DEFENSE THEORIES AND INSTRUCTIONS

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RIGHT TO PRESENT A DEFENSE

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation Clause of the Sixth Amendment [citation], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

SUA SPONTE RESPONSIBILITY TO INSTRUCT ON DEFENSES

> "It is far worse to convict an innocent man than to let a guilty man go free." (*In re Winship* (1970) 397 U.S. 358, 372 (conc. opn. of Harlan, J.), cited in *Rose v. Clark* (1986) 478 U.S. 570, 580; see also *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1219, fn. 35, quoting Blackstone.)

"It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence (*People v. Michaels* (2002) 28 Cal.4th 486, 529) – evidence sufficient for a reasonable jury to find in favor of the defendant (*Matthews v. United States* (1988) 485 U.S. 58, 63) – unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court 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.' [Citations.]" (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

"Even if it does not inspire confidence, a defendant's testimony constitutes substantial evidence. (*People v. Webster* (1991) 54 Cal.3d 411, 443; *People v. Melton* (1988) 44 Cal.3d 713, 746.)" (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1446.)

The defense has the right to instructions on inconsistent defense on request but not over defendant's objection. (*People v. Atchison* (1978) 22 Cal.3d 181, 183; *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7; *People v. DePlane* (1979) 88 Cal.App.3d 223, 248; see *Matthew v. United States* (1988) 485 U.S. 58, 63-64 [relying on Federal Rules of Criminal Procedure].)

But the court has no sua sponte duty to give clarifying or limiting instruction. "Generally, a party may not complain on appeal that an instruction correct in law was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Although there are exceptions, most defenses in California only require the defendant to raise a reasonable doubt. (*People v. Mower* (2002) 28 Cal.4th 457, 477-480.) It is error to instruct such a defense must be proven by a preponderance of the evidence. (See, e.g., *People v. Costello* (1943) 21 Cal.2d 760, 763.)

JUSTIFIABLE USE OF FORCE

PERFECT SELF-DEFENSE

"Extremism in the defense of liberty is no vice." – Barry Goldwater

"Homicide is also justifiable when committed by any person in any of the following cases: [¶] 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or, [¶] . . . [¶] 3. When committed in the lawful defense of such person, . . . but such person, . . . if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." (Pen. Code, § 197.) "A bare fear of the commission of any of the offenses mentioned in subdivision[ ] . . . 3 of Section 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." (Pen. Code, § 198.)

"Lawful resistence to the commission of a public offense may be made: [¶] 1. By the party about to be injured." (Pen. Code, § 692.) "Resistance sufficient to prevent the offense may be made by the party about to be injured: [¶] 1. To prevent an offense against his person . . . . (Pen. Code, § 693.)

"Any necessary force may be used to protect from wrongful injury the person or property of oneself . . . ." (Civ. Code, § 50.)

Battery is defined as an unlawful offensive touching, homicide as an unlawful killing, and resisting arrest as interfering with the officer's lawful performance of their duties. Thus, self-defense attacks an element the prosecution must prove if the defendant raises it as an issue. Consequently, the defendant has the burden only of raising a reasonable doubt. (*People v. Banks* (1976) 67 Cal.App.3d 379, 383-384; see *Mullaney v. Wilbur* (1975) 421 U.S. 684, 701.) Self-defense applies to brandishing a weapon. (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19.) A felon may possess a firearm when in imminent danger of harm and there are no reasonable alternatives. (*People v. King* (1978) 22 Cal.3d 12, 24-26.)

The court has a sua sponte duty to give the instruction if there is sufficient evidence

and it is not inconsistent with the defense case. (*People v. Lemus* (1988) 203 Cal.App.3d 470, 478.) If the instruction is inconsistent with the defense theory, the instruction may be given only if requested by the defendant. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611-615.) The defendant need not testify. "[S]ubstantial evidence of a defendant's state of mind may be found in the testimony of witnesses other than the defendant." (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1102; accord, *People v. De Leon* (1992) 10 Cal.App.4th 815, 824.)

Lawful self-defense exists when (1) the defendant reasonably believes that he or she is in imminent danger of suffering a battery, (2) the defendant reasonably believes that the immediate use of force is necessary to defend against that danger, and (3) the defendant uses no more force than is reasonably necessary to defend against that danger. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083; see CALCRIM Nos. 505, 3470.)

The first element to the self-defense claim consists of two components: an honest, subjective fear of imminent peril and the fear is objectively reasonable. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The imminent danger need not be real, so long as a reasonable person would believe it to be real. (*Ibid.*; *People v. Clark* (1982) 130 Cal.App.3d 371, 377.) What is reasonable is viewed from a reasonable person in the defendant's position. "Although the belief in the need to defend must be objectively reasonable, a jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .' [Citation.] It judges reasonableness 'from the point of view of a reasonable person in the position of defendant . . . .' [Citation.] To do this, it must consider all the ' " 'facts and circumstances . . . in determining whether the defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety.' " ' [Citation.] As we stated long ago, '. . . a defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind . . . .' [Citation.]" (*Id.* at pp. 1082-1083; see also *People v. Minifie* (1996) 13 Cal.4th 1055, 1068; *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1220-1221; but see *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [the reasonable person standard does not change to account for the defendant's mental illness].)

The CALCRIM instruction states the defendant must be in imminent danger of suffering "bodily injury," but reasonable force is permissible against any battery, even if it is only an offensive touching. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.)

An imminent danger is one that must be dealt with instantly. (*In re Christian S.* (1994) 7 Cal.4th 468, 483; *People v. Aris* (1989) 215 Cal.App.3d 1178, 1186-1188, overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.)

Antecedent threats: The defendant is justified in taking quicker or harsher action

when he or she is aware of threats against the defendant or others, or past violence by the victim. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065; *People v. Moore* (1954) 43 Cal.2d 517, 528; *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [it was sufficient that the defendant honestly believed the victim made the threats, though the victim never did]; see also *People v. Gonzales* (1992) 8 Cal.4th 1658, 1664; *People v. Bush* (1978) 84 Cal.App.3d 294, 302-304; *People v. Torres* (1949) 94 Cal.App.2d 146, 151-153.) The courts have held there is not a sua sponte duty to instruct on antecedent threats, though such an instruction must be given upon request. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) An antecedent threat instruction is now integrated into CALCRIM Nos. 505 and 3470 as an optional instruction.

In California, there is no requirement that the defendant retreat. (*People v. Hughes* (1951) 107 Cal.App.2d 487, 494; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22.)

CALJIC No. 5.55, "the right of self-defense is not available" in the first place "to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." The instructions appear to be correct if read narrowly: a defendant cannot "contrive[ ]" self-defense by provoking the victim to respond with force. (*People v. Holt* (1914) 25 Cal.2d 59, 65-66.) The instructions, however, are quite vague in not describing what a quarrel was. For example, CALJIC No. 5.17 stated the imperfect self-defense "principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attack or pursuit." This has caused some courts and prosecutors to conclude the defendant cannot invoke self-defense when the victim responded to some wrongdoing by the defendant, however slight. (See *People v. Seaton* (2001) 26 Cal.4th 598, 664; *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; see also *People v. Hardin* (2000) 85 Cal.App.4th 625, 634 [imperfect self-defense did not apply to a defendant who had entered another's home without consent].) Under the law, however, if one peaceably starts a confrontation or commits a wrong, the "victim" cannot respond with unreasonable force. If unreasonable force is the response, the defendant has a right to self-defense. (*People v. Crandell* (1988) 46 Cal.3d 833, 871-872; *People v. Quach* (2004) 116 Cal.App.4th 294, 301-302.) CALCRIM No. 3472 more narrowly states a "person does not have right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

