- the requirement of jury unanimity as to the incident on which the conviction is based. CALJIC 17.01; CALCRIM 3500.
- the allocation and weight of the burden of proof as to defenses and exceptions to liability. *People v. Figueroa* (1986) 41 Cal.3d 714, 721.
- lesser included offenses supported by substantial evidence. *Breverman, supra*, 19 Cal.4th 142.
- definitions of technical terms peculiar to the law. *People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Roberge* (2003) 29 Cal.4th 979, 988.
- defense theory instructions 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. Boyer (2006) 38 Cal.4th 412, 468-469; *People v. Maury* (2003) 30 Cal.4th 342, 424; *People v. Russell* (2006) 144 Cal.App.4th 1415. These do not include “pinpoint” instructions which relate the defense theory to the reasonable doubt standard, e.g., accident and alibi. E.g., *People v. Anderson* (2011) 51 Cal.4th 989, 996-997.

- Accomplice instructions. E.g., *People v. Gordon* (1973) 10 Cal.3d 460, 470-473.
- a warning that a evidence of a unrecorded statement by the defendant must be viewed with caution. CALCRIM 358; CALJIC Nos. 2.71 & 2.71.7; *People v. Carpenter* (1997) 15 Cal.4th 312, 392-393; *People v. Stankewitz* (1990) 51 Cal.3d 72, 93-94.

If an instruction comes within these or other sua sponte categories, the defendant may challenge the adequacy of the instructions on appeal, regardless of whether he objected to the instruction given, requested an instruction, or otherwise raised the issue below. There are also certain instructions required by federal constitutional guarantees. See, e.g., *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1827-1830 (a warning to disregard shackling at trial; CALJIC 1.04; CALCRIM 337); *Richardson v. Marsh* (1987) 481 U.S. 200, 211 (the requirement that the jury consider a co-defendant’s extrajudicial statement only as to him or her and not as to the jointly tried defendant).

Conversely, if the instruction is deemed a “pinpoint,” “amplifying,” or “modifying” instruction, the court is only required to deliver it upon request, and the absence of a request will bar raising the issue on appeal. Many 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 “Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; see also, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Andrews* (1989) 49 Cal.3d 200, 218.)

² For a more comprehensive treatment of the scope of a trial court’s sua sponte instructional duties (and, conversely, of the categories of “pinpoint” instructions, required only upon request), see O’Connell & Soglin, “Preserving Instructional Error for Appellate Review” (Mar. 2006), available on FDAP web site: www.fdap.org/downloads/seminar-criminal/PreservingInstructionalErrorforAppellateReview.pdf

A. Instructions Given.

As a practical matter, it is usually possible to challenge the validity of any instruction given by virtue of Pen. Code § 1259: “The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” Although § 1259 only authorizes review of instructions affecting “substantial rights,” that determination “necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.” *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.

Moreover, an instruction actually given by the trial court is generally reviewable on appeal, even if that instruction ordinarily would not come within the court’s sua sponte duties. “Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly.” *People v. Castillo* (1997) 16 Cal.4th 1009, 1015; accord *People v. Hudson* (2006) 38 Cal.4th 1002, 1012.

B. “Amplifying” Instructions vs. Terms Requiring Definition

As noted above, if an instruction is deemed a “pinpoint,” “amplifying,” or “modifying” instruction, the court is only required to deliver it upon request, and the absence of a request will bar raising the issue on appeal. *People v. Guiuan, supra*, 18 Cal.4th at 570.

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

Under this standard, the need for definition of a term does not turn on whether the term would typically be labeled a common one or a legal one. The question is whether the particular term, whether common or legal, has a definition that diverges

from its common meaning when used in the context of the statute at issue. Below are some examples of common terms with specialized legal meanings requiring definition by trial courts:

- 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.
- The term “distinctively marked” for purposes of flight from a pursuing officer under Vehicle Code § 2800.1. 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, supra*, 38 Cal.4th at 1012.
- The term “dangerous fireworks” for purposes of Health and Safety Code sections 12677 and 12505, which prohibit possessing such fireworks. “While the phrase ‘dangerous fireworks’ may be understood in a general sense, the term has a technical meaning peculiar to the law. . . . Health and Safety Code section 12505. . . provides that ‘dangerous fireworks’ includes. . . [specific] items enumerated therein.” *People v. Miller* (1999) 69 Cal.App.4th 190, 208.

- STANDARDS OF REVIEW – DETERMINING INSTRUCTIONAL ERROR

- 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.

- “Reasonable Likelihood” Standard of Review for Ambiguous Instructions

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

jurors may construe the instruction in a way which infringes constitutional rights (for example, by diluting the prosecution's burden to prove every element beyond a reasonable doubt). *Waddington v. Sarausad* (2009) 555 U.S. 179, 190-191. The U.S. Supreme Court has fashioned the following test:

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

This original formulation of the test, focusing on whether “an” instruction is ambiguous, has been broadened. The instructions must be considered as whole. Therefore, a clearly erroneous instruction, combined with one or more correct or clarifying instructions, results in an inconsistency and a “charge as a whole [which] is ambiguous,” requiring application of the reasonable likelihood test. *Middleton v. McNeil* (2004) 541 U.S. 433, 437.

This “reasonable likelihood” test is probably the least-understood of the standards relevant to instructional issues. As discussed in the following subsections, there has often been confusion over which types of instructional issues are subject to this test and where exactly the “reasonable likelihood” inquiry fits into the overall presentation and analysis of an instructional claim. But it is an essential subject for criminal defense attorneys to master, particularly since most of the litigation over the adequacy of standard CALCRIM instructions will require understanding the nuances and limits of the “reasonable likelihood” test (including recognizing the errors to which it should not apply).

