NAVIGATING CALCRIM TO ACHIEVE

A SUCCESSFUL SELF-DEFENSE STRATEGY

By Vicki Firstman

"The rhetoric of self-defense is powerful. A claim of self-defense captures our moral and legal imagination, prompting us to consider, and sometimes reconsider, the foundational premises of the law as well as the rationales underlying our social practice of blaming and punishing. . . . [¶] But the rhetoric of self-defense is also fraught with uncertainty. All self-defense situations involve making predictions – about the necessity of using force, as well as the amount of force that is appropriate to use." (Young, *The Rhetoric of Self-Defense* (2008) 13 Berkeley J. Crim. L. 261.) The perfect self-defense model – and probably the one most likely to succeed – invites "a first-person perspective when thinking about self-defense. In other words, people are apt to think, 'it could be me.'" (*Id*. at p. 268.) If defense counsel can persuade the trier of fact – or the appellate justice – to accept this perspective based on the narrative presented at trial, then the chances of a successful self-defense strategy will be greatly enhanced. The journey to a successful outcome, however, will only be achieved if counsel takes full advantage of the criminal jury instructions and case authority which inform the law of self-defense in California.

With this in mind, this article will (1) explain when the burden of proper instruction falls to the trial court and when the duty falls to trial counsel; (2) lay out some general instructions on self defense; and (3) discuss some case examples demonstrating the type of

evidence which prompts self-defense instruction.

I. Instructional Duty[1]

It is well-settled that "the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other points in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10 and *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) This duty also encompasses the obligation to instruct on defenses, including self-defense and unconsciousness, and on the relationship of these defenses to the elements of the charged offense. (*Id*. at p. 716.)

However, the *sua sponte* obligation of the court only goes so far when it comes to defenses. This duty arises when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) In this context, substantial evidence is "evidence sufficient to deserve consideration by the jury (*People v. Williams* (1992) 4 Cal.4th 354, 361), that is, evidence that a reasonable jury could find persuasive. [Citation.].)" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8; compare with *People v. Salas* (2006) 37 Cal.4th 967, 982 [In determining whether the evidence is sufficient to warrant a jury instruction, the trial court

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[1] A portion of this section of the article is taken from a brief authored by Dallas Sacher.

does not determine the credibility of the defense evidence, but only whether "there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt."].) If, on the other hand, there is substantial evidence of a defense *inconsistent* with the defendant's theory of the case, the trial court should "ascertain from the defendant whether he wishes instructions on the alternative theory." (*Breverman*, *supra*, 19 Cal.4th at p. 157.) Importantly, if the trial court fails in this latter duty, and trial counsel also fails to request such instruction, any claim of error will be considered forfeited on appeal. (*People v. Wickersham* (1982) 32 Cal.3d 307, 328.)

The controlling rule under state law is that the failure to instruct on the defense theory of the case constitutes reversible error unless "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' [Citation.]" (*People v. Stewart* (1976) 16 Cal.3d 133, 141; accord, *People v. Lee* (1987) 43 Cal.3d 666, 675, fn. 1; *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [per se reversal ordered where no instruction was given on self defense].)

Notwithstanding the foregoing cases, the California Supreme Court has inexplicably stated in a recent decision that it has "not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense. [Citation.]" (*People v. Salas*, *supra*, 37 Cal.4th 967, 984.) Since the court's earlier precedents did state a governing rule, appellate counsel should argue that these cases represent the binding standard of review. However, appellate counsel should be aware that there is some uncertainty in the state of the law.

Under federal principles, the failure to instruct on the defense theory of the case violates the defendant's right to due process of law and is reversible per se. (See, e.g.,

United States v. Escobar De Bright (9th Cir. 1984) 742 F.2d 1196, 1201-1202 ["The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error."].)

Escobar De Bright is also consistent with subsequent United States Supreme Court authority which indicates that per se reversal is required when an error "vitiates all the jury's findings." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281, emphasis in original.) Or, stated otherwise, per se reversal is compelled when the consequences of an error "are necessarily unquantifiable . . . ." (*Id*., at p. 282; accord, *Neder v. United States* (1999) 527 U.S. 1, 10-11.) Since it is impossible to know whether a jury would have accepted a defense which it never had occasion to consider, the conclusion is inescapable that the effect of the instructional omission is "necessarily unquantifiable." (See, e.g., *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 740-741 [structural error found where the defense was precluded from presenting its "theory of the case"]; *United States v. Sarno* (9th Cir. 1995) 73 F.3d 1470, 1485 ["failure to instruct a jury upon a legally and factually cognizable defense is not subject to harmless error analysis. [Citations.]"]; but see *People v. Quach* (2004) 116 Cal.App.4th 294, 303 [wrongly applying the *Chapman* standard in a case where an erroneous instruction in effect advised the jury to disregard the defense theory of the case.].)

Of course, it goes without saying that defense counsel has the duty to request appropriate jury instructions on the defense theory of the case. (*People v. Sedeno*, *supra*, (1974) 10 Cal.3d 703, 717, fn. 7, overruled on other points in *People v. Breverman*, *supra*, 19 Cal.4th 142, 163, fn. 10 and *People v. Flannel*, *supra*, 25 Cal.3d 668, 684-685, fn. 12.)

Thus, where there is no *sua sponte* duty for the trial court to instruct and counsel fails to request the appropriate instruction, appellate counsel must investigate a claim of ineffective assistance of counsel.