Similarly, CALJIC Nos. 5.54 and 5.56 require the defendant to engage in several steps in order to claim self-defense when he has "initiated an assault" or "engaged in mutual combat." It includes an attempt to actually stop fighting, telling the opponent he wants to stop fighting, and give the opponent an opportunity to stop fighting. (CALJIC Nos. 5.54, 5.56; CALCRIM No. 3471.) The instructions derive from Penal Code section 197 which

states for one who is an "assailant or engaged in mutual combat" to be justified in a homicide, he or she "must really and in good faith have endeavored to decline any further struggle." The law does not require an assailant to engage in a multi-step process to end the fight in order to invoke self-defense, so long as he or she clearly tries to withdraw from the fight. Further, "[a]n aggressor using nondeadly force . . . who meets the deadly force in response, is not required to communicate an intent to withdraw . . . . " (*People v. Crandell* (1988) 46 Cal.3d 833, 871-872; *People v. Hecker* (1895) 109 Cal. 451, 464; *People v. Quach* (2004) 116 Cal.App.4th 294, 301-302 [about every 40 years the courts say the instruction is illegal and then the instruction resurfaces again]; *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75, fn. 2; contra *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055-1056; *People v. Nem* (2003) 114 Cal.App.4th 160, 165-167.) Newer versions of CALJIC Nos. 5.54 and 5.56 explain that if the victim to a simple assault responds with unreasonable deadly force, the defendant may use reasonable force in self-defense. Finally, just because a defendant and another are fighting each other does not mean they have "engaged in mutual combat." The Sixth District recently held that "mutual combat" occurs only when there is an arranged or consensual fight. (*People v. Ross* (2007) 155 Cal.App.4th 1033, relying on *People v. Fowler* (1918) 178 Cal. 657, 671; *People v. Jecker* (1895) 109 Cal. 451, 462; *People v. Rogers* (1958) 164 Cal.App.2d 555, 557.)

CALJIC No. 5.12 states, in part, that the right to self-defense applies when the defendant actually and reasonably believes he or she is in imminent danger of death or great bodily injury, in which case the defendant may use deadly force if he or she "act[ed] under the influence of such fears alone." CALJIC No. 5.12 derives from section 198 which states, in part, "the party killing must have acted under the influence of such fears alone." (*People v. Flannel* (1979) 25 Cal.3d 668, 674-675.) As the court observed in *People v. Trevino* (1988) 200 Cal.App.3d 874, 879, "an instruction which states that the party killing must act under the influence of such fears alone, is a correct statement of the law. [Citations.] [¶] In so holding, we do not mean to imply that a person who feels anger or even hatred toward the person killed, may never justifiably use deadly force in self-defense." (*Id.* at p. 879.) "it would be unreasonable to require an absence of any feeling other than fear, before the homicide could be considered justifiable. Such a requirement is not a part of the law, nor is it a part of CALJIC No. 5.12. Instead, the law requires that the party killing act out of fear alone." (*Ibid.*) The *Flannel* case itself concerned a defendant who was in a feud with the victim and approached the victim with a gun. (*Flannel, supra,* at p. 673-674, 679-680.)

A defendant can use deadly force only if he or she is reasonably in fear of great bodily injury. (See *People v. Ceballos* (1974) 12 Cal.3d 470, 477-479.)

The defendant's right to use self-defense ceases when there no longer appears to be

a threat. (*People v. Martin* (1980) 101 Cal.App.3d 1000, 1010-1011.)

Transferred self-defense. A defendant who uses reasonable deadly force but accidently kills a bystander is not guilty of the homicide. (*People v. Matthews* (1979) 91 Cal.App.3d 1018, 1024; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1257.) But there is no sua sponte responsibility to instruct on this principle. (*Id.* at p. 1025.)

There is a right to use reasonable force to defend against an attacking animal. In a recent case, a retired sheriff deputy shot at two "knee-high" unleashed dogs that appeared to be a threat. The defendant was charged with recklessly discharging a firearm and attempted cruelty to an animal. The defendant's reasonable apprehension was a defense to the charges. (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1426-1429.)

IMPERFECT SELF-DEFENSE

"Violence is the last refuge of the incompetent." – Isaac Asimov

" 'It is the honest belief of imminent peril that negates malice in a case of complete self-defense; the reasonableness of the belief simply goes to the justification for the killing.' [Citation.] We concluded that 'An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter.' [Citation.]" (*In re Christian S.* (1994) 7 Cal.4th 768, 773, quoting *People v. Flannel* (1979) 25 Cal.3d 668, 674, 679, emphasis omitted; see also *People v. Viramantes* (2001) 93 Cal.App.4th 1256, 1262-1263 [the subjective elements are the same as for perfect self-defense]; *People v. Blakeley* (2000) 23 Cal.4th 82; CALCRIM No. 571; CALJIC No. 5.17.)

When the defense of imperfect self-defense was developed, the principle was that a defendant acting with an honest though unreasonable fear lacks malice, so he or she is not guilty of murder. Such an honest but unreasonable fear, however, does not negate the specific intent to kill, so he is guilty of the lesser included offense of voluntary manslaughter. The California Supreme Court has stated that "because malice is a statutory requirement for a murder conviction (Pen. Code, § 187, subd. (a)), the statute required courts to determine whether an actual but unreasonable belief in the imminent need for self-defense rose to the level of malice within the statutory definition." (*In re Christian S.* (1994) 7 Cal.4th 768, 773-774.) But recently, the court has viewed imperfect self-defense as a judicially created crime, stating "unreasonable self-defense' is . . . not a true defense; rather it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of

passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

Imperfect self-defense can apply when a killing is provoked as a result of battered women's syndrome. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1086.)

Imperfect self-defense does not apply when the defendant honestly but unreasonably perceives a need for self-defense due to intoxication or diminished capacity. (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1444-1446 [delusions]; *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [diminished capacity can no longer reduce murder to manslaughter]; *People v. Padilla* (2002) 103 Cal.App.4th 675, 678 [hallucinations].) Justice Brown explained that intoxication can have two effects. It can cause one not to perceive a real risk, as is common with alcohol abuse, or it can cause one to perceive a risk that is not real, as is common with cocaine or methamphetamine abuse. In the first situation, express malice, but not implied malice, is not rebutted by voluntary intoxication. She stated it should not be used to reduce murder to voluntary manslaughter in the second situation. (*People v. Wright* (2005) 35 Cal.4th 964, 985-986 (conc. opn. of Brown, J.).)

Imperfect self-defense does not apply to felony murder. (*People v. Robertson* (2004) 34 Cal.4th 156, 164-166; *People v. Tabios* (1998) 67 Cal.App.4th 1, 6-9.)

Imperfect self-defense applies to attempted murder. (See CALCRIM No. 604.)

The theory of imperfect self-defense has not been well received as a defense to any other crime, but the issue is not foreclosed. It might apply to mayhem. (See *People v. McKelvy* (1987) 194 Cal.App.3d 694, 704 (lead opn. of Kline, J.) [accepting it as a defense]; contra *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1166; *People v. Hayes* (2004) 120 Cal.App.4th 796, 801-805 [6DCA says it does not apply]; *People v. Sekona* (1994) 23 Cal.App.4th 443, 457; see also *People v. Michaels* (2002) 28 Cal.4th 486, 530 [noting that cases have only held there is no sua sponte duty to instruct on imperfect self-defense for mayhem]; *People v. Vital* (1996) 45 Cal.App.4th 441, 446.)

It does not apply to shooting into a residence or occupied vehicle (with an enhancement under Pen. Code, § 12022.53, subd. (d)), even when the jury finds the defendant guilty only of voluntary manslaughter. (*People v. Waite* (2002) 100 Cal.App.4th 866, 882.)

The court should instruct on imperfect self-defense whenever it instructs on perfect self-defense since the only distinction is whether defendant's belief in the need to protect himself is not reasonable. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85-86, overruled on

other grounds in *People v. Blakely* (2000) 23 Cal.4th 82, 91; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824; but see *People v. Hill* (2005) 131 Cal.App.4th 1089, 1101-1102 [failure to instruct on perfect self-defense was not error because there was insufficient evidence to instruct on imperfect self-defense]; *People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1273-1275; *Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1021, 1030.)

DEFENSE OF OTHERS

> "Violence can only be concealed by a lie, and the lie can only be maintained by violence." – Aleksandr Solzhenitsyn

"Homicide is also justifiable when committed by any person in any of the following cases: [¶] . . . [¶] 2. When committed in defense of . . . person . . . . " 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." (Pen. Code, § 197.) "A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of Section 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." (Pen. Code, § 198.)