- 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 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].

- 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. In *Coleman*, the Court remanded a capital case to the Ninth Circuit because that court had reversed the penalty upon finding a “reasonable likelihood” of juror misunderstanding, but had neglected to take the next step of assessing prejudice. The Supreme Court did not overturn the Ninth Circuit’s finding of a “reasonable likelihood” of juror misunderstanding. But it held that the reviewing court must then separately analyze whether that constitutional error required reversal under the applicable prejudice standard.³

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

- Limitation of the “Reasonable Likelihood” Test to Ambiguous Instructions

Ambiguous vs. Clearly Erroneous Instructions. 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, supra*, 525 U.S. at 146. Consequently, as the Ninth Circuit has cautioned on several occasions, the “reasonable likelihood” test has no application where the instruction was “clearly erroneous” or “facially incorrect”: “This court is not required to use the ‘reasonable likelihood’ standard employed for ambiguous jury instructions ‘when the disputed instruction is erroneous

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

on its face.” *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 592; accord *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321 (cited in *Ho*); *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 967-968. For example, an instruction which omits an element of the offense (*Ho*) or which allows the jury to “convict based on legally impermissible grounds” (*Murtishaw*) is “flatly” or “clearly” 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.

Alternative Arguments: Addressing the Likelihood that a Reviewing Court will Find an Instruction, at Worst, Ambiguous Rather than Erroneous. It is generally wise not to assume that California reviewing courts will deem an instruction clearly erroneous and skip application of the reasonable likelihood test. Especially in light of the fact that the state law standard for review of jury instructions requires application of the reasonable likelihood test, California reviewing courts will most often apply it. *People v. Clair, supra*, 2 Cal.4th at 663. Indeed, in any given case, the court of appeal could find reversible state law error under the “reasonable likelihood” test and never have a need to address whether an instruction was clearly erroneous. Accordingly, in many cases, it will be necessary to make alternative arguments, i.e. to argue that an instruction was clearly erroneous in a way that violated the federal constitution, and then to argue that, even assuming lack of clear error, the instruction was ambiguous and there is a reasonable likelihood the jurors understood it in a manner that violated due process.

Omitted instructions. At least one California case has found the “reasonable likelihood” test inapplicable to *omission* of an instruction. *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1220 (omission of CALJIC 2.90, the definition of reasonable doubt). But (without specifically discussing *Elguera*) several subsequent California cases have applied “reasonable likelihood” analysis to omission of a portion of a particular CALJIC instruction or to omission of one instruction among a series of instructions on a subject. E.g., *People v. Catlin* (2001) 26 Cal.4th 81, 151; *People v. Snead* (1993) 20 Cal.App.4th 1088.

- Consideration of Instructions as a Whole

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.

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

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

- The Role of Counsel’s Arguments

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

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. (As noted above, *McNeil* was the imperfect self-defense case in which the Supreme Court considered the instructions as a whole merely "ambiguous" or "inconsistent" because, though one "reasonable person" instruction was incorrect, the rest of the instructions contained numerous correct statements of the unreasonable belief principle.) In approving the California appellate court's consideration of the attorneys' correct statements as clarifying the proper imperfect self-defense standard, the Supreme Court cautioned, "this is not a case where the jury charge clearly says one thing and the prosecutor says the opposite; the instructions were at worst ambiguous because they were internally inconsistent. Nothing in *Boyd* precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge. This assumption is particularly apt when it is the *prosecutor's argument* that resolves an ambiguity in favor of the *defendant*." *McNeil, supra*, at 438, emphasis in original.

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

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

- Other Critical Rules for Construction of Instructions

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

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

Mid-deliberation instructions must be sufficient to satisfy the jury's request. Under Penal Code section 1138 "after the jury have retired for deliberation, ... if they desire to be informed on any point of law arising in the case, ... the information required must be given...." *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022, quoting Pen. Code, § 1138; see also *People v. Miller* (1981) 120 Cal.App.3d 233, 236. Penal Code

section 1138 gives the trial court a “statutory obligation ‘to provide the jury with information the jury desires on points of law’” and “must attempt ‘to clear up any instructional confusion expressed by the jury.’ [Citation.]” *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 316; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465; see also *People v. Smithey* (1999) 20 Cal.4th 936, 985.

The court is not always required to “elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.” *People v. Beardslee* (1991) 53 Cal.3d 68, 97; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331. However, “[A] court must do more than figuratively throw up its hands and tell the jury it cannot help.” *Beardslee*, 53 Cal.3d at 97. In exercising its discretion, the trial court “must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.” (*Ibid.*) Under these standards, the court errs when its reply leaves “the jury with the responsibility for deciding a question of law.” *People v. Moore, supra*, 44 Cal.App.4th at 1332; see also *Beardslee, supra*, 53 Cal.3d at 97. Additionally “[a] definition of a commonly used term may . . . be required if the jury exhibits confusion over the term's meaning. [Citation.]” *People v. Solis* (2001) 90 Cal.App.4th 1002, 1015, quoting 5 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Criminal Trial, § 633, p. 906.