One interesting twist on the *sua* sponte duty to instruct arises in light of the current formulation of self-defense instructions under CALCRIM, California Criminal Jury Instructions. The Judicial Council adopted the new CALCRIM instructions on August 26, 2005 to be effective January 1, 2006. Notably, there is a significant difference between CALJIC and CALCRIM in that most of the essential self-defense principles are contained in a single instruction: CALCRIM 3470 for non-homicide cases, and CALCRIM 505 for homicides. In contrast, CALJIC covered a number of self-defense principles in separate instructions. (See, e.g., CALJIC No. 5.30 [self-defense against assault]; CALJIC 5.50 [no duty to retreat]; CALJIC 5.50.1 [antecedent threats or assaults by the victim].) This distinction is important because prior to the adoption of CALCRIM, a number of cases either assumed or held that defense theories specific to the facts of a given case did not fall within a court's *sua sponte* duty to instruct. (See, e.g., *People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489 [concluding that the trial court was not obligated to instruct on antecedent threats absent a request]; *People v. Pena* (1984) 151 Cal.App.3d 462, 474-475 and *People v. Bush* (1978) 84 Cal.App.3d 294, 302-303 [refusal of request for antecedent threat instructions found to be reversible error].)

Arguably, a *sua sponte* duty now exists as to those principles contained in CALCRIM 3470 and 505. Thus, where a proper instruction was omitted, counsel should argue on appeal that there is a *sua sponte* duty to instruct. Absent firm California Supreme Court precedent

establishing a *sua sponte* duty, however, counsel should raise a back-up argument that trial counsel's failure to request instruction constitutes constitutionally deficient representation, and when necessary, investigate whether habeas relief must be pursued.

II. General Right to Self-Defense - CALCRIM 3470 & 505

As mentioned above, CALCRIM 3470 instructs the jury on the right to self-defense or defense of another in a non-homicide case and CALCRIM 505, in a homicide. In addition to general principles of self-defense or defense of others, these instructions contain other relevant self-defense tenets, such as antecedent or third party threats, and the right to stand one's ground rather than retreat. These concepts will be discussed separately below.

CALCRIM 3470 reads, in part, as follows:

> Self-defense is a defense to _____<insert list of pertinent crimes charged>. The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:
>
> 1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____insert name of third party>) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];
>
> 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;
>
> AND
>
> 3. The defendant used no more force than was reasonably necessary to defend against that danger.
>
> Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/[or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would

> believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).
>
> When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.
>
> The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____<insert crime(s) charged>.

CALCRIM 505 conveys the same principles as CALCRIM 3470 except that it applies in a homicide and provides for a not guilty verdict for a charge of murder, manslaughter, attempted murder or attempted voluntary manslaughter where the killing is done (1) because the defendant reasonably believed there was an imminent danger of death, great bodily injury, or a forcible and atrocious crime, such as murder, mayhem, rape, and robbery; (2) the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and (3) the defendant used no more force than was reasonably necessary to defend against that danger.

The classic self-defense case is illustrated by *People v. Estrada* (1923) 60 Cal.App. 477. There, the defendant was the subject of a violent and sudden attack by a companion named Murillo. During the struggle which followed, the victim, who was armed with both a wooden club and a knife, struck the defendant multiple times with the club. After striking one of these blows, the victim lost his grip on the knife and dropped it. The defendant grabbed the weapon and fatally stabbed Murillo. (*Id*. at pp. 478-481.) Murillo's body was

found the next day on a public roadside, lying next to a wooden club that was about three feet long and three inches thick. (*Id*. at p. 478.) Around the body and extending a distance of about twelve feet, the grass had been trampled down, indicating that a struggle had occurred. The knife was never found. (*Id*. at p. 478-479.) Another companion who had been with Estrada and Murillo just before the incident occurred, indicated that Murillo had been "quarrelsome" and intoxicated. (*Id*. at p. 479.) Estrada had a large bruise on his chest and extending across his shoulder, where he claimed he had been struck with the club. (*Ibid*.)

Mr. Estrada was charged with murder and convicted of manslaughter. (*Estrada*, *supra*, 60 Cal.App. at p. 478.) On appeal, he challenged the judgment on the ground that the killing was done in self-defense. (*Ibid.*) The Court of Appeal agreed and reversed, holding that there was no indication that the defendant, "in repelling the attack of Murillo, acted other than in necessary self-defense." (*Id*. at p. 481.) The court reasoned: "This state has upheld a defendant's right to stand his ground and meet by force a sudden and violent attack. So that while the killing must be under an absolute necessity, actual or apparent, *as a matter of law* that necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. [Citations.]" (*Id*. at p. 482, italics in original.)

On the other end of the spectrum stands *People v. Myers* (1998) 61 Cal.App.4th 328, where a fairly minor confrontation resulted in serious and permanent neurological injuries for the alleged victim, George Staley. What makes this case particularly important, however, is that it expanded the availability of self-defense to situations where the defendant does not believe he is facing a threat of *any* bodily harm or injury.

The facts showed that the defendant, Thomas Myers, lived in an apartment complex managed by Staley and that the two did not get along. (*Id*. at p. 330.) On the day of the incident, Staley approached Myers at a carwash across the street from the apartment complex with what he admitted was "a little bit of an attitude." Staley claimed that Myers then struck him without any provocation. (*Id.* at p. 331.) Staley lost consciousness from the blow and did not remember anything else about the incident. (*Ibid*.) A specialist testified that Staley suffered a traumatic brain injury which had left him with cognitive deficits and behavioral problems. (*Id*. at p. 332.)