"Lawful resistence to the commission of a public offense may be made: [¶] . . . [¶] 2. By other parties." (Pen. Code, § 692.) "Resistance sufficient to prevent the offense may be made by the party about to be injured: [¶] 1. To prevent an offense against his person, or his family, or some member thereof. (Pen. Code, § 693.) "Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense." (Pen. Code, § 694.)

There is a right to defend a third person when the defendant reasonably believes the he or she needs defending, even if the third person would not have the right to invoke the right to self-defense. (*People v. Randle* (2005) 35 Cal.4th 987, 996-1001.) There is also a right to imperfect defense of others. (*Ibid.*; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 198.)

A defendant who started a fight can invoke the right to defend others after retreating from the fight. (*People v. Randle* (2005) 35 Cal.4th 987, 1002.)

DEFENSE OF PROPERTY

> "So long as the great majority of men are not deprived of either property or honor, they are satisfied." – Niccolo Machiavelli

"Homicide is also justifiable when committed by any person in any of the following cases: [¶] . . . [¶] 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein . . . . " (Pen. Code, § 197.)

"Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. [¶] As used in this section, great bodily injury means a significant or substantial physical injury." (Pen. Code, § 198.5)

"Resistance sufficient to prevent the offense may be made by the party about to be injured: [¶] . . . [¶] 2. To prevent an illegal attempt by force to take or injure property in his lawful possession. (Pen. Code, § 693.)

Defense of property or home in Penal Code section 197, subdivision 2 applies only if the victim intends to commit an "atrocious crime attempted to be committed by force." (*People v. Ceballos* (1974) 12 Cal.3d 470, 478.) Forcible and atrocious crimes are those whose character and manner reasonably create fear of death or serious bodily harm. (*Id.* at p. 479.) Murder, mayhem, rape, and robbery qualify as a matter of law. (*Id.* at p. 478.) Burglary, without more, does not. (*Id.* at p. 479.)

What followed was the enactment of Penal Code section 198.5. Called the Home Protection Bill of Rights, it creates a presumption of justified force against a trespasser. (*People v. Watie* (2002) 100 Cal.App.4th 866, 878 [applied when a resident was confronted on the front porch]; *People v. Hardin* (2000) 625, 633 [there is a presumption that deadly force by a resident against a trespasser was appropriate]; *People v. Owen* (1991) 226 Cal.App.3d 996, 1005; but see *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1327 [did not

apply to a guest when the resident saw no need to defend herself]; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1496-1497 [did not apply to a confrontation on a front porch].) CALCRIM No. 506 generally instructs on defense of property, but the instruction for the presumption created by section 198.5 is found at CALCRIM No. 3477. There is generally a sua sponte duty to instruct on presumptions. (Evid. Code, § 502; *People v. Mower* (2002) 28 Cal.4th 457, 483-487; but see *People v. Owen* (1991) 226 Cal.App.3d 996, 1005 [the jury was otherwise adequately instructed].)

DURESS AND NECESSITY

Duress needs to be distinguished from necessity. " 'Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.' (*United States v. Bailey* (1980) 444 U.S. 394, 409-410.) An underlying premise common to both defenses is 'if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail.' (*Id*. at p. 410.)" (*People v. Heath* (1989) 207 Cal.App.3d 892, 899-900.)

DURESS

"Persons (unless the crime is punishable with death) who commits the act or made the omission charged under threats or menace suffices to show that they had reasonable cause to and did believe their lives would be endangered if they refused" are not guilty of the crime. (Pen. Code, § 26, subd. Six.)

Duress for a defendant is more narrow than duress for a victim. (*People v. Leal* (2004) 33 Cal.4th 999, 1009.) By comparison, a sex offense by duress is "a direct or implied threat of force, violence, danger, hardship, retribution, to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been

performed, or (2) acquiesce in an act to which one otherwise would not have submitted." (*Id.* at pp. 1004-1005.)

A court has a sua sponte duty to give a duress instruction if supported by substantial evidence and is not inconsistent with the defense theory. (*People v. Wilson* (2005) 36 Cal.4th 309, 331.)

The defense of "duress negates an element of the crime charged – the intent or capacity to commit the crime – and the defendant need raise only a reasonable doubt that he acted in the exercise of his free will. . . . The defendant does not have the time to form criminal intent because of immediacy and imminency of the threatened harm and need only raise a reasonable doubt as to the existence or nonexistence of this fact." (*People v. Heath* (1989) 207 Cal.App.3d 892, 901; *People v. Beach* (1987) 194 Cal.App.3d 955, 973.)

There are two elements to the defense of duress. "The defendant must show that the act was done under such threats or menaces that he had (1) an actual belief his life was threatened and (2) reasonable cause for such belief." (*Heath, supra,* 207 Cal.App.3d at p. 900; accord, *People v. Perez* (1973) 9 Cal.3d 651, 657; *People v. Petzenick* (2003) 114 Cal.App.4th 663, 676-677.)

"Duress is an effective defense only when the actor responds to an immediate and imminent danger. '[A] fear of future harm to one's life does not relieve one of responsibility for the crimes he commits.' [Citations.]" (*Heath, supra,* 207 Cal.App.3d at p. 900; accord, *People v. Vieira* (2005) 35 Cal.4th 264, 289; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 100; see *People v. Wilson* (2005) 36 Cal.4th 309, 331-332 [duress was unavailable when the defendant was unaware of the threat to his life].) Duress applies if the defendant has been threatened with imminent great bodily harm. (See *People v. Otis* (1959) 174 Cal.App.2d 119, 124; *United States v. Bailey* (1980) 444 U.S. 394, 409.) Although this is not reflected in the instruction, duress probably applies if the instigator threatens harm to another person. (See *Heath, supra,* at p. 898, discussing *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 21-25 [a necessity defense due to threats to a third party].) Duress does not apply to hardships. (*People v. Valentine* (2001) 93 Cal.App.4th 1241, 1249.)

The defendant's fear must be reasonable. There is not an imperfect duress defense (an unreasonable but good faith belief in duress). (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 126, fn. 4; *People v. Son* (2000) 79 Cal.App.4th 224, 238-240; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135-1137; *People v. King* (1991) 1 Cal.App.4th 288, 297-298; *People*

v. Jacobs (1991) 230 Cal.App.3d 1337, 1345.)

Duress does not apply if there are legal alternatives. (*Heath, supra,* 207 Cal.App.3d at p. 900; *People v. Lewis* (2004) 120 Cal.App.4th 882, 886.)

The duress defense is not available if the crime is punishable by death (or when the defendant is charged with murder). (*People v. Vieira* (2005) 35 Cal.4th 264, 289 [it cannot be used to negate expressed malice]; *People v. Anderson* (2002) 28 Cal.4th 767, 776, 779 [it cannot be applied to any form of murder]; but see *id.* at pp. 783-784 [it can be a defense to the underlying felony in a felony murder case].)

NECESSITY

> " 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . . ' see J. Bartlett, Familiar Quotations 550 (16th ed. 1992) [quoting Anatole France]" (*Hill v. Colorado* (2000) 530 U.S. 703, 744 (dis. opn. of Scalia, J.).)

The defendant is not guilty if (1) he or she acted in an emergency to prevent a significant harm or evil; (2) he or she had no adequate legal alternative; (3) the defendant did not create a greater danger than the one avoided; (4) the defendant actually believed that the act was necessary to prevent the threatened harm or evil; (5) a reasonable person would have believed the act was necessary; and (6) the defendant did not substantially contribute to the emergency. (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135; *People v. Heath* (1989) 207 Cal.App.3d 892, 898; see *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 25-26; CALCRIM No. 3403.) Unlike duress, the threatened harm need not be imminent. (*Heath, supra,* at p. 901.)