- STANDARDS OF PREJUDICE AND HARMLESS ERROR

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

Though *Fulminante* did not involve instructional error, it is a crucial opinion because the Court adopted a new terminology to distinguish “trial errors” from the narrow category of constitutional violations which are exempt from harmless error analysis. Under *Fulminante* and its progeny, only “structural defects” are deemed reversible per se. “[S]tructural defects in the constitution of the trial mechanism” are errors that

“defy analysis by ‘harmless-error’ standards” and “transcend[] the criminal process.” *Fulminante, supra*, 499 U.S. at 309-311.

The California Supreme Court (in another involuntary confession case) has adopted a similar distinction between “trial errors,” susceptible to harmless error analysis and those few “structural” errors considered reversible per se. *People v. Cahill* (1993) 5 Cal.4th 478. In the wake of *Fulminante* and *Cahill*, most errors – including most instructional errors – will be subject to some form of harmless error analysis. Usually that will require application of the *Chapman* standard (“harmless beyond a reasonable doubt”), if the error can be characterized as a federal constitutional violation, or the California *Watson* standard (“reasonable probability” of a more favorable outcome), if it is deemed a state law error only.

- “Structural Defects” (Reversible Per Se)

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

Due to the necessity for accuracy in the reasonable doubt instruction, the California Supreme Court has warned against any tinkering with the language: “Modifying the standard instruction [on reasonable doubt] is perilous, and generally should not be done.” *People v. Freeman* (1994) 8 Cal.4th 450, 504. Due to the likelihood for error in this context and the reversible per se standard, errant judicial comments about reasonable doubt should be closely scrutinized and any arguable deviation from the standard definition should give rise to an appellate challenge. Notably, trial courts may make reversible comments about reasonable doubt when extemporizing at any point during trial, including during jury voir dire. *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171.

Analogizing application of the beyond-a-reasonable-doubt standard to everyday decision-making is one way in which the court may misdefine the burden of proof. *Johnson, supra*, 119 Cal.App.4th at 985-986; *Johnson, supra*, 115 Cal.App.4th at 1171. Additionally, a trial court may be too restrictive in describing the circumstances

under which a jury can find reasonable doubt. In this context, it is important to note that both the United States Supreme Court and the California Supreme Court have recognized that fact-finders in criminal trials may vote against guilt based on an inarticulable determination and that a juror need not be able to say why he or she has a reasonable doubt. *Harris v. Rivera* (1981) 454 U.S. 339, 347 [judge in a court trial may acquit upon a belief that the evidence “created some doubt about the guilt of one defendant that [the judge] might or might not be able to articulate in a convincing manner”]; *People v. Engelman* (2002) 28 Cal.4th 436, 446 [“[I]t is not always easy for a juror to articulate the exact basis for disagreement after a complicated trial, nor is it necessary that a juror do so. As we have stated, it is not required that jurors deliberate well or skillfully”; emphasis supplied]; *People v. Cleveland* (2001) 25 Cal.4th 466, 481-484 [accord; court erred in excusing juror who did not refuse to deliberate but may have deliberated inarticulately].

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

- Omission of “Reasonable Doubt” Instruction: Failure to Instruct on the Requirement that the Prosecution Prove the Defendant's Guilt of *Each* Charged Offense Beyond a Reasonable Doubt

The omission of the standard instruction defining reasonable doubt, CALJIC No. 2.90 or CALCRIM No. 220, during the pre-deliberation instructions will amount to a federal due process violation when the instructions, as a whole, that were given by the court failed to explain that the defendants could not be convicted ““unless each element of the crimes charged was proved to the jurors’ satisfaction beyond a reasonable doubt.”” *People v. Aranda* (2012) 55 Cal.4th 342, 357, quoting *People v. Vann* (1974) 12 Cal.3d 220, 227. Since other standard instructions may make reference to the reasonable doubt standard in relation to specific charged crimes, the omission of CALJIC No. 290 or CALCRIM No. 220 may amount to prejudicial error

as to one count of conviction and not others. (*Ibid.*)

In *Aranda, supra*, the California Supreme Court held that the failure to give the standard instruction is not structural error: “We believe. . . that when, as here, the court has not misdefined the reasonable doubt standard in a manner that improperly lowers the prosecution's burden of proof, but nonetheless has failed to satisfy its federal constitutional obligation to instruct on the requirement that the prosecution prove the defendant's guilt of *each* charged offense beyond a reasonable doubt, the effect of the instructional omission, like most errors of constitutional dimension, is amenable to harmless error review.” *Id.* at 365. Such error, however, is subject to review under a modified *Chapman* standard:

No matter how overwhelming a court may view the strength of the evidence of the defendant's guilt, that factor is not a proper consideration on which to conclude that the erroneous omission of the standard reasonable doubt instruction was harmless under *Chapman*.” [¶] [A] reviewing court applying the *Chapman* standard to determine the prejudicial effect of the erroneous omission of the standard reasonable doubt instruction should evaluate the record as a whole—but not rely upon its view of the overwhelming weight of the evidence supporting the verdict—to assess how the trial court’s failure to satisfy its constitutional obligation to instruct on the prosecution's burden of proof beyond a reasonable doubt affected the jury's determination of guilt. If it can be said beyond a reasonable doubt that the jury must have found the defendant’s guilt beyond a reasonable doubt, the error is harmless. If the reviewing court cannot draw this conclusion, reversal is required.
Aranda, supra, 55 Cal.4th at 368.

- Omission of Standard Reasonable Doubt Instruction: Failure to Define “Reasonable Doubt.”

The omission of the standard reasonable doubt instruction, either CALJIC No. 2.90 or CALCRIM No. 220, may not only have the effect of failing to inform the jurors that the reasonable doubt standard applies to each charged offense, it may also leave the jurors uninformed of the definition of reasonable doubt.