The defense, on the other hand, presented evidence that Staley suddenly approached Myers from the rear and began yelling angrily. (*Myers*, *supra*, 61 Cal.App.4th at p. 332.) Myers turned and yelled back, telling Staley to go away. Instead, Staley came closer and started to poke Myers in the chest with his finger. In response, Myers pushed Staley away. According to Myers, the pavement at the carwash was wet and Staley slipped and fell backwards to the ground. (*Ibid*.) Myers denied ever punching Staley. (*Ibid*.)

At trial, Myers claimed he had a right to defend himself against a battery – the finger poking -- by pushing Staley away. He further claimed that the right to resist a battery is not necessarily dependent upon whether the battery poses an imminent threat of bodily injury. (*Myers*, *supra*, 61 Cal.App.4th at p. 334.) Accordingly, Myers asked the trial court to modify former CALJIC No. 5.30 (*ibid*), which instead provided that a person may defend himself from attack *only* if, "as a reasonable person, he has grounds for believing and does believe that *bodily injury is about to be inflicted upon him*. . . ." (*Id*. at p. 333; italics added.)

Alternatively, Myers asked the trial court to give a special instruction on the right of self-defense against a battery. (*Id*. at p. 334.)

The trial court refused these requests and limited defense counsel's argument to a self-defense theory consistent with former CALJIC 5.30. (*Myers*, *supra*, 61 Cal.App.4th at p. 334.) As a result, the prosecutor relied on CALJIC 5.30 to argue that there was no evidentiary basis for a claim of self-defense since Staley's finger-poking would not give rise to a reasonable belief that bodily injury was imminent. (*Ibid*.) The jury convicted Myers of aggravated battery (Pen. Code, § 243, subd. (d)) and simple assault. (*Id*. at p. 330.)

On appeal, Myers renewed his claim, arguing that the standard instruction on self-defense against an assault (former CALJIC 5.30) should have been modified to provide that a defendant "may, in appropriate circumstances, use reasonable force to resist a battery even when he has no reason to believe he is about to suffer bodily injury." (*Myers*, *supra*, 61 Cal.App.4th 328, 330.)

The *Myers* court agreed. (*Ibid*.) The appellate court first acknowledged that it is well-settled, in both tort and criminal law, that "'the least touching' may constitute battery. In other words, *force* against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark. . . . The 'violent injury' here mentioned is not synonymous with 'bodily harm,' but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act. [Citation.]" (*Myers*, *supra*, 61 Cal.App.4th at p. 335, internal quotation marks omitted.) Given these principles, the court reasoned that "an offensive touching, although it inflicts no bodily harm, may nonetheless constitute a

battery, which the victim is privileged to resist with such force as is reasonable under the circumstances. The same may be said of an assault insofar as it is an attempt to commit such a battery. To hold otherwise would lead to the ludicrous result of a person not being able to lawfully resist or defend against a continuing assault or battery, such as the act defendant alleged here." (*Ibid*., fn. omitted.) Accordingly, the court held that the trial court committed reversible error in refusing to give a modified self-defense instruction. (*Id*. at p. 336.)

The holding in *Myers* exemplifies the importance of trial counsel's ability to hone in on the defense theory of the case, and to do everything possible to ensure that supportive instructions are given. It also illustrates the fallibility of the standard instructions, a factor which should also guide trial and appellate counsel's evaluation of their case. Here, counsel came up with a novel theory – that there is a right to self-defense against an assault or battery *even* when the defendant does not reasonably believe that bodily injury will occur. Counsel took this creative defense theory, merged that theory with an appropriate strategy on instructions, and preserved the issue for review. Even though trial counsel did not succeed in persuading the trial court to give the requested instructions, counsel laid the necessary groundwork to enable appellate counsel to take the ball and run with it, and violà, a new self-defense theory was born, and the judgment reversed.

III. Antecedent Threats

Also included in CALCRIM 3470 and CALCRIM 505 are principles relating to antecedent threats. CALCRIM 3470 provides:

> [The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information

> that was not true. However, the defendant must actually and reasonably have believed that the information was true.]
>
> [If you find that _____<insert name of victim> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]
>
> [If you find that the defendant knew that _____<insert name of victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]
>
> [Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

As CALCRIM 3470 and 505 demonstrate, California law provides that a person is entitled to act more quickly and harshly in self defense than is usually the case when he has been the subject of prior assaults or threats by the alleged victim. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065; *People v. Moore* (1954) 43 Cal.2d 517, 531; *People v. Garvin*, *supra*, 110 Cal.App.4th 484, 488.)

In *People v. Pena*, *supra*, 151 Cal.App.3d 462, the defendant knew that Frank Ambrosio was a violent man. After a dispute arose between the two men, Ambrosio told the defendant that he would be "looking" for him. Eventually, the empty-handed Ambrosio approached the defendant in a bar. The defendant drew a gun and shot and killed Ambrosio. On these facts, the failure to give an antecedent threats instruction was deemed to be reversible error. (*People v. Pena*, *supra*, 151 Cal.App.3d 462, 474-476.)