The defendant has the burden of proving the defense by a preponderance of the evidence. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901.) But the definition of some crimes include a phrase such as "without lawful excuse." In such situations, the defendant has the burden of raising a reasonable doubt that the conduct was not without good cause. (See, e.g., *People v. Dewberry* (1992) 8 Cal.App.4th 1017, 1021 [defendant would be not guilty of detaining a child in violation of a court order when the other person would harm the child].)

The court has a sua sponte duty to give the instruction when supported by substantial

evidence. (See *In re Eichorn* (1998) 69 Cal.App.4th 382, 389, relying on *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [which held the court did not err in failing to give the instruction because there was insufficient evidence].)

The defense is not available if there are reasonable legal alternatives. (*People v. Trippett* (1997) 56 Cal.App.4th 1532, 1539.)

"Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime. [Citations.] [¶] An important factor of the necessity defense involves the balancing of the ham to be avoided as opposed to the costs of the criminal conduct. [Citation.]" (*People v. Heath* (1989) 207 Cal.App.3d 892, 901.) Generally, the necessity defense exists only if it is consistent with public policy. (See, e.g., *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164-1165 [drunk passenger did not have a defense to gross vehicular manslaughter while intoxicated when she grabbed the wheel as the drunk driver fell asleep]; *People v. Youngblood* (2001) 91 Cal.App.4th 66, 74 [no necessity defense for keeping 94 cats despite fear that they would be killed]; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135 [necessity and duress were not available defenses for an addicted 18 year old forced by abusive boyfriend to participate in robberies]; *People v. Waters* (1986) 163 Cal.App.3d 935, 938; cf. *In re Eichorn* (1999) 69 Cal.App.4th 382, 390 [a defense for a homeless person charged with sleeping in the park]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831-832 [a defense to non-violent escape from prison]; *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 19-20, 25-26 [a defense to drunk driving when responding to fears of his girlfriend being attacked].) Courts generally do not apply a necessity defense for acts of civil disobedience. (See, e.g., *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1160-1161, 1164 [no necessity defense to distribution of medical marijuana]; *People v. Trippett* (1997) 56 Cal.App.4th 1532, 1538; *People v. Garziano* (1991) 230 Cal.App.3d 241, 244 [blocking access to abortion clinics]; *United States v. Oakland Cannabis Buyers' Co-operative* (2001) 532 U.S. 483, 494.)

MENTAL STATE DEFENSES

MISTAKE

> "If it looks like a duck, walks like a duck and quacks like a duck, it's a duck — not a platypus." (*Pieper v. Commercial Underwriters Ins. Co.* (1997) 59 Cal.App.4th 1008, 1014, internal quotation marks omitted.)

"In every public offense, there must exist a union, or joint operation of act and intent, or criminal negligence." (Pen. Code, § 20.) A person is not guilty of a crime if the "[p]erson who committed the act or made the omission charged [acted] under an ignorance or mistake of fact, which disproves any criminal intent." (Pen. Code, § 26, subd. Three.)

The court has a sua sponte duty to instruct on mistake of fact. (*People v. Lucero* (1988) 203 Cal.App.3d 1011, 1018.) The instruction must be given on request if there is substantial evidence. (*People v. Goodman* (1970) 8 Cal.App.3d 705, 709, disapproved on other grounds in *People v. Beagle* (1972) 6 Cal.3d 441, 452.)

Generally, ignorance of the law or mistake of law is not a defense. (*People v. O'Brien* (1892) 96 Cal. 171, 176; see *Cheek v. United States* (1991) 498 U.S. 192, 199; see CALCRIM No. 3407.)

Mistake or ignorance of the law can in some situations negate specific intent. (See, e.g., *People v. Marsh* (1962) 58 Cal.2d 732, 742-743 [conspiracy to practice medicine without a license requires knowledge that their conduct would constitute practicing medicine]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 776 [it was a defense to conspiracy that the defendant believed distribution in a marijuana buyers' cooperative would not be illegal]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669-670 [honest belief that a custody order from another state was not enforceable in California was a defense to violating a custody order]; *People v. Gregory* (1990) 217 Cal.App.3d 665, 675-679 [no fraud on the government when defendant was unaware should have disclosed certain information on a form]; *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137; *People v. Bowman* (1958) 156 Cal.App.2d 784, 797 [conspiracy requires proof the defendant believed they would be committing a crime]; but see *People v. Parker* (1985) 175 Cal.App.3d 818, 822 [mistaken belief that a structure is not a residence is not a defense to reduce residential burglary to second degree].) Mistake or ignorance of the law can be a defense when the defendant has a duty to act but is unaware of the duty. (*Lambert v. California* (1957) 355 U.S. 225 [failing

to register]; *People v. Garcia* (2001) 25 Cal.4th 744, 754 [failure to properly register as a sex offender].)

For a distinction between mistake of fact and mistake of law, see *People v. Honig* (1996) 48 Cal.App.4th 289, 348, fn. 26.

Mistake of fact is a defense when the defendant's actions would not have been illegal had the facts known or assumed by him or her were actually true. (*People v. Vogel* (1956) 46 Cal.2d 798, 801 [it was a defense to bigamy that defendant honestly believed the previous marriage had been terminated]; *People v. Watkins* (1992) 2 Cal.App.4th 589.) It is a defense to general intent crimes if the defendant's mistaken belief was reasonable. (See CALCRIM No. 3406.)

By comparison, if the defendant tried to commit a crime and would have committed the crime had the believed facts been true, the defense is impossibility. Factual impossibility is not a defense to most inchoate crimes. (See, e.g., *People v. Rizo* (2000) 22 Cal.4th 681, 685 [attempt]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1130-1131 [conspiracy exists even if one of the co-conspirators never intended to carry out the crime]; *People v. Fraize* (1995) 36 Cal.App.4th 1722, 1725-1727 [aiding and abetting]; *People v. Thompson* (1993) 12 Cal.App.4th 195, 202-203 [guilty of attempted rape when victim died before the intercourse]; *People v. Peppars* (1983) 140 Cal.App.3d 677, 688.) For the difference between legal and factual impossibility, see *People v. Braze* (1997) 57 Cal.App.4th 1, 7.) As a practical matter, impossibility and mistake are usually treated the same. (See, e.g., *People v. Rojas* (1961) 55 Cal.2d 252, 258 [describing attempt to receive purportedly stolen property from an undercover officer to be a defense of mistake].)

A reasonable mistake of age is a defense for statutory rape (*People v. Hernandez* (1964) 61 Cal.2d 529, 532-534; but see *People v. Scott* (2000) 83 Cal.App.4th 784, 800 [not a defense to intercourse with a minor younger than 16 when the defendant believed she was a minor]) and oral copulation with a minor (*People v. Peterson* (1981) 126 Cal.App.3d 396, 397).

Mistake of age is not a defense to lewd conduct with a minor under the age of 14 years (*People v. Olsen* (1984) 36 Cal.3d 638, 647-648; *In re Donald R.* (1993) 14 Cal.App.4th 1627, 1629-1631), attempted lewd conduct with a minor under the age of 16 years (*People v. Paz* (2000) 80 Cal.App.4th 293, 294; see also *People v. Reed* (1997) 53 Cal.App.4th 389, 399 [attempted on a minor under 14]), aggravated kidnapping of a minor

under the age of 14 (*People v. Magpuso* (1994) 23 Cal.App.4th 112, 118), or giving drugs to a minor (*People v. Williams* (1991) 233 Cal.App.3d 407, 410-412; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760-761).

Mistake of whether the gun was capable of firing was not a defense to involuntary manslaughter which requires only criminal negligence. (*People v. Velez* (1983) 144 Cal.App.3d 558, 565-566.) But the accident defense applied to accidently pulling the trigger. (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1314; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 865-872.)

Mistaken belief that the property taken was the defendant's is a defense to larceny and embezzlement but not forcible crimes, such as robbery. (See claim of right, above.)