Failure to define the term “reasonable doubt” does not amount to federal constitutional error. As the high court explained in *Victor*, “the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.” *Victor v. Nebraska* (1994) 511 U.S. 1, 5.

However, even if, due to other instructions referencing the reasonable doubt requirement, federal constitutional error did not occur, the failure to give CALJIC No. 2.90 or CALCRIM No. 220 during the pre-deliberation phase constitutes error under state law subject to review for prejudice under the *Watson* standard. *Aranda, supra*, 55 Cal.4th at 368.

- Submission of Invalid Alternative Theory of Liability

Unauthorized legal theory. Appellate practitioners frequently confront situations in which a charge went to the jury on a combination of valid and invalid alternative theories – for example, a trial court may have given a legally inadequate theory of aiding abetting, for which the instructions omitted a critical element the prosecution must prove, combined with a legally adequate theory of direct liability.

Under both federal and state authorities, the *Chapman* standard applies to submission of a legally unauthorized theory and requires reversal when it is impossible to determine whether the jurors relied upon that invalid theory or on an alternative legally permissible ground. *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60-62; *Yates v. United States* (1957) 354 U.S. 298, 312; *Stromberg v. California* (1931) 283 U.S. 359, 369-370; *Zant v. Stephens* (1983) 462 U.S. 862, 880-882. In California, this led to the adoption of a standard generally known as the “*Green-Guiton* rule,” after *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129, and *People v. Green* (1980) 27 Cal.3d 1, 69. Under the *Green-Guiton* rule, a reviewing court would affirm only when *the other verdicts* affirmatively established that the jurors necessarily relied on a valid theory – for example, the jury’s verdict on some other count, enhancement or special circumstance may establish that the jurors made all the findings necessary to the valid theory of liability (e.g., a valid felony-murder predicate).

However, in *People v. Chun* (2009) 45 Cal.4th 1172, the California Supreme Court rejected the notion that the *Green-Guiton* standard – looking to other portions of the verdict – was the only way to find a court’s instruction on an invalid legal theory harmless. *Chun* affirmed that, in general, the *Chapman* standard applies so that “to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory.” *Id.* at 1201. However, the Supreme Court expressly declined to articulate one single test that should be employed in all cases to satisfy *Chapman*. Instead, in light of the particular facts of *Chun*, the Supreme Court concluded that a harmless error test articulated by Justice Scalia in a concurring opinion in *California v. Roy* (1996) 519 U.S. 2 was useful. Justice Scalia had pronounced: “The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible,

upon the evidence, to have found what the verdict did find without finding this point as well.” *Id.* at 7. Under this standard, the California Supreme Court found the error in *Chun* harmless. The trial court had instructed on an invalid theory of second degree felony murder liability. Looking to “undisputed evidence” concerning the circumstances of the killing, the California Supreme Court concluded that “on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice,” i.e. without also finding the facts necessary to support a second degree murder verdict on a theory of liability for which the court’s instructions were accurate. *Chun, supra*, 45 Cal.4th at 1205. In practice, after *Chun*, it is safe to assume that reviewing courts in California will look not only to the other verdicts, but also to the record evidence, to determine whether a court’s error in instructing on an invalid legal theory of liability is harmless.

At least in California, submission of an invalid legal theory to the jury can also occur through the prosecutor’s argument, when combined with instructions which could be susceptible to the same interpretation. *People v. Morgan* (2007) 42 Cal. 4th 593, surprisingly concluded that submission of a “legally inadequate” theory of conviction can occur. Here, the Supreme Court reversed a kidnaping conviction, relying in part on the fact the prosecutor argued an incorrect legal theory.

Distinction between “legal” and “factual” insufficiency. Both the U.S. Supreme and California Supreme Courts have drawn a distinction between instruction on legally inadequate theories of liability (e.g., a non-qualifying predicate felony for felony-murder) and instruction on factually unsupported theories of liability. *Griffin v. United States* (1991) 502 U.S. 46; *People v. Guiton* (1993) 4 Cal.4th 1116. A trial court instructs on a factually invalid theory of liability if the prosecution has failed to present sufficient evidence to support a finding of guilt on that theory of liability.

Where the error is merely one of “factual insufficiency,” a less stringent standard of review for harmless error applies: “In that instance, we must assess the entire record, ‘including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.’ (Citation.) We will affirm ‘unless review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.’ (Citation.)” *People v. Perez* (2005) 35 Cal.4th 1219, quoting *Guiton, supra*, 4 Cal.4th at 1130. In other words, the *Watson* standard applies. (*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.)

- Omission of Elements or Defects in Description of Elements

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

Omission of an element. Both the U.S. and California Supreme Courts have held that *omission or removal of an element is not a structural defect and is subject to harmless error analysis under the Chapman standard.* *Neder v. United States* (1999) 527 U.S. 1; *People v. Flood* (1998) 18 Cal.4th 470. Both *Neder* and *Flood* were cases in which the instructions omitted an element which was not reasonably susceptible to dispute under the respective circumstances of the cases – in *Neder*, whether the failure to report over \$5 million satisfied the “materiality” element of tax fraud; and, in *Flood*, whether the uniformed police officers from whom Flood was fleeing were “peace officers,” as required for Veh. Code § 2800.3. Predictably, each opinion found the instructional error harmless under *Chapman*.

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

In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee. [¶] Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error--for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary

finding--it should not find the error harmless. [¶] A reviewing court making this harmless-error inquiry does not ... "become in effect a second jury to determine whether the defendant is guilty." [Citation.] Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. *Neder, supra*, 527 U.S. at 19, emphasis added.