The court held

> The jury must take defendant's knowledge of uncontradicted antecedent threats into consideration in its determination of whether defendant acted in

> a manner [in] which *a reasonable person* would act in protecting his own life or bodily safety. [Citations.] Absent a clear instruction to consider defendant's knowledge of the uncontradicted antecedent threats made by Ambrosio to him and to others about him, we cannot be sure jurors did not construe instructions which were proffered as narrowing the scope of facts and circumstances which they were entitled to consider to only those perceived by any other 'reasonable man' approached by Ambrosio while sitting in the bar at the Mexican Village restaurant. Suffice it to say, that other 'reasonable man' would view Ambrosio simply as another patron; Ambrosio's entrance and approach would lack the import perceived by one aware of antecedent threats. A defendant's knowledge of uncontradicted antecedent threats must, therefore, be taken into consideration in the determination of the reasonableness of a belief in the necessity of self-defense. (*Pena*, *supra*, 151 Cal.App.3d 462, 476; italics in original; internal quotations omitted.)[2]

People v. Bush, *supra*, 84 Cal.App.3d 294, provides another interesting application of the antecedent threat doctrine. In that case, the defendant, Una Bush, stabbed her husband to death. The evidence showed that George Bush had beaten Una on several occasions in their brief marriage. (*Id*. at pp. 296-302.) He had also threatened to kill her. (*Ibid.*) On the night of the killing, George hit Una repeatedly, choked her with sufficient force to interfere with her breathing, and threatened to "'send [her] to [her] grave.'" (*Id*. at p. 302.) At trial, Una testified she was frightened and believed George was trying to kill her. Seeing a knife on a nearby kitchen counter, she grabbed it and "'just started jabbing at him.'" George continued hitting and verbally taunting Una, and thus, she did not believe the knife had touched him. She only realized she had injured him when George finally stopped hitting her, fell to his knees, and told Una he was hurt. (*Ibid*.)

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[2] The two preceding paragraphs discussing *People v. Pena*, *supra*, in this section are taken from briefing authored by Dallas Sacher.

Una was convicted of involuntary manslaughter after the trial judge refused a requested instruction on antecedent threats. (*Bush*, *supra*, 84 Cal.App.3d 294, 296, 302-303.) On appeal, the reviewing court held that it was reversible error to refuse the instruction. (*Id*. at pp. 303-304.) "Where, as in this case, there is evidence tending to show the making of threats of death or great bodily harm by deceased against the defendant, which are relied on as influencing or justifying defendant's act, instruction on the law of this subject is proper, and if not covered, a correct instruction on the subject proposed by one of the parties should be given." (*Id.* at p. 304.)

These cases illustrate the critical importance of antecedent threats in assessing the reasonableness of the defendant's actions, and often the instruction marks the dividing line between success and failure either in the trial court or on appeal.

IV. Third Party Threats

Instruction on this principle is also contained in CALCRIM 3470, for non-homicide cases, and CALCRIM 505 for cases involving homicides. The instruction reads:

> [If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____<insert name of victim>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

The relevance of third party threats to a person's right to act in self-defense appears to have first been decided in the case of *People v. Lee Chuck* (1887) 74 Cal. 30. Chuck was convicted of the murder of Yin Yuen. (*Id*. at p. 30.) The two young men were members of rival Chinese gangs in San Francisco. (*Id*. at p. 32.) The prosecution claimed that Chuck

shot Yuen in cold blood, without provocation, when they crossed paths on Washington Street. (*Id*. at p. 31.) The prosecution also established that at the time of the killing, Chuck was wearing a steel coat-of-mail, and was armed with four pistols. (*Id.* at p. 34.) Not surprisingly, the prosecution used this evidence to persuade the jury that Chuck had prepared himself to make a "murderous assault" upon Yuen. (*Ibid.*)

Chuck maintained that he and two others were walking peacefully along Washington Street when Yuen suddenly fired on them. (*Chuck*, *supra*, 75 Cal. 30, 35-36.) Chuck and his companions returned fire, and a volley of shots was then exchanged between Chuck and his companions and Yuen and five or six of his associates. In the melee, Yuen was killed. (*Id*. at p. 36.) On cross-examination of the main prosecution witness, a member of the opposing gang, Chuck attempted to elicit evidence demonstrating the animus between these two gangs, that two Chinese gangs associated with Yuen had threatened to kill Chuck, and that Chuck had been informed of these threats. (*Chuck*, *supra*, 75 Cal. 30, 34.) The defense intended to use this evidence to show that Chuck had reason to believe his own life was in danger and that this was why he was armed and dressed in a coat-of-mail. (*Ibid*.) The trial judge excluded the evidence upon the prosecution's objection that this evidence was "incompetent, irrelevant, and immaterial." (*Id*. at pp. 32-34.)

The California Supreme Court held that the exclusion of the evidence was reversible error. (*Chuck*, *supra*, 74 Cal. 30, 35.) "The fact of the extraordinary armor worn by the defendant at the time of the homicide was important evidence for the prosecution. To refuse to permit the defendant to show that the preparation was for a different purpose, and for

reasons which implied no intent to assault the deceased, was a denial of a most essential right." (*Ibid*.)