A reasonable, good faith belief an adult victim consented to sexual activity is a defense to forcible rape. (*People v. Mayberry* (1975) 15 Cal.3d 143, 153-158; see CALJIC No. 10.65.) The courts have applied this defense in limited circumstances where the allegation was that the victim's equivocal conduct would have led a defendant reasonably and in good faith to believe consent existed when it did not. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1149 [a defense that the victim actually consented to sex did not lead to a *Mayberry* defense]; *People v. Williams* (1992) 4 Cal.4th 354, 360-362.) The defendant's mistaken belief in the victim's consent must be reasonable. (*Williams, supra*, at pp. 360-361.) The defense did not apply when the victim withdrew her consent during intercourse. (*In re John Z.* (2003) 29 Cal.4th 756, 760.) It did not apply to rape of an unconscious person. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 36-37 [wife's purported advanced consent to have sex when she passed out was not reasonable]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471.) The court has a sua sponte duty to give the instruction in the appropriate case. (*Williams, supra,* at p. 362; *Mayberry, supra,* at pp.153-158.) The defendant has the burden of presenting evidence and raising a reasonable doubt. (*Id.* at pp. 361-364.)

Mistake of fact based on voluntary intoxication is not a defense to a general intent crime. (*People v. Kelly* (1973) 10 Cal.3d 565, 573; see *People v. Scott* (1983) 146 Cal.App.3d 823, 829-833.)

Imperfect self-defense derived, in part, on good faith mistaken belief of the need to defend oneself. (See *People v. Flannel* (1979) 25 Cal.3d 668, 686.)

Because a mistake of fact must be reasonable, mistake predicated on delusions or mental illness is not a defense to a general intent crime. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 124-125; *People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1083-1084.)

Reliance on the advice of an attorney is generally not a defense, especially to general intent crimes, because this is considered to be a mistake of law. (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [attorney telling defendant the underlying crime was a misdemeanor when it was actually a felony was not a defense to felon in possession of a firearm]; *People v. Honig* (1996) 48 Cal.App.4th 289, 347-348; *People v. Aresen* (1949) 91 Cal.App.2d 26, 35; *People v. McCalla* (1923) 63 Cal.App. 783, 793, disapproved on other grounds in *People v. Elliot* (1960) 59 Cal.2d 498; see also *People v. Chacon* (2007) 40 Cal.4th 558, 570-571 [no entrapment defense when city official relied on the advice of a subordinate city attorney].)

INTOXICATION

> "I believe, if we take habitual drunkards as a class, their heads and their hearts will bear an advantageous comparison with those of any other class."
> – Abraham Lincoln

Voluntary intoxication is a defense to specific intent crimes. (Pen. Code, § 22, subd. (b); *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131-1134; see CALCRIM No. 3426.) It is not a defense to general intent crimes. (Pen. Code, § 22, subd. (a); *People v. Atkins* (2001) 25 Cal.4th 76, 81 [arson]; *People v. Hood* (1969) 1 Cal.3d 444, 451 [assault].) Nor is it a defense to crimes where the mens rea is knowledge, malice. premeditation, deliberation, or conscious disregard. (Pen. Code, § 22, subd. (a); *People v. Saille* (1991) 54 Cal.3d 1103, 1116; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1300-1301 [voluntary intoxication now irrelevant to mental state of whether there is implied malice or conscious disregard]; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114-1115.) Penal Code section 22 eliminates the defense that the defendant lacked the capacity to control his behavior, but there is still a defense that intoxication prevented the actual formation of intent. (*People v. Olea* (1984) 160 Cal.App.3d 891, 896-897.) Intoxication includes the ingestion of drugs. (Pen. Code, § 22, subd. (c).)

There is no sua sponte duty to instruct on voluntary or involuntary intoxication. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Voluntary intoxication is still relevant in determining if the defendant formed the required mental state. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [if the defendant never informed the intent to kill, the homicide is reduced to involuntary manslaughter]; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982-986 [voluntary intoxication was relevant to whether the defendant knowingly possessed stolen property]; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1160-1165.)

Involuntary intoxication is a defense. (See CALCRIM No. 3427.) Consuming something that the defendant did not know was spiked is considered to be involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 831-833 [punch spiked with PCP]; but see *People v. Velez* (1985) 175 Cal.App.3d 785, 795-796 [smoking pot laced with PCP was not a defense; though the defendant did not know it was laced with PCP, marijuana frequently is].) A deliberate overdose in a suicide attempt did not qualify as involuntary intoxication. (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 855-857.)

Penal Code section 29 limits expert testimony on whether the defendant lacked the intent due to intoxication. (*People v. Rangel* (1992) 11 Cal.App.4th 291, 300-303.)

UNCONSCIOUSNESS

A person is not guilty of a crime if he or she "committed the act charged without being conscious" of the actions. (Pen. Code, § 26, subd. Four.)

A court has a sua sponte duty to give the instruction if there is sufficient evidence. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 695-696; *People v. Ray* (1975) 14 Cal.3d 20, 26.)

Because there is a presumption that a person who appears conscious is so, the defendant has a duty to present evidence; the defendant's burden of persuasion is to raise a reasonable doubt that the mens rea is lacking. (*People v. Hardy* (1948) 33 Cal.2d 52, 63-64; *People v. Kitt* (1978) 83 Cal.App.3d 834, 842, disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836; *People v. Cruz* (1978) 83 Cal.App.3d 308, 332; see also *People v. Babbitt* (1988) 45 Cal.3d 660, 689-694.)

Evidence only that the defendant did not remember the incident is usually insufficient evidence to warrant an instruction. (*People v. Rogers* (2006) 39 Cal.4th 826, 887-888; *People v. Heffington* (1973) 32 Cal.App.3d 1, 10; *People v. Coston* (1947) 82 Cal.App.2d

23, 40-41; *People v. Sameniego* (1931) 118 Cal.App. 165, 173.)

Legal unconsciousness includes blackouts, epileptic seizure, involuntary intoxication, and sleepwalking. (*People v. Methever* (1901) 132 Cal. 326, 329-330 [sleepwalking or delirium], overruled on other grounds in *People v. Gorshen* (1953) 51 Cal.2d 716; *People v. Cox* (1944) 67 Cal.App.2d 166, 172 [blackout]; *People v. Freeman* (1943) 61 Cal.App.2d 110, 115-116 [epilepsy]; see CALCRIM No. 3425; see generally *People v. Hughes* (2002) 27 Cal.4th 287, 343-344.)

"Unconsciousness does not mean that the actor lies still and unresponsive. Instead, a person is deemed 'unconscious' if he or she committed the act without being conscious thereof." (*People v. Haley* (2004) 34 Cal.4th 283, 313; *People v. Ochoa* (1998) 19 Cal.4th 353, 423; *People v. Kelly* (1976) 10 Cal.3d 565, 572; *People v. Velez* (1985) 175 Cal.App.3d 785, 791.) " 'Unconsciousness,' as the term is used in the rule just cited, need not reach the physical dimensions commonly associated with the term (coma, inertia, incapability of locomotion or manual action, and so on); it can exist – and the above-stated rule can apply – where the subject physically acts in fact but is not, at the time, conscious of acting." (*People v. Newton* (1970) 8 Cal.App.3d 359, 376 [Huey Newton not aware of his actions in killing police officer after being shot].)

Voluntary intoxication leading to unconsciousness is governed by Penal Code section 22, not section 26. (*People v. Halvorsen* (2007) 42 Cal.4th 349, 418; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1621.)

Involuntary intoxication leading to unconsciousness is a defense. (*People v. Halvorsen* (2007) 42 Cal.4th 349, 418-419; see *People v. People v. Heffington* (1973) 32 Cal.App.3d 1, 8.)

IMPAIRMENT

> "I hate to advocate drugs, alcohol, violence or insanity to anyone, but they've always worked for me." – Hunter S. Thompson

Evidence of mental impairment is relevant to show the defendant did not form the requisite intent. This defense is available for specific intent crimes, or crimes requiring malice aforethought or knowledge. (Pen. Code, § 28, subd. (a); *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982-986; see CALCRIM No. 3428.) The defense is not available for general intent crimes. (See *People v. Mendoza*

(1998) 18 Cal.4th 1114, 1131-1134.)