Under a faithful reading of *Neder*, a reviewing court should find omission of an element harmless *only* in cases such as *Flood* and *Neder* itself, where the omitted element was not reasonably susceptible to dispute. But, if the evidence *does* pose a factual question concerning that element, the appellate court "should not find the error harmless." *Ibid.* 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.

People v. Gonzalez (2012) 54 Cal.4th 643, 665-666, provides a recent example of application of the *Neder* standard. It demonstrates the potential complexity of analyzing whether an element was actually contested at trial and also the potential necessity of addressing the strength or weakness of record evidence in arguing prejudice under *Neder*.

In *Gonzalez*, the jury was instructed in a manner that allowed it to find first degree murder without deciding whether the defendant acted with premeditation and deliberation. The defendant's mental state was a "hotly contested" issue at trial, with the defense "strongly" disputing that the defendant had the intent to kill. *Id.* at 664-665. Defendant, however, did not separately argue lack of premeditation and deliberation, and the jury's other verdicts indicated they found intent to kill. The *Gonzalez* court's analysis focused on whether, in light of the record evidence, a rational jury could have failed to find premeditation and deliberation while still finding intent to kill. It first emphasized that *Neder* stated that a reviewing court will often have to thoroughly examine the record in assessing prejudice:

[] *Neder* furnishes the appropriate harmless error test for instructions that erroneously omit an element of an offense. (*People v. Mil* (2012) 53 Cal.4th 400, 409-415.) In this context, the *Neder* court concluded a demonstration of harmless error does not require proof that a particular jury "actually rested its verdict on the proper ground (*Neder, supra*, 527 U.S. at pp. 17-18 []), but rather on proof beyond a reasonable doubt that a rational jury would have

found the defendant guilty absent the error (*id.* at p. 18 []). Although the former *can be* proof of the latter (see *id.* at p. 26 [] (conc. opn. of Stevens, J.)), the *Neder* majority made clear that such a determination is not essential to a finding of harmlessness (*id.* at p. 16, fn. 1 []), which instead ‘will often require that a reviewing court conduct a thorough examination of the record’ (*id.* at p. 19).” (*People v. Cross* (2008) 45 Cal.4th 58, 71. . . (conc. opn. of Baxter, J.)) *Gonzalez, supra*, 54 Cal.4th at 665-666; italics in original.

The California Supreme concluded, after “exhaustively” reviewing the evidence, that no rational juror could have found intent to kill without finding premeditation and deliberation, and found the defective instruction on the latter element harmless. *Id.* at 666.

Since the defendant in *Gonzalez* did not strictly contest premeditation and deliberation *in the absence of intent to kill*, one can rely on *Gonzalez* as support for an interpretation of *Neder* which focuses on whether the omitted element was contested at trial. However, the California Supreme Court in *Gonzalez* also approved application of a harmless error test which requires careful scrutiny of the entire record.

In addition, the California Supreme Court indicated that the *Neder* standard is *less* stringent than the *Yates v. Evatt* (1991) 500 U.S. 391, 404–405, harmless error standard applicable to instruction on a mandatory presumption. When the court has instructed on a mandatory presumption “the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.” *Id.* at 404.

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

elements of a charge. *Harmon v. Marshall* (9th Cir.1995) 69 F.3d 963, 966.

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

The California Supreme Court revisited this issue in *People v. Mil* (2012) 53 Cal.4th 400, where the trial court failed to instruct on two elements of a felony-murder special circumstance allegation. Under *Mil*, the omission of an instruction on one or more elements of a charged offense or special circumstance allegation is structural error only when it "wholly withdrew from jury consideration substantially all of the elements ..., [or] vitiated all of the jury's findings as to effectively deny defendant[] a jury trial altogether." *Id.* at 415, quoting *People v. Wims* (1995) 10 Cal.4th 293, 312, fn. omitted. In the absence of these effects on the jury's consideration and findings, the instructional omission is amendable to *Chapman* harmless error review.

In applying this standard to the facts before it, the California Supreme Court in *Mil* considered not only the number of elements omitted from the instructions, but also the findings the jurors had to make under other correct instructions and whether "the instructional error prevent[ed] defendant from offering evidence" to challenge the truth of the elements. *Id.* at 416. After concluding that the instructional error before it did not meet these prerequisites for structural error, the California Supreme Court applied the *Chapman-Neder* standard to find the error prejudicial.

- Offenses vs. Enhancements

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

(2001) 26 Cal.4th 316.

In the wake of *Apprendi*, an instructional error concerning the elements of an enhancement will usually be reviewed under the same federal constitutional principles, including *Chapman-Neder* harmless error analysis, as a comparable error involving the elements of an offense. But there are several quirks which may take some enhancements out of the scope of those protections, which flow from limitations or uncertainties in the U.S. Supreme Court's *Apprendi* jurisprudence.

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

Relationship of enhancement to minimum sentence for offense. The right to jury trial and to a finding beyond a reasonable doubt also applies to enhancements which increase the required minimum sentence of an offense. Succinctly, the United States Supreme Court held in *Alleyne v. United States* (June 17, 2013) __ U.S. __, 133 S.Ct. 2151: “Any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.”⁴

The “Prior Conviction” Exception. *Apprendi* and its progeny apply only to sentencing provisions “*other than the fact of a prior conviction*” which increase the term beyond the statutory maximum prescribed for the underlying offense or increase the mandatory minimum. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-489, emphasis added; *Blakely v. Washington* (2004) 542 U.S. 296, 301; *United States v.*

⁴ *Alleyne* calls into question the validity of the California Supreme Court's holding in *People v. Sengpadychith* (2001) 26 Cal.4th 316 that the *Apprendi* rule does not apply to gang enhancements which, for offenses which already carry a life sentence, bar parole until a minimum of 15 calendar years have been served. See Pen. Code, § 186.22(b)(5).