Despite the holding in *Chuck*, *supra*, the relevancy of third party threats did not become settled law until the California Supreme Court decided *People v. Minifie*, *supra*, 13 Cal.4th 1055, the facts of which are discussed in Lori Quick's materials. In *Minifie*, the Attorney General argued that third party threats should not affect a defendant's right to self-defense, and alternatively, that they would only be relevant if the victim adopted the threats. Noting its previous decision in *Chuck*, *supra*, the Supreme Court held: "*Lee Chuck* establishes that under California law evidence of threats from the victim's associates may be used in support of a claim of self-defense to show that the defendant had reason to think his life in danger. [Citation.]" (*Minifie*, *supra*, 13 Cal.4th at p. 1067, citing *Chuck*, *supra*, at 74 Cal. at p. 34; internal quotations omitted.) *Minifie* then went on to reject the Attorney General's assertions, reasoning that ". . . the law recognizes the justification of self-defense not because the victim 'deserved' what he or she got, but because the defendant acted reasonably under the circumstances. Reasonableness is judged by how the situation appeared to the defendant, not the victim. . . . Because justification does not depend upon the existence of actual danger but rather depends upon appearances, a defendant may be equally justified in killing a 'good' person who brandishes a toy gun in jest as a 'bad' person who brandishes a real gun in anger. If the defendant kills an innocent person, but circumstances made it reasonably appear that the killing was necessary in self-defense, that is tragedy, not murder. The test, therefore, is not whether the victim adopted the third party threats, but

whether the defendant reasonably associated the victim with those threats." (*Minifie*, *supra*, 13 Cal.4th at p. 1068.)

It should also be noted that "[w]hether a defendant has personally perceived threats or has been informed of threats by others is irrelevant so long as his belief in the danger represented by those threats is both reasonable and honest." (*People v. Pena*, *supra*, 151 Cal.App.3d 462, 475.) Thus, a third party threat relayed by others to the defendant, i.e., hearsay, can also support a claim of self-defense.

V. The Defendant Has No Duty to Retreat

Also included in CALCRIM 3470 and 505 is a provision instructing the jury, where applicable, that the defendant has no duty to retreat:

> A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/ _____<insert crime>) has passed. This is so even if safety could have been achieved by retreating.

The right of a person to "stand his ground," in one form or another, has been extant in California law at least as far back as 1882. (See, e.g., *People v. Ye Park* (1882) 62 Cal. 204, 208 ["Where an attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground, and, if necessary, kill his adversary."].) While originally limited to cases where the assault was "murderous" (*ibid.*), the principle in modern-day case law, as exemplified by CALCRIM 3470, extends to any type of assault.

This concept was acknowledged in the *Estrada* case, decided in 1923, and discussed above, where the reviewing court made a point of emphasizing that Estrada had the right to

stand his ground: "Our law no-where imposes the duty of retreat upon one who without fault himself is exposed to a sudden felonious attack, and that the duty of withdrawal or retreat is imposed upon him alone who is the first aggressor, or has joined in a mutual combat, . . . " (*People v. Estrada*, *supra*, 60 Cal.App. 477, 482.)

A more modern-day application can be found in the *Rhodes* case discussed in Lori Quick's materials. (*People v. Rhodes* (2005) 129 Cal.App.4th 1339.) It should be noted that prior to the adoption of CALCRIM, this instruction was viewed as one relating to "specific points developed at the trial" and therefore outside the scope of the court's *sua sponte* duty to instruct. (See, e.g., *People v. McGoldrick* (1951) 107 Cal.App.2d 171, 173-174.)

VI. Mutual Combat or Initial Aggressor

Instructions pertaining to the right of self-defense by a person who has engaged in mutual combat or who is the initial aggressor are now contained in CALCRIM 3471 and 3472. CALCRIM 3472 is discussed below. CALCRIM 3471 provides:

> A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if:
>
> 1. (He/She) actually and in good faith tries to stop fighting;
>
> [AND]
>
> 2. (He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting;
>
> <Give element 3 in cases of mutual combat.>
>
> [AND]

> 3. (He/She) gives (his/her) opponent a chance to stop fighting.] If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight.
>
> [A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose.]

A. Mutual Combat

The principle of mutual combat goes back as far as *People v. Hecker* (1895) 109 Cal. 451. However, the most interesting development in recent years is reflected in the Sixth District's decision in *People v. Ross* (2007) 155 Cal.App.4th 1033.

In *Ross*, the defendant was convicted of battery causing serious bodily injury (Pen. Code, §§ 242, 243, subd. (d)) and assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). Due to the recidivist allegations that were also sustained, including four prior strike convictions, Ross was sentenced to a prison term of 25 years to life plus 11 years. (*Ross*, *supra*, 155 Cal.App.4th at p. 1041.)

The evidence showed that defendant Leonard Ross and the alleged victim, Maria Antonia Speiser ("Toni"), engaged in a hostile verbal exchange, at the culmination of which, Toni slapped Ross. Ross responded "with a combination, flurry, or barrage of blows" (*Ross*, *supra*, 155 Cal.App.4th at p. 1052), after which Toni was left with multiple fractures to her cheekbone. (*Id*. at p. 1036.)

The defense presented an expert witness who opined that the fractures to the cheekbone were caused by a single blow. (*Ross*, *supra*, 155 Cal.App.4th at p. 1041.) Indeed, the defense theory was that only the first blow could have caused the fractured cheekbone and that this blow was righteously struck in self-defense. (*Ibid*.)

In the first trial, which resulted in a hung jury, the trial judge found that there was no evidence to support the mutual combat instruction and refused to give it. (*Ross*, *supra*, 155 Cal.App.4th 1033, 1050.) During the second trial, however, the prosecutor argued that the instruction was required to rebut the defense theory concerning the lesser offenses of simple assault and battery. This persuaded the court to change its mind and give the instruction over Ross's objection. (*Id*. at pp. 1050-1051.) As a result, the trial court instructed the jury that "one engaged in 'mutual combat' cannot invoke the right of self-defense unless he has first taken specific steps to terminate, or withdraw from, the conflict." (*Id*. at p. 1042.)