There is not a sua sponte duty to give an instruction on mental impairment, but it must be given upon request if there is substantial evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

There is no longer a defense of diminished capacity. (Pen. Code, § 28, subd. (a); *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Penal Code section 29 limits the testimony of an expert witness on whether the defendant formed the requisite intent. (*People v. Coddington* (2000) 23 Cal.4th 529, 582-583, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364-1365.)

If a defendant is physically impaired, the issue is whether he or she is formed the same mens rea as a reasonable person with the same physical disability would have in the same situation. (*People v. Matthews* (1994) 25 Cal.App.4th 89, 99-100 [a defendant who was blind, hearing impaired, and confined to a wheelchair was charged with brandishing a firearm at police; the defense was entitled to an instruction that the jury must take his physical disabilities into account]; see CALCRIM No. 3429.) This instruction does not apply to mental impairment. (See *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519.)

ENTRAPMENT

THE PRINCIPLE

> "The defense [of entrapment] appears to have first been asserted by Eve, who complained, when charged with eating fruit of the tree of knowledge of good and evil: 'The serpent beguiled me, and I did eat.' (Genesis 3:13.)" (*People v. Barraza* (1979) 23 Cal.3d 675, 686, fn. 1.)

The principle behind the entrapment defense was discussed in *People v. Barraza* (1979) 23 Cal.3d 675. There is an objective version in which there is "(1) governmental instigation and inducement overstep the bounds of permissibility, and (2) the defendant did not harbor a preexisting criminal intent." (*Id.* at p. 686.) There is a subjective version in which the defendant must also show he lacked a disposition to commit the crime. (*Id.* at pp. 686-687.) This is the federal standard. (*Matthews v. United States* (1988) 485 U.S. 58, 63.) The federal standard has been criticized for condoning police misconduct, for applying a different standard of justice depending on the defendant, and for permitting the admission of otherwise inadmissible damning evidence of the defendant's character. (*Id.* at pp. 686-

688.) On the other hand, there is a strong reluctance to set free those who undisputedly broke the law, many of whom appear perfectly willing to do so if given the opportunity.

STATE LAW

California claims to use "a hybrid position." (*Barraza, supra,* 23 Cal.3d at p. 688.) "[W]e hold that the proper test for entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect – for example, a decoy program – is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (*Barraza, supra,* at pp. 689-690; see CALCRIM No. 3408.)

An entrapment instruction must be given sua sponte if there is substantial evidence. (*People v. Watson* (2000) 22 Cal.4th 220, 222; *Barraza, supra,* 23 Cal.3d at p. 691.)

The defendant has the burden of proving entrapment by a preponderance of the evidence to all 12 jurors. (*People v. McIntyre* (1990) 222 Cal.App.3d 229, 232-233; see also *People v. Moran* (1970) 1 Cal.3d 755, 760-761.) This is because "entrapment is a collateral issue not affecting a defendant's criminal intent; rather, it prohibits defendant's punishment for the crime because of improper police conduct." (*McIntyre, supra,* at p. 232.)

Entrapment can include statements by law enforcement promising the act is not illegal or would go undetected, offering some extraordinary benefit, or manipulating the defendant by badgering, flattery, coaxing, insistent requests, offers of friendship or pleas for sympathy. (*Barraza, supra,* 23 Cal.3d at p. 690; see *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1096 [granting federal writ because state entrapment would apply to law enforcement using a decoy who was withdrawing from drugs to beg for drugs].) Entrapment exists if the manipulating is done by a private person as an agent of law enforcement. (*People v. McIntire* (1979) 23 Cal.3d 742, 748.)

Simply giving the defendant an opportunity to commit a crime, such as a decoy program or sting operation, is not entrapment. (*Barraza, supra,* 23 Cal.3d at p. 690; accord *People v. Watson* (2000) 22 Cal.4th 220, 223 [making an auto theft look particularly attractive by staging an arrest of a motorist in a poor neighborhood and leaving the key in the unlocked car was not entrapment]; *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 568-569 [minor agent buying alcohol]; *Dept. of Alcoholic*

Beverage Control v. Alcoholic Beverage Control Appeals Bd. (*4805 Convoy, Inc.*) (2002) 100 Cal.App.4th 1094, 1099-1100 [it is irrelevant if the criminal plan originated from law enforcement officers]; *People v. Reed* (1997) 53 Cal.App.4th 389 [officer answers defendant's solicitation].)

Inconsistent defenses are permissible. The defendant can claim entrapment and still claim he did not commit the crime. (*People v. Perez* (1965) 62 Cal.2d 769, 775-776; see *Matthews v. United States* (1988) 485 U.S. 58, 63-68.)

VARIATIONS OF THE ENTRAPMENT DEFENSE

> " ' "No, no!" said the Queen. "Sentence first — verdict afterwards." ' (Carroll, Alice's Adventures in Wonderland (1865) ch. XII, Alice's Evidence.)" (*People v. Casillas* (2001) 92 Cal.App.4th 171, 180.)

Entrapment by estoppel when the officer tells the defendant that certain conduct is lawful and the defendant believes the officer. (*People v. Bray* (1975) 52 Cal.App.3d 494, 499 [called the "official advice excuse"]; *People v. Ferguson* (1933) 134 Cal.App. 41, 53; see *People v. Benford* (1959) 53 Cal.2d 1.9 [as an entrapment defense]; *People v. Mello* (2002) 97 Cal.App.4th 511, 518, fn. 2; *People v. Cappuccio, Inc.* (1988) 204 Cal.App.3d 750, 765; *People v. Gonda* (1982) 138 Cal.App.3d 774, 780, fn. 3; *People v. Sapse* (1980) 104 Cal.App.3d Supp. 1, 12; *United States v. Penn. Industrial Chem. Corp.* (1973) 411 U.S. 655, 674; *Cox v. Louisiana* (1965) 379 U.S. 559, 569-571; *Raley v. Ohio* (1959) 360 U.S. 423, 438-439; *United States v. Gil* (9th Cir. 2002) 297 F.3d 93, 107; *United States v. Ramirez-Valencia* (9th Cir. 2000) 202 F.3d 1106, 1109 (per curiam).) But the defense did not apply when a city official relied on the opinion of a city attorney who was the city official's inferior officer. (*People v. Chacon* (2007) 40 Cal.4th 558, 570-571.)

Official agent defense. It is a defense to possession or distribution of drugs for a law enforcement officer or private person to be acting as a police agent in a sting operation. (Health & Saf. Code, § 11367; see CALCRIM No. 3409.) A defendant's good faith mistake in believing his actions were immunized is a defense. (*People v. Lucero* (1988) 203 Cal.App.3d 1011, 1017; but see *People v. Jones* (1962) 200 Cal.App.2d 805, 813.)

Sentencing entrapment requires reducing the crime to a lesser charge (or eliminating an enhancement or penalty provision) when the defendant was predisposed to commit a less serious offense but was entrapped by law enforcement officers to commit a more serious offense. The defense has not been accepted in California. (*People v. Smith* (2003) 31 Cal.4th 1207, 1211-1212, 1216; *People v. Graves* (2001) 93 Cal.App.4th 171, 179.) It has been accepted by federal courts. (See, e.g., *United States v. Parilla* (9th Cir. 1997) 114

F.3d 124, 127 [undercover officer trades a gun for drugs to charge the defendant will possession of gun as well]; *United States v. Lacey* (10th Cir. 1996) 86 F.3d 956 ,963; *United States v. Montoya* (9th Cir. 1995) 62 F.3d 1, 4-5; *United States v. Staufer* (9th Cir. 1994) 38 F.3d 1103, 1107 [officer buy more drugs than defendant requested];

There is a related concept of sentence manipulation where officers use outrageous conduct to aggravate a crime, creating a due process violation. California has not accepted this defense either. (*People v. Smith* (2003) 31 Cal.4th 1207, 1211-1212.)

MISCELLANEOUS DEFENSES

ACCIDENT

> "[W]e must reject the district attorney's anomalous position that a claimant must rigidly comply with statutory procedures but close is good enough for government work." (*Nasir v. Sacramento County Office of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 987.)