Booker (2005) 543 U.S. 220, 244. This is known as the “*Almendarez-Torres* exception,” after *Almendarez-Torres v. United States* (1998) 523 U.S. 224. Though there may be 5 votes to overrule *Almendarez-Torres* (see Justice Thomas’ concurrence in *Apprendi*), the Supreme Court has so far declined invitations to take up the issue. Consequently, as matters stand now, a failure to require jury determination of such recidivist enhancements as “strikes,” “serious felony” enhancements, and prior prison term enhancements generally does not pose a federal constitutional violation. But, even leaving aside whether the *Almendarez-Torres* exception will remain good law, there is considerable uncertainty over the scope of that exception – i.e., over the precise dividing line between *Apprendi* and *Almendarez-Torres*.

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

Complete removal of an enhancement from the jury. Under the *Apprendi-Blakely* line of cases, an enhancement or other sentencing factor which increases the maximum term or the mandatory minimum 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.

- Failure to Instruct/Erroneous Instruction on Burden of Proof as to Defense or Exception to Liability.

Under a long line of California case authority, as well as under statutory authority, a trial court is required to instruct sua sponte on the allocation and weight of the burden

of proof as to defenses and exceptions to liability, such as the medical marijuana defense. See *People v. Figueroa* (1986) 41 Cal.3d 714, 721 (court erred by failing to instruct on what burden of proof applied to exemption from liability for violation of Corporate Securities Law); Evid. Code, §§ 501 & 502. The trial court must also give these instructions correctly. *Figueroa, supra*, 41 Cal.3d at 721; *People v. Mower* (2002) 28 Cal.4th 457, 483-484 (court erred by erroneously instructing jury that defendant bore the burden of establishing medical marijuana defense by preponderance of evidence).

When a defense relates to or negates an element of the offense, the defendant need only raise a reasonable doubt as to the defense to trigger the trial court's duty of instruction on it. *People v. Neidinger* (2006) 40 Cal.4th 67; *People v. Mower, supra*, 28 Cal.4th at 477; *People v. Salas* (2006) 37 Cal.4th 967, 981-982. Although this issue has not been definitively resolved, there is ample authority for the proposition that after the defendant bears that initial burden, the prosecution must disprove such defenses beyond a reasonable doubt. See, e.g., *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 (conc.opn. Of Chin J.); *People v. Salas, supra*, 37 Cal.4th at 981-982; *People v. Saavedra* (2007) 156 Cal.App.4th 561, 570-571 and cases cited therein. *Mower* and *Neidinger, supra*, generally used the term "burden of proof" or "initial burden," rather than burden of producing evidence, in discussing the burden on the defense. However, *People v. Salas, supra*, 37 Cal.4th at 981-982, explained that *Mower* held that the "burden of producing evidence" as to the Compassionate Use Act was on the defense.

In his concurring opinion in *People v. Mentch, supra*, 45 Cal.4th at 292-294, Justice Chin noted the importance of resolving the question of whether the defendant's burden in medical marijuana cases was a burden of producing evidence under Evidence Code section 101 or a burden of proof under Evidence Code section 115. Surprisingly, the Attorney General agreed the defendant bore only the burden of producing evidence under Evidence Code section 110. *Ibid.* Justice Chin's discussion of the issue indicates that the interplay of Evidence Code sections 501 and 1096 requires a trial court to instruct that the prosecution bears the ultimate burden of disproving beyond a reasonable doubt the existence of defenses that negate or relate to an element. See *People v. Loggins* (1972) 23 Cal.App.3d 597, 602; see also Law Revision Commission Comments to Evid. Code, §§ 500, 501.

Although *People v. Frazier* (2005) 128 Cal.App.4th 807 held that it is not error for a trial court to instruct the jury that the defendant bears the burden of raising a reasonable doubt as to such a defense – in that case, a medical marijuana defense -- the above case authority indicates that there is a very strong argument that *Frazier*

was wrongly decided. In fact, since the California Supreme Court has observed that only a handful of defenses, e.g. the defenses of necessity and entrapment, require a defendant to prove the underlying facts, the court's duty to instruct the jury on the prosecution's burden to disprove defenses should be widely applicable. *People v. Mower, supra*, 28 Cal.4th at 481. Although CALCRIM instructions are not authority for appellate arguments, it is also notable that standard CALCRIM instructions on defenses which relate to or negate an element of the offense require the prosecution to prove the non-existence of the defenses beyond a reasonable doubt. (See, e.g., CALCRIM 1252 [protection from immediate injury defense to child abduction]; 2361, 2362, 2363, 2370 [Compassionate Use Act defense to various marijuana offenses].)

Since there exists a strong argument that state law requires the prosecution to disprove defenses that negate or relate to an element beyond a reasonable doubt, there also exists a strong argument that the failure to so instruct is federal constitutional error. The absence of the exonerating facts functions as a fact necessary to establish guilt, and therefore as an element which the jury must find beyond a reasonable doubt. See *Mullaney v. Wilbur* (1975) 421 U.S. 684. Additionally, when a trial court's instructions prevent a jury from giving meaningful consideration to a defendant's defense, the instructions violate the defendant's federal constitutional rights to due process and a jury trial. See *California v. Trombetta* (1984) 467 U.S. 479, 485; *Mathews v. United States* (1988) 485 U.S. 58, 63; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 875-876.