During deliberations, the jury sent in a note asking the court to clarify the mutual combat instruction. (*Ross*, *supra*, 155 Cal.App.4th 1033, 1042.) Upon questioning by the court, the jury indicated they were seeking a legal definition of the term. (*Ibid*.) In response, the court told the jury there was no legal definition, and suggested the jury use the common everyday meaning of the words. (*Id*. at pp. 1042-1043.)

The Court of Appeal reversed the judgment. First, it held that the trial court erred in refusing to clarify the mutual combat instruction because the term "mutual combat" is a technical one which is not properly defined by its common vernacular import. (*Ross*, *supra*, 155 Cal.App.4th 1033, 1043-1049.) In this respect, the court noted: "Like many legal phrases, 'mutual combat' has a dangerously vivid quality. The danger lies in the power of vivid language to mask ambiguity and even inaccuracy." (*Id*. at p. 1043, fn. omitted.) In defining this term of art, the court went on to say:

> In ordinary speech, . . . "mutual combat" might properly describe any violent struggle between two or more people, however it came into being. If A walks up to B and punches him without warning, and a

> fight ensues, the fight may be characterized as "mutual combat" in the ordinary sense of those words. But as this example demonstrates, the phrase so understood may readily describe situations in which the law plainly grants one of the combatants a right of self- defense. In the case above, B would be entitled under the law of this state to punch A immediately, without further ado, provided he acted out of an actual and reasonable belief that such action was necessary to avert imminent harm [citation], and he used no more than reasonable force [citation]. That right cannot be forfeited or suspended by its very exercise. Yet that is the effect of relying on the everyday meaning of "mutual combat." B's entitlement to strike back in self-defense would then be conditioned, absurdly, on his first refusing to fight, communicating his peaceable intentions to his assailant, and giving his assailant an opportunity to desist. [fn.] By then, of course, his assailant might have beaten him senseless.
>
> (*Ross*, *supra*, 155 Cal.App.4th 1033, 1044.)

The court also pointed out that "[t]he mutuality triggering the doctrine inheres not in the combat, but in the *preexisting intent to engage in it.* Old but intact case law confirms that as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*. (*Ross*, *supra*, 155 Cal.App.4th at p. 1045; italics in original.) In sum, the court found that the "mutual combat" instruction cannot be given unless there is evidence from which a jury "could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*" (*Id*. at p. 1047; italics in original.)

The *Ross* court then considered the sufficiency of the evidence to support the instruction in the first place. On this point, the court found the instruction was not supported by the evidence because "no reasonable juror could conclude beyond a reasonable doubt that defendant and Toni were engaged in 'mutual combat' when he punched her." (*Ross*, *supra*,

155 Cal.App.4th 1033, 1049-1054.) Based on these errors, the court reversed the judgment. (*Id*. at pp. 1054-1058.)

Notably, the *Ross* court's prejudice analysis contains some very helpful language. Among other things, the court pointed out that the prosecutor in the case had "conflated Ross's *conduct* with the *consequences* it produced." *Ross*, *supra*, 155 Cal.App.4th at p. 1057; italics in original.) On this point, the court reasoned:

> The test is not whether the force used appears excessive in hindsight but whether it appeared reasonably necessary to avert threatened harm under the circumstances at the time. The law grants a reasonable margin within which one may err on the side of his own safety, and so long as he is found to have done so reasonably, no abuse of the right of self-defense should be found to have occurred. . . . '[I]n using force in self-defense, a person may use only that amount of force, and no more, that is reasonably necessary for that person's protection. However, since in the heat of conflict or in the face of an impending peril a person cannot be expected to measure accurately the exact amount of force necessary to repel an attack, that person will not be deemed to have exceeded his or her rights unless the force used was so excessive as to be clearly vindictive under the circumstances.' [Citations.]
>
> (*Ross*, *supra*, 155 Cal.App.4th at p. 1057.)

The *Ross* case is not only an up-to-date and favorable analysis of the law on mutual combat, but it is also the type of case that takes one by surprise. At first glance, this case looks like a losing proposition: an argument between a man and woman that escalates into a physical confrontation, and concludes with a flurry of blows by the male defendant which results in multiple fractures to the woman's cheekbone. In the end, though, this case was like an onion: as the layers were slowly pulled away, some daylight appeared, and a successful self-defense strategy was revealed. It should not go unmentioned, either, that

Justice Rushing's opinion is an impressive example of thorough and thought-provoking appellate analysis, something all too rare.

B. Initial Aggressor

Possibly the earliest case in California on this issue, as well as a case with fascinating facts and analysis, is *People v. Button* (1895) 106 Cal. 628. There, the defendant, Charles Button, was charged with murder and convicted of manslaughter. On appeal, he argued instructional error and won a reversal of the judgment. Interestingly, in this 1895 case, the court never mentions the victim by name, only referring to him as "the deceased." The facts show that Button, the victim, and several others were camping in the mountains. They had been drinking, and were all under the influence of alcohol to one degree or another, "the defendant to some extent, the deceased to a great extent." (*Id*. at p. 629.) The victim was lying on the ground with his head resting upon a rock when an argument broke out between him and Button. (*Ibid*.) Button kicked or stomped the victim in the face, causing serious injuries, including the probable destruction of an eye, fractured facial bones, and likely a dazed condition which impaired the victim's reasoning, judgment and perception. (*Id.* at pp. 629-630.) Immediately after the assault, Button traveled some distance from the camp where he got his horse, returned and saddled it, and declared his intention to leave the camp to avoid any more trouble. (*Id*. at p. 630.) It took Button between five and fifteen minutes to secure his horse and prepare for departure. Apparently, as Button was preparing to leave, the victim approached Button with a knife. (*Ibid*.) When a bystander took the knife from the victim, the victim grabbed his gun and tried to shoot Button. In response, Button fatally shot the victim. (*Ibid.*)

Based on these facts, the trial court instructed the jury as follows:

> one who has sought combat for the purpose of taking advantage of another, may afterward endeavor to decline any further struggle, and, if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same ground as he might if he had not originally sought such combat for such purpose, provided that you also believe that his endeavor was of such a character, so indicated as to have reasonably assured a reasonable man, that he was endeavoring in good faith to decline further combat, *unless* you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat.
>
> (*Button*, *supra*, 106 Cal. 628, 630-631; italics in original.)

