SEX CRIME INSTRUCTIONAL ERROR ISSUES

By William Robinson

Introduction

I know what you're thinking. There are never any good instructional error issues in sex crime cases. In most cases the defense will be (1) the acts of child molestation never took place, but were dreamed up by the vindictive mother or exaggerated by a jealous child or (2) there were no forcible sex crimes because (a) it was all consensual or (b) they got the wrong guy. So, what difference will it really make in such cases if there is some problem in the definition of the crimes, or a failure to instruct on a lesser included offense? All the exciting issues on instructional error come in homicide law.

Well, you're wrong. The purpose of this extended essay is to let you know that there are some good instructional error issues out there, in a variety of contexts, which apply to sex crime charges and trials. Most, if not all of the instructional issues discussed here can make a big difference to your client, leading to reversals of some or all charges, and meaningful reductions in sentence.

Handling sex crime cases is frequently a tough business, even for the diehard appellate lawyer. The facts are often very unpleasant, and the ruins of people's lives are very often all over the place. But there is also lots of injustice out there – people accused of heinous crimes that really never took place; people doing virtual life without parole sentences for convictions of "forcible" sex crimes where the evidence of force was minuscule or absent; and people being convicted of new charged crimes through evidence of their "propensity to commit sexual offenses" based on prior offenses. So, let's roll up our sleeves and get to work.

What follows is a survey of instructional issues, in some semblance of logical order which I hope is self-explanatory. An exhaustive discussion is not possible, at least not without months (rather than weeks) of work on the subject. However, I hope the following suggestions are helpful to all levels of appellate practitioners, and will provide you with food for thought for finding your own instructional error issues in sex crime cases.

I. The Requirement of Correct and Full [And Not Over-Inclusive] Definitions of Terms Force, Duress, and Menace in Sex Crimes.

In just about every type of sex crime, involving either minor or adult victims, proof of the use of force, duress, menace, or threat of bodily harm is either a required element making the conduct criminal or one which elevates the degree or species of the crime and increases punishment dramatically. A number of issues arise concerning the court's duty to give definitions of three of these terms: force, duress and menace.

This is further complicated by a number of factors: (a) the question whether definition of

these terms is required sua sponte, or is only to be given on request; (b) a fair measure of conflict within the law as to the proper definition of the terms as to particular crimes; (c) a confusing array of CALJIC instructions, some of which provide standardized definitions, and others of which do not; and (d) inconsistencies between the CALJIC instructions and either case law or statutory definitions.

First, some basic principles.

A. **Sua sponte duty to instruct**

The general rule is that absent a request, instructions defining particular terms need not be given if the terms used in the instructions are "commonly understood by those familiar with the English language." (*People* v. *Anderson* (1966) 64 Cal.2d 633, 639.) However, there is a sua sponte duty to "give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law." (*People* v. *Shoals* (1992) 8 Cal.App.4th 475, 489-490, quoting *People* v. *Reynolds* (1988) 205 Cal.App.3d 776, 779; see also *People* v. *Anderson*, *supra*, at p. 639 and *People* v. *Purcell* (1993) 18 Cal.App.4th 65, 71.)

Applying these principles to the terms force, duress and menace, one would probably assume that "force," a commonly used word, would not require definition, but that "duress" and "menace," much more arcane and sophisticated terms of discourse, would require definition. Oddly enough, until recently it's been the other way around: force pretty clearly requires sua sponte definition in sex crimes; and duress and menace have been found to be used in their common sense, and not requiring definition – though this latter point is now up for grabs. However, while the appropriate "technical legal" definition of "force" is not disputed, there is considerable dispute about the correct definition of duress and menace.

B. **The Elements**

1. **Force**

Anderson, the seminal case on words with "technical" versus "common" meanings, holds that "force" and "fear," as used in the crime of *robbery*, do not have a technical legal meaning, but are understood in their common sense. (*Id*., at p. 640.) However, in the different context of sex crimes, a number of cases recognize that "force" has a unique meaning, based on the notion that the sexual acts themselves in such crimes require some measure of force being employed. Beginning in *People* v. *Cicero* (1984) 157 Cal.App.3d 465, the court recognized that for purposes of proving a forcible lewd act under Penal Code section 288, subdivision (b), ("288(b)")[1] the prosecution must prove that the defendant used "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*Id*., at p. 474; accord, *People* v. *Bolander* (1994) 23 Cal.App.4th 155, 159.)

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[1] Statutory references are to the Penal Code if not otherwise specified.

By parity of reasoning, the same rule should apply to all sex crimes requiring proof of "force." In the crime of rape, for example, "force" would have to be "substantially different or greater" than that required to commit the act of penetration required to constitute rape. The *Cicero* court's definition of force, in fact, comes from the law of rape. (*People* v. *Cicero*, *supra*, at p. 476; see also *People* v. *Bergschneider* (1989) 211 Cal.App.3d 144, 153, where the trial court gave the *Cicero* definition of force in a forcible rape and forcible oral copulation prosecution and the Court of Appeal, while not directly addressing the issue, implicitly accepted the *Cicero* instruction as correct.)

Two recent cases make it clear that the *Cicero* definition of "force" applies to the crime of rape. The court in *People* v. *Mom* (2000) 80 Cal.App.4th 1217, while rejecting a hybrid argument based on *Cicero* that rape in concert requires force greater than that required to commit forcible rape under section 261 (*id*., at pp. 1221-1223), makes it clear that "force" in rape and related forcible sex crimes requires something greater than what is required to commit the underlying act of intercourse:

> Force, within the meaning of section 261, subdivision (a)(2), is that level of force substantially different from or substantially greater than that necessary to accomplish the rape itself.