A person is not criminal culpable for his or her actions if they were committed "through misfortune or accident, when it appears that there was no evil design, intention, or culpable negligence." (Pen. Code, § 26, subd. Five.)

For a person to be guilty of a general intent crime, the person need only commit the act or omission without needing to intend the consequence. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 396; *People v. Lopez* (1986) 168 Cal.App.3d 592, 598.) So what is an accident?

Accident is defined as the lack of intent. Intent is defined, in part, as lack of an accident. CALCRIM No. 510, for example, states accident for excusable homicide as follows: "1. the defendant was doing a lawful act in a lawful way; [¶] 2. The defendant was acting with usual and ordinary caution; [¶] AND [¶] 3. The defendant was acting without any unlawful intent." Similarly, CALCRIM No. 3404 states "[t]he defendant is not guilty of <insert crime[s]> if (he/she) acted [or failed to act] without the intent required for that crime, but acted accidentally." One case states, "[t]he accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime." (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.)

CALCRIM says the court does not have a sua sponte responsibility to instruct on accident, but it must give the instruction upon request if there is substantial evidence. (citing *People v. Acosta* (1955) 45 Cal.2d 538, 544 [holding that failure to instruct on the requested

accident instruction was error]; but see *People v. Bohana* (2000) 84 Cal.App.4th 360, 370 [stating there was a sua sponte duty to give the instruction]; *People v. Gonzalez* (1999) 74 Cal.App.4th 382, 389 [same]; *People v. Jones* (1991) 234 Cal.App.3d 1303, 1313-1314 [same].) It is often argued that the failure to instruct on accident is harmless because the jury is instructed elsewhere on the definition of intent. A finding of intent necessarily negated the existence of an accident. (See, e.g., *People v. Jones* (1991) 234 Cal.App.3d 1303, 1314-1316.)

The accident defense applies to general intent crimes and negligence crimes such as involuntary manslaughter. (Pen. Code, § 26, subd. Five.) If the offense is a general intent crime, the accident defense is available even if the defendant acts negligently. (*Lara, supra,* 44 Cal.3d at p. 110.)

Examples of when an accident defense was available are as follows: Defendant charged with willfully inflicting corporal injury (Pen. Code, § 273.5) when, during an argument, he opened a closed door and hit the victim who, unbeknownst to him, was directly behind the door. (*People v. Gonzalez* (1999) 74 Cal.App.4th 382.) Defendant was in an argument and was leaving until the victim implored him to stay; he spun around to face her but the side of his right hand struck her in the face, breaking her nose. (*People v. Lara* (1996) 44 Cal.App.4th 102, 105.) The defendant did not mean to fire the gun. (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1314; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 865-872.) The defendant was not guilty of assault or battery with a car when he was arguing with a passenger and hit a pedestrian because he was not looking where he was driving. (*People v. Brucker* (1983) 148 Cal.App.3d 230, 235-236.)

There is no accident if the defendant hit the victim who then fell into a swimming pool and drowned (i.e., her falling in the pool was not legally an accident). (*People v. Bohana* (2000) 84 Cal.App.4th 360, 370-371.) But if the victim falls while trying to escape the defendant, who has not touched her yet, he is not guilty of battery. This is not really an accident defense; there simply is no offensive touching. (*People v. Jackson* (2000) 77 Cal.App.4th 574.)

ALIBI

'Some other dude did it.'

There is not a sua sponte duty to instruct on alibi, but it must be given upon request. (*People v. Freeman* (1978) 22 Cal.3d 434, 437-438; *People v. Whitson* (1944) 22 Cal.3d 434, 437-438; see CALCRIM No. 3401.)

The alibi defense applies if the defendant claims he could not have committed the crime because he was not present. The defense does not apply if the prosecution does not contend he was present. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 26-28.)

When was the defendant not supposed to be there? It is proper to allege a crime occurred on or about a certain date or within a range of dates. (Pen. Code, §§ 951, 955.) The prosecution normally need not prove the exact date of the crime. (See CALCRIM No. 207; CALJIC No. 4.71.) But if the crime allegedly occurred at a certain time, and the defense is alibi, this instruction should not be given. (*People v. Jones* (1973) 9 Cal.3d 546, 557, overruled on other grounds in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713; *People v. Barney* (1983) 143 Cal.App.3d 490, 497-498; see *People v. Jennings* (1991) 53 Cal.3d 334, 358-359.)

CHARACTER DEFENSE

> A court cannot imply another is a kangaroo court on the record. (*People v. Zachery* (2007) 147 Cal.App.4th 380, 390-393.)

"In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is . . . [admissible] if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)." (Evid. Code, § 1102; see CALCRIM Nos. 350, 351.)

The court has no sua sponte duty to give a character defense instruction, but it must be given upon request. (*People v. Bell* (1875) 49 Cal. 485, 489-490; *People v. Wilson* (1913) 23 Cal.App. 513, 523-524; see also *People v. Eli* (1967) 66 Cal.2d 63, 79 [must instruct upon request how to evaluate cross-examination of character witnesses]; *People v. Hempstead* (1983) 148 Cal.App.3d 949, 954 [same].)

The defendant need only show reasonable doubt he committed the crime. (*People v. Jones* (1954) 42 Cal.2d 219, 222.)

CLAIM OF RIGHT

> "I appropriate what is already mine . . . . " – Oscar Wilde

"Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful

retention of the property of another to offset or pay demands held against him." (Pen. Code, § 511.)

It is a defense to larceny as well as embezzlement to take property the defendant actually believes is his or hers, even if the belief is mistaken and unreasonable. (*People v. Tufunga* (1999) 21 Cal.4th 935, 952; *People v. Stewart* (1976) 16 Cal.3d 133, 140; *People v. Romo* (1990) 220 Cal.App.3d 514, 518; see CALCRIM No. 1863.)

The court has a sua sponte duty to give the instruction when supported by substantial evidence. (*People v. Creath* (1995) 31 Cal.App.4th 312, 319; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1145.)

An actual belief is required. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Stewart* (1976) 16 Cal.3d 133, 139-140; see *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4, 10-11.)

The taking must be done openly; it does not apply if the defendant conceals the taken property. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848-1849.)

However, a defendant can be guilty of theft of community property if he or she intends to permanently deprive the spouse of the property. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1738-1740.)

The defense does not apply when the defendant takes some of victim's property to repay a debt. (*People v. Holmes* (1970) 5 Cal.App.3d 21, 24-25.)

The defense does not apply to recover property in the victim's possession from illegal conduct (*People v. Gates* (1987) 43 Cal.3d 1168, 1181-1182 [money from a fraud ring]; *People v. Johnson* (1991) 233 Cal.App.3d 425, 457-458 [money from drug sales].)

It is not a defense to robbery. (*People v. Tufunga* (1999) 21 Cal.4th 935, 95; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 622-623; *People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) It is not a defense to carjacking. (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 701-703.)

It does not apply to extortion or to kidnapping for ransom or extortion. (*People v. Lancaster* (2007) 41 Cal.4th 50, 88.)

CONSENT

This defense attacks an element of an offense when lack of consent is required. Thus, it could be a defense to larceny or certain sex crimes. Most crimes do not provide for consent as a defense. (See *People v. Carr* (2000) 81 Cal.App.4th 837, 842, citing 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, §§ 257-258, pp. 294-296; 1 LaFave & Scott, Substantive Criminal Law (1986) Justification and Excuse, § 5.11, pp. 687-688.) In particular, it is not a defense to incest or sex crimes with a minor. (*People v. Statton* (1904) 141 Cal. 604, 609.)

Consent is not a defense to elder abuse where the victim's "consent" was the result of poor health. (*People v. Rae* (2002) 102 Cal.App.4th 116, 118-120; *People v. Manis* (1992) 10 Cal.App.4th 110, 116, overruled on other grounds in *People v. Heitzman* (1994) 9 Cal.4th 189, 209, fn. 17.)

When the crime is taking advantage of an incapacitated victim (such as rape of an a victim incapable of giving consent), the issue is whether the defendant had a good faith belief the victim was capable of consent and actually did consent. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 471-472; *People v. Dolly* (1966) 239 Cal.App.3d 143, 146.)