Not surprisingly, Button challenged that portion of the instruction relating to the victim's capacity to understand his withdrawal from combat. (*Button*, *supra*, 106 Cal. 628, 631.) There being no case law on point, the Supreme Court aptly described the two sides of the question presented: Did Button by his first assault forfeit his life to the victim despite that victim's use of deadly force? Or, conversely, "may a defendant so assault another as to deprive him of his mind, and then kill him in self-defense when he is in such a condition that he is unable to understand that his assailant has withdrawn in good faith from the combat?" (*Id*. at p. 632.)

In answering this question, the *Button* court first acknowledged that the party attacked must also act in good faith and cannot continue the combat for the purpose of "wreaking vengeance, for then he is no better than his adversary. . . . If the party assailed has eyes to see he must see; and if he has ears to hear he must hear. He has no right to close his eyes or

deaden his ears." (*Button*, *supra*, 106 Cal. 628, 634.) On the other hand, the court found that in this case, "[w]hile the deceased had eyes to see and ears to hear he had no mind to comprehend, for his mind was taken from him by the defendant at the first assault." (*Ibid*.) As a result, the court concluded that Button "not only brought upon himself the necessity for the killing, but, in addition thereto, brought upon himself the necessity of killing a man wholly innocent in the eyes of the law. . . ." (*Id*. at p. 635.) Accordingly, the Supreme Court upheld the challenged portion of the instruction and found that under the circumstances, Button "left no room in his case for the plea of self-defense." (*Ibid*.)

The law stands virtually unchanged to this date. Where a person is the initial aggressor, he must, by word or by conduct, reasonably convey to his opponent his intent to withdraw from combat and he must, in fact, withdraw, with certain exceptions. (See, e.g., *People v. Hecker*, *supra*, 109 Cal. 451; *People v. Hernandez* (2003) 111 Cal.App.4th 582, 588-588.)

C. Initial Aggressor Using Non-Deadly Force Who Is Confronted With Sudden & Deadly Force

The major exception to the rule just discussed in Section B is the situation where an initial aggressor uses non-deadly force and is then confronted with sudden and deadly force in response. On these facts, CALCRIM 3471 instructs the jury as follows:

> If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.

This rule dates back at least to the 1895 decision in *People v. Hecker*, *supra*, 109 Cal. 451. In *Hecker*, a dispute arose between Hecker and the victim, Riley, over some horses. (*Id*. at pp. 455-456.) Riley had offered Hecker $10 to find two horses that had wandered away. Hecker found the horses, and secured them at a nearby ranch where Riley lived. (*Id*. at p. 455.) A dispute arose when Riley refused to pay the promised amount, believing that Hecker had taken the horses in the first place to obtain the reward. (*Id*. at p. 456.) The dispute escalated over the course of a couple of days until a confrontation ensued at the ranch where Riley lived. (*Id*. at pp. 456-458.) When Hecker attempted to regain possession of one of the horses, the dispute turned violent and the men ended up exchanging gunfire. During the melee, Riley was fatally shot. (*Ibid.*)

Hecker claimed the killing was done in self-defense, though there were differing accounts as to which man was the initial aggressor. (*Hecker*, *supra*, 109 Cal. 451, 459-460.) In deciding whether there had been instructional error, the Supreme Court discussed a number of principles governing the right to self-defense. Among these was the right of an initial aggressor who has used non-deadly force to repel a sudden and deadly attack. On this issue, the court held that the trial judge had committed reversible error in instructing the jury that Hecker could only claim self-defense if his attempt to regain possession of the horse had been non-violent. (*Id*. at pp. 460-461.) Rather, the Supreme Court found that Hecker was entitled to an instruction that (1) even if Hecker was in the act of committing a forcible but non-deadly trespass, Riley was not justified in using deadly force to prevent it (*id*. at pp. 461-462); and (2) if Riley's counter assault was sudden and deadly such that Hecker had no opportunity to "decline the strife

. . . [and] retreat with safety," then he would be justified in using deadly force in self-defense. (*Id*. at p. 464.)

This rule remains essentially the same today with the exception of a change enacted in 1984, pursuant to Penal Code section 198.5, and currently contained in CALCRIM 3477. Under this provision, the law presumes that a "defendant reasonably feared imminent death or great bodily injury to himself or to a member of his family or household if a confrontation takes place *inside* the residence. The instruction provides:

> The law presumes that the defendant reasonably feared imminent death or great bodily injury to (himself/herself)[, or to a member of (his/her) family or household,] if:
>
> 1. An intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;
>
> 2. The defendant knew [or reasonably believed] that an intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;
>
> 3. The intruder was not a member of the defendant's household or family;
>
> AND
>
> 4. The defendant used force intended to or likely to cause death or great bodily injury to the intruder inside the home.
> [Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]
>
> The People have the burden of overcoming this presumption. This means that the People must prove that the defendant did not have a reasonable fear of imminent death or injury to (himself/herself)[,or to a member of his or her family or household,] when (he/she) used force against the intruder. If the People have not met this burden, you must find the defendant reasonably feared death or injury to (himself/herself)[,or to a member of his or her family or household].