- Refusal to Instruct on Defenses

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

The California courts have not resolved whether there is any *federal constitutional*

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

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

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

Assuming that there is a due process right to instructions on a defense theory supported by the evidence, an erroneous refusal of an instruction on an affirmative defense should at least be subject to *Chapman* prejudice review, when the error is raised on direct appeal.⁵ However, many federal cases suggest that an even less-forgiving standard than *Chapman* applies. Under those cases, the denial of requested instructions on a defense theory which has evidentiary support is prejudicial error, unless other instructions adequately covered that defense. E.g., *United States v. Ruiz* (11th Cir. 1995) 59 F.3d 1151, 1154-1155; *United States v. Allen* (2nd Cir. 1997) 127 F.3d 260, 265; *United States v. Montanez* (1st Cir. 1997) 105 F.3d 36, 39. “The right to have the jury instructed as to the defendant’s theory of the case is one of those rights ‘so basic to a fair trial’ that failure to instruct where there is evidence to support

⁵ Because *Bradley* arose on a federal habeas petition, rather than direct appeal, it was instead governed by the *Brecht* standard, requiring a “substantial and injurious influence” on the verdict. Cf. *Brecht v. Abrahamson* (1993) 507 U.S. 619.

the instruction can never be considered harmless error.” *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.

Although these circuit cases generally pre-date *Neder v. United States* (1999) 527 U.S. 1, they parallel the *Neder* opinion’s cautionary notes on the limits of harmless error review of omitted elements. As *Neder* stated, omission of an element cannot be held harmless where that element was contested. *Neder, supra*, at 19. Because a trial court has a duty to instruct on all elements of the offense in every case, there will be cases, such as *Neder* itself, in which omission of an element will be harmless because that element was not susceptible to dispute. See, e.g., *People v. Gonzalez, supra*, 54 Cal.4th at 665-666. However, since the duty to instruct on an affirmative defense only arises if there is evidentiary support for that defense, the relevant facts will almost always be contested, and the erroneous refusal of such an instruction should not be salvageable through harmless error analysis.

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

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

Federal constitutional implications of lesser offense instructions. The *Breverman* majority also held that there is no general right to lesser included offense instruction

in *non-capital* cases. There is a limited federal constitutional right to a lesser included offense instruction under some circumstances in capital cases. *Beck v. Alabama* (1980) 447 U.S. 625. But the *Breverman* majority noted that the U.S. Supreme Court had given that right a very narrow construction even in the capital context (e.g., *Schad v. Arizona* (1991) 501 U.S. 624; *Hopkins v. Reeves* (1998) 524 U.S. 88) and has never extended the *Beck* analysis to non-capital cases. In this respect, the California Supreme Court’s view is consistent with that of the Ninth Circuit. “Under the law of this circuit, the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question. [Citation.]” *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1106.

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

Unique relationship between voluntary manslaughter and malice. The *Breverman* majority declined to decide whether the omission of imperfect self-defense instructions resulted in incomplete instructions on the charged offense of murder because the majority believed that issue was not presented in the briefing. *Breverman, supra*, 19 Cal.4th at 170-171 & fns. 18 -19. But Justice Kennard did address that issue in her dissent. She found that, due to “the unique relationship between murder and voluntary manslaughter,” an erroneous failure to instruct on heat-of-passion or imperfect self-defense violated due process. Because, under California law, heat-of-passion or imperfect self-defense *negates malice aforethought*, a failure to instruct the jurors on that doctrine *results in incomplete instructions on the malice element of the charged crime of murder*, contrary to *United States v. Gaudin* (1995) 515 U.S. 506. The error also relieves the prosecution of its burden, under *Mullaney v. Wilbur* (1975) 421 U.S. 684, of proving beyond a reasonable doubt that the defendant did not kill in the heat of passion or in imperfect self-defense. See *Breverman, supra* at 187-191 (Kennard, J., dissenting opn.). Justice Kennard’s dissent provides a blueprint for this argument. Additionally, because the majority opinion did not address the *Gaudin-Mullaney* issue on the merits, the *Breverman* opinion should not bar raising that claim in a California court.

People v. Thomas (2013) 218 Cal.App.4th 630 recently directly addressed the issue of whether a trial court’s erroneous failure to instruct on heat of passion voluntary manslaughter violated federal due process. In its first opinion in *Thomas*, Division Three of the First District found the error to be only of state law and affirmed the

conviction after applying the *Watson* standard. The defendant petitioned for review, arguing the error violated federal due process. The California Supreme Court remanded to Division Three to determine whether the lack of a heat of passion voluntary manslaughter instruction infringed on federal constitutional guarantees. Division Three then agreed with Justice Kennard's analysis in dissent in *Breverman*, applied *Chapman*, and reversed. As of the most recent update of this article (October 2013), the Attorney General had petitioned for review in *Thomas*, and the California Supreme Court had not issued an order either granting or denying review. The California Supreme Court's previous grant and remand in this case seems to have set it up for a second grant of review and an opportunity for the Court to finally address this issue fully.