See also mistake of fact (*Mayberry* defense)

DISCIPLINE OF A CHILD

> "Too many sticks, not enough carrots."

Parents have the right to use reasonable force to discipline their children. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050-1051; *People v. Checketts* (1999) 71 Cal.App.4th 1190, 1194 [can include confining the child]; see CALCRIM No. 3405.) But it is not a defense to lewd conduct on a minor (Pen. Code, § 288). (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1195.) The court has a sua sponte responsibility to give this instruction in appropriate cases. (*Whitehurst, supra,* at p. 1049.)

MEDICAL MARIJUANA

> "If even a small fraction of the money we now spend on trying to enforce drug prohibition were devoted to treatment and drug rehabilitation, in an atmosphere of compassion not punishment, the reduction in drug usage and in the harm done to users could be dramatic." – Milton Friedman

Possession of a reasonable amount of marijuana is not unlawful under the Compassionate Use Act (Prop. 215) if it is for personal medical purposes or the defendant is a primary caregiver of a patient with medical need. (Health & Saf. Code, § 11362.5; see CALCRIM No. 2361.) The Legislature has determined that a reasonable amount is up to eight dry ounces, six mature plants, or 12 immature plants, but it permits local communities to set higher levels. (Health & Saf. Code, § 11362.77; see *People v. Frazer* (2005) 128 Cal.App.4th 807, 825-827; *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, 109-111.) It is also a defense for transportation of marijuana. (Health & Saf. Code, § 11362.765, subd. (a); *In re Wright* (2006) 40 Cal.4th 81, 92-93; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.) It is not a defense for transporting or possessing an amount more than for one's medical use. (*Trippet, supra,* at p. 1550; *People v. Young* (2001) 92 Cal.App.4th 229, 237; see Health & Saf. Code, § 11365.765, subd. (a).) It previously was not a defense to distribution, except for a primary caregiver to a patient (*People v. Mower* (2002) 28 Cal.4th 457, 475; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1161, 1166-1167 [buyers' club]; *People v. Peron* (1997) 59 Cal.App.4th 1383 [buyers' club]), but the Legislature has now permitted distribution to a buyers' club (Health & Saf. Code, §§ 11362.765, subd. (a); see *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 768). The defense applied to bringing marijuana into prison (Pen. Code, § 4573.5), but it probably would not be a defense to section 4573 which prohibits bringing in controlled substances. (*People v. Harris* (2006) 145 Cal.App.4th 1456, 1465-1467.)

The defendant has the burden of presenting evidence; once this is done, the prosecution must prove beyond a reasonable doubt the possession was illegal. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350; see *People v. Frazier* (2005) 128 Cal.App.4th 807.)

The defendant must have at least oral "approval" from a doctor to use marijuana, but it need not be "recommended" or prescribed. (*People v. Jones* (2003) 112 Cal.App.4th 341, 347.)

Although there is a concept of a medical necessity for possessing drugs in California (see *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538), the medical marijuana defense is available without needing to show necessity (*People v. Sparks* (2004) 121 Cal.App.4th 259, 268; *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441). Medical necessity is not a defense to the federal drug laws. (*United States v. Oakland Cannabis Buyers' Co-operative* (2001) 532 U.S. 483, 494.)

The statutes do not apply retroactively to make previously illegal activity legal. (*People v. Rigo* (1999) 69 Cal.App.4th 409.)

The statutes do not prevent the existence of reasonable suspicion or probable cause. (*People v. Mower* (2002) 28 Cal.4th 457, 468-469; *People v. Fisher* (2002) 96 Cal.App.4th 1147, 1152; see also *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, 111 [police were not required to return the seized material].)

Proposition 215 might not be a defense to a violation of probation. (*People v. Bianco* (2001) 93 Cal.App.4th 748, 753.)

TRANSITORY POSSESSION

It is a defense to illegal possession that the defendant intended to possess the contraband for only for a momentary or transitory period in order to abandon it, dispose of it, or destroy it, and the defendant did not intend to prevent law enforcement officers from obtaining it. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191 & fn. 9; *People v. Mijares* (1971) 6 Cal.3d 415, 423; see CALCRIM No. 2305; see also *People v. Sullivan* (1989) 215 Cal.App.3d 1446.)

The defendant has the burden of proving the defense by a preponderance of the evidence. (*People v. Spry* (1997) 58 Cal.App.4th 1345, 1349, cited with approval in *People v. Martin* (2001) 25 Cal.4th 1180, 1192, fn. 10.)

The court has a sua sponte duty to give the instruction. (*People v. Mijares* (1971) 6 Cal.3d 415, 423.)

Transitory possession typically applies to possession of drugs, but it also applies to possession of firearms. (*People v. Spry* (1997) 58 Cal.App.4th 1345, 1370-1371; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814-815.) It is not a defense for illegal possession of a weapon by a prisoner. (*People v. Brown* (2000) 82 Cal.App.4th 736, 739-740.) It is a defense to receipt of stolen property when the defendant intended to return it to the owner. (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494; *People v. Osborne* (1978) 77 Cal.App.3d 472, 476.)

PREJUDICIAL ERROR

Failure to instruct on an element of the offense: "The federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) Thus, a trial court's failure to instruct on an element of a *crime* is federal constitutional error (see *United States v. Gaudin* (1995) 515 U.S. 506, 509-511, 522-523)

that requires reversal of the conviction unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict (*Chapman*, *supra*, 368 U.S. at p. 24; *People v. Flood* (1998) 18 Cal. 4th 470, 492-504; see *Neder v. United States* (1999) 527 U.S. 1, 8-15.)" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325, emphasis omitted.) A trial court's failure to instruct the jury on an element of the crime requires reversal when 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . . . ' (*Neder v. United States* (1999) 527 U.S. 1, 19 . . . .) The high court in *Neder* also pointed out that the error is not prejudicial when on appeal it is clear 'beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence . . . . ' (*Id.*, at p. 17.)" (*People v. Garcia* (2001) 25 Cal.4th 744, 760-761.)

Arguably, failure to instruct on a defense theory automatically requires reversal. "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. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it believed or if it help create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal." (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202; accord, *People v. Lee* (1987) 43 Cal.3d 666, 675, fn. 1; *United States v. Miguel* (9th Cir. 2003) 338 F.3d 995, 1000-1002 [precluding a defense instruction and at closing argument of third party culpability reversible per se]; *United States v. Zuniga* (9th Cir. 1993) 989 F.2d 1109, 1111 [this is because the error "effectively removed . . . appellant's defense from the jury consideration." Thus, the "failure to instruct . . . on the defendant's theory of the case, where there is evidence to support such a conclusion, is reversible per se and can never be considered harmless error."]; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741 [complete denial of a defense]; *id.* at p. 739 ["It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case."].)

Or the *Chapman v. California* (1967) 386 U.S. 18 standard can apply. (*People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1154 [statute of limitations]; see also *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1263 [error in omitting imperfect self-defense though jury rejected heat of passion and perfect self-defense].)

Or the standard in *People v. Watson* (1956) 46 Cal.2d 818 can apply. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 343-344 [failure to give affirmative defense not a federal

question because it is purely an issue of state law].) An "affirmative defense" is one that does not negate a prima facie element but instead presents new matters to excuse or justify the conduct. (*People v. Noble* (2002) 100 Cal.App.4th 184, 189.) The *Watson* standard has been used in numerous cases. (See, e.g., *People v. Perez* (2005) 35 Cal.4th 1219, 1232 [misinstruct on "defenses to" aiding and abetting the manufacture of methamphetamine]; *People v. Cole* (2007) 156 Cal.App.4th 452, 484-485 [failed to instruct on lack of knowledge of illegally selling corporate stock]; *People v. Woodward* (2004) 116 Cal.App.4th 821, 842 [instruction misstated a legally legitimate grounds for possessing pornography]; *People v. Henderson* (2003) 110 Cal.App.4th 737, 744 [failure to instruct on flight by third party suspect].)