This new instruction was applied in *People v. Hardin* (2000) 85 Cal.App.4th 625, to prevent the defendant from claiming that he acted in self-defense after he burst into the victim's house in a drug-induced psychosis, and killed her with a hammer after she first threatened him with the hammer herself. (*Id*. at pp. 627-628.) Due to the change in the law, the defendant's attempt to rely on the principles laid out in *Hecker* was rejected (*id*. at pp. 630-634), though the court also made it clear that prior to killing the elderly and physically smaller victim, Hardin had disarmed her, and thus could not claim that she constituted an imminent and deadly threat justifying his use of deadly force. (*Id*. at p. 634, fn. 7.)

Acknowledging the change in the law, the *Hardin* court noted that to the extent that *Hecker* can be read as inconsistent with section 198.5, it is no longer valid. (*Id*. at p. 633-634.) In any context other than a residential trespass, however, the *Hecker* rule remains intact.

D. No Self-Defense Where Person Provokes A Fight As Excuse to Use Force

CALCRIM 3472 bars the use of self-defense for a certain class of initial aggressors. The instruction provides:

> A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.

A form of this instruction was also discussed in *People v. Hecker*, *supra*, 109 Cal. 451. In relevant part, the court stated:

> Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a *deadly issue* and thus, through his

> fraud, contrivance, or fault, to create a real or apparent necessity for killing. . . .
>
> *Hecker*, *supra*, 109 Cal. 451, 462, emphasis added; accord, *People v. Garnier* (1950) 95 Cal.App.2d 489, 496-497.)

As the emphasized language reveals, there is a conflict between CALCRIM 3472, as presently formulated, and the law as stated in *Hecker*. Under *Hecker*, a person who seeks a quarrel loses his right to self defense only when he seeks to force a "deadly issue." Obviously, this limitation is a significant issue for the jury's consideration, and the absence of this vital language could be a critical omission, depending upon the facts of a given case.

The discrepancy here serves to emphasize the fact that the standard instructions should not be taken as the final word, and both trial and appellate counsel must ensure that the instructions, as given, accurately reflect the law.

Conclusion

"Legal scholars have long posited that the law of justified self-defense requires satisfaction of two main conditions: necessity and proportionality. (Young, *The Rhetoric of Self-Defense*, *supra*, 13 Berkeley J. Crim. L. 261, 295, fn. omitted.) Yet cases such as *Myers* and *Ross* teach us that these concepts are not written in stone, and the tension between necessity and proportionality continues to force the evolution of the law of self-defense.

In *Brown v. United States* (1921) 256 U.S. 335, recognized as perhaps "the most important armed self-defense case in American legal history" (Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First* (2000) 27 Am. J.

Crim. L. 293, 294 (hereafter *The Self-Defense Cases*)), Oliver Wendell Holmes "traced the duty to retreat rule to an earlier period in English history, when the law did not even recognize a legal right of self-defense. 'The law has grown,' Holmes wrote, 'in the direction of rules consistent with human nature.' This echoed Holmes's observation in *The Common Law* that 'the life of the law has not been logic: it has been experience.'" (*Id*. at pp. 318-319.)

The decision in *Brown* reversed a judgment of death by one of the most notorious judges in our history, Judge Isaac C. Parker, known as the "hanging judge." (*The Self-Defense Cases*, *supra*, 27 Am. J. Crim. L. at pp. 294, 296-297.) The case established that at least under federal law, there is no duty to retreat from anywhere that a victim has a right to be, expanding the no-retreat-rule from attacks occurring at one's home or place of abode. (*Id*. at p. 319; Brown, *supra*, 256 U.S. at p. 344.) The most notable quotation from the *Brown* decision and one which has become part of American folk wisdom (*The Self-Defense Cases*, *supra*, 27 Am. J. Crim. L. at p. 319) is Justice Holmes' observation that: "Detached reflection cannot be demanded in the presence of an uplifted knife." (*Brown*, *supra*, 256 U.S. at p. 343.)

Almost a hundred years later, this principle was echoed in the *Ross* decision, where the Sixth District Court of Appeal cautioned against conflating conduct with consequences (*Ross*, *supra*, 155 Cal.App.4th at p. 1057) and quoted an Oklahoma case for the proposition that "[i]t would be absurd to anticipate that a defendant could calculate a mathematically accurate quantity of force essential to do no more than repel an attack, at the moment of the attack." (*Ross*, *supra*, 155 Cal.App.4th 1033, 1057, citing *Hommer v. State* (Okla.Crim.App.

1983) 1983 OK CR 2.) The court refused to expand the doctrine of mutual combat beyond its proper parameters. Just as importantly, in a case which initially appeared to be an example of the use of *unreasonable* force by the defendant, the court recognized that proportionality is at best imprecise and that the law must take into account the vagaries of human nature at the moment of an attack.

Clearly, Justice Holmes' observation that "[t]he law has grown in the direction of rules consistent with human nature" is still being borne out in today's jurisprudence as the concepts of necessity and proportionality in the law of self-defense continue to evolve. It is up to the diligent and creative defense attorney to forge the way ahead on that interesting journey.