Meanwhile, the California Supreme Court has repeatedly made statements which foster the notion that a failure to instruct on imperfect self-defense or heat of passion voluntary manslaughter is an error of state law only. Fortunately, it appears these cases can be distinguished or argued as dictum. For example, recently in *People v. Beltran* (2013) 56 Cal.4th 935 the defendant argued that the court erred in its instructions on heat of passion voluntary manslaughter and that the instructional error was exacerbated by prosecutorial misconduct. In its prejudice analysis, the Supreme Court parroted the statement in *Breverman*: “in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under... *Watson*.” *Id.* at 955, quoting *Breverman*, 19 Cal.4th at 178. However, the California Supreme Court had not found instructional error and had only found that the prosecutor's arguments “muddied the waters” as to the correct law, rendering the Court's discussion of the applicable prejudice standard either inapplicable to instructional error or dictum. *Id.* at 954. Similarly, in *People v. Randle* (2005) 35 Cal.4th 987, 1003 the California Supreme Court stated: “Any error in failing to instruct on imperfect defense of others is state law error alone, and thus subject ... to the harmless error test articulated in” *Watson*. *People v. Randle* (2005) 35 Cal.4th 987, 1003. The *Randle* opinion did not mention the unresolved due process issue raised in Justice Kennard's *Breverman* dissent. But arguably the broad statement in *Randle* was dictum: Because the Court found the error in *Randle* prejudicial even under a *Watson* analysis, it was not necessary for the Court to address the federal constitutional question.

The U.S. Supreme Court's opinion in *Middleton v. McNeil* (2004) 541 U.S. 433 appears to provide some implicit support for a due process argument along the lines sketched in Justice Kennard's *Breverman* dissent. As discussed earlier, in *McNeil*, the Supreme Court found that an error in the imperfect self-defense instructions did

not require reversal because, considering the instructions as a whole and the attorneys' arguments, there was no "reasonable likelihood" the jurors misunderstood that doctrine. But the very fact that the Supreme Court was addressing the adequacy of those instructions in the first place reflects its apparent recognition that due process required correct instructions on imperfect self-defense. "In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." *McNeil, supra*, at 437.

Even assuming that Justice Kennard was correct in her *Breverman* dissent, the same "unique" characteristics of imperfect self-defense and heat-of-passion which support that due process analysis also effectively restrict that argument to omissions of those grounds for voluntary manslaughter. It is hard to think of any other context in which the omission of lesser offense instructions also results in incomplete instructions on the elements of the charged greater offense. (For example, assuming that the court instructs adequately on the definition of "deadly weapon," an erroneous failure to submit simple assault as a lesser included offense does not result in incomplete instructions on the elements of assault with a deadly weapon.)

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

The California Supreme Court has not ruled out the possibility that refusal of a *requested* lesser included offense instruction could violate due process as a denial of instructions on the "defense theory." *Breverman* involved a trial court's failure to deliver sua sponte instructions on a ground for a lesser offense verdict. The same was true of a claim rejected in a recent capital case. The Court acknowledged such federal

“defense theory” opinions as *Conde v. Henry* and *Duncan v. Bradley*, but found them distinguishable. “In these cases, unlike the present one, the instruction at issue was requested by the defense. The cases do not support the proposition that a trial court’s failure to instruct on a lesser included offense *sua sponte* denies due process.” *People v. Rogers* (2006) 39 Cal.4th 826, 872.

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

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

Instructions on the elements of crimes, burdens of proof, 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:

- Instructions on “Other Offenses”

(a) In general, use of “other offenses” evidence as proof of a defendant’s “character” or criminal propensity offends federal due process because of the historic common law proscriptions against such evidence. *McKinney v. Rees* (9th Cir. 1993)

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

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

Supreme Court held that this revised version of 2.50.01, when considered together with all the instructions, posed no risk of a construction allowing conviction on less than proof beyond a reasonable doubt. *People v. Reliford* (2003) 29 Cal.4th 1007.

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

- Other limitations on Consideration of Evidence

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

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

- Inferences from other Circumstances at Trial

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

(b) Presumably, the same goes for “*Carter* error”--refusal of a defense-

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

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

(d) Retroactive application of California Supreme Court cases overruling prior standards (e.g., *Carlos* error re: intent for felony-murder special circumstance) violative of due process as unforeseeable judicial enlargement of criminal liability. *People v. Johnson* (1993) 6 Cal.4th 1, 44-45; *People v. Fierro* (1991) 1 Cal.4th 173, 227; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1704-1709; *In re Baert* (1988) 205 Cal.App.3d 514, 519-520.

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

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

1. Accomplice instructions. E.g., *People v. Gordon* (1973) 10 Cal.3d 460, 470-473.
2. Cautionary instructions (e.g., oral admissions, CALJIC 2.70, 2.71, etc.; CALCRIM 358.). E.g., *People v. Heishman* (1988) 45 Cal.3d 147, 166.
3. Identification instructions (CALJIC 2.91, 2.92; CALCRIM 315) and most other defense-requested “pin-point instructions” drawing the jurors' attention to particular aspects of the evidence. *People v. Wright* (1988) 45 Cal.3d 1126.
4. “*Dewberry* error,” failure to instruct specifically on the application of

the reasonable doubt rule to the choice between greater and lesser offenses. *People v. Dewberry* (1959) 51 Cal.2d 548.

5. “*Kurtzman* error” – instructions which misinform jurors that they can’t “consider” a lesser offense until they have actually returned a verdict of acquittal on the greater charge. *People v. Berryman* (1993) 6 Cal.4th 1048, 1076-1077 n. 7.
6. Most other evidence- and inference-related instructions, including consciousness-of-guilt from flight, suppression of evidence, etc.
7. Errors in “housekeeping” instructions (e.g., juror note-taking, etc.).