(*Id*., at p. 1224, citing *Bergschneider*, *Cicero*, and *People* v. *Kusumoto* (1985) 169 Cal.App.3d 487, 492-494.) Or, as more aptly phrased by the court in *People* v. *Elam* (2001) 91 Cal.App.4th 298, 306, "[t]he force necessary in sexual offense cases is 'physical force substantially different from or substantially in excess of that required' for the commission of the sexual act."

Since the *Cicero* definition of "force" provides a specialized meaning for the term peculiar to the law, which the average juror would not understand without direction from the court, the trial court is obligated to instruct on that definition on its own motion and errs when it fails to give such an instruction. (*People* v. *Pitmon* (1985) 170 Cal.App.3d 38, 52 [court that decided *Cicero* finds error where trial court fails to *sua sponte* define "force" per *Cicero* definition].)

2. **Duress**.

In *Pitmon*, the same court that found a sua sponte duty to define "force" in connection with a violation of section 288(b) held that because the Webster's definition of "duress" was the correct one under the law, there was no sua sponte duty to give an instruction defining duress. (*Id*., at p. 52; accord, *People* v. *Elam*, *supra*, 91 Cal.App.4th at p. 307.) There are two major problems with this conclusion, one of which is revealed by common sense, and the second of which is addressed in recent case law.

Begin by asking yourself if you could define the term "duress" effectively *without* looking it up in a dictionary? The definition of "duress" cited by the court in *Pitmon* is quite convoluted:

> a direct or implied threat of force, violence, danger, hardship or retribution sufficient

> 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.

(*Pitmon*, *supra*, at p. 50.) *Elam* gets even more complicated, citing one dictionary definition of "'stringent compulsion by threat of danger, hardship, or retribution . . .: COERCION . . .'" and a second "common meaning" as "'compulsion or constraint by which a person is illegally forced to do or forbear some act by . . . physical violence to the person or by threat of such violence, the violence or threat being such as to inspire a person of ordinary firmness with fear of serious injury to the person . . . [or] reputation.'" (*Elam*, *supra*, at p. 307, quoting Webster's Third New Internat. Dict. (1993), p. 703, col. 2.)

What's wrong with this analysis? The need for sua sponte definition of words used as elements of crimes is obviated only if the words in question are "*commonly understood* by those familiar with the English language." (*Anderson*, *supra*, 64 Cal.2d at p. 639, emphasis added.) The fact that Webster's definition is consonant with that of Black's does not, and should not, settle the question whether a term such as "duress" is "commonly understood." Just ask yourselves, for example, how many of your educated adult friends who aren't criminal lawyers could come up with a satisfactory definition of "duress" that would cover the above concepts adequately? Most of us would say something like "felt compelled to do it." Of course this would be inadequate, because it wouldn't lay out the requirement of threat, fear, or the reasonableness of such fear, in these definitions. Thus, the reasoning of *Pitmon* and *Elam* on this point should be strenuously resisted. "Commonly understood" means exactly what it says, and the fact that an obscure legal term also happens to be defined appropriately in a large standard dictionary is an inadequate reason to hold that it is not a legal term requiring sua sponte definition.

Since few courts will elevate reason and common sense over precedent, especially when that precedent defeats the argument of a sex crime defendant, it is fortunate that we also have a further argument, adopted recently by the court in *People* v. *Valentine* (2001) 93 Cal.App.4th 1241, as to why "duress" requires a sua sponte definition. *Valentine* held that when the Legislature in 1994 amended the statutory definition of "duress" in sections 261and 262 to specifically exclude "a direct or implied threat of . . . hardship" as within the definition of duress, it altered the meaning of "duress" as to all forcible sex crimes. (*Id*., at pp. 1247-1252.) The reasoning of the court in *Valentine* is quite sound. The Legislature in 1990 added "duress" as a way of committing the crime of forcible rape following comments by the court in *Bergschneider* on the absurdity of allowing duress to sustain every sex crime except rape. Amendments to the new law at first did not define "duress," then used the Black's definition, and then, in the version which was enacted and became law in 1991, switched to the Webster's definition, which included the threat of "hardship." However, in 1994, the Legislature changed the definition of "duress" to delete the term "hardship." Reasoning that since the whole point of adding duress was to *conform* the ways of committing forcible rape to the means of committing other forcible sex crimes, the court in *Valentine* concluded that the narrowed definition of "duress" applies to forcible oral copulation and digital penetration

under sections 288a and 289. (*Valentine*, *supra*, at p. 1249-1250)[2]

Valentine further concluded that the courts in *Pitmon* and *Elam* were wrong in ruling that duress had no "technical meaning," holding that, at least since the 1994 amendment, the Legislature's express act of defining "duress" as excluding "threat of hardship" gives the term a technical meaning peculiar to California law which requires sua sponte definition. (*Id*., at pp. 1250-1252.)

Thus, there are two strong arguments, one supported by reasoned common sense, and the other by case law, as to why courts have a sua sponte duty to define "duress" as to all sex crimes.

3. **Menace**

Does anyone know what "menace" means? After decades of seeing a certain blond haired terminal toddler on the comics page, most people probably think it is synonymous with "annoyance." Surely, the legal meaning of "menace" is one which requires sua sponte definition. Yet no court has found a sua sponte duty to define "menace." *Valentine* ducked the issue, finding invited error when the defense requested an instruction that contained the term "menace" without tendering a definition of menace. (*Id*., at p. 1246.)[3] In *Elam*, the court reached the same result with respect to "menace" as it did with "duress," finding that the dictionary definition of the word – "'a show of intention to inflict harm'; 'a threatening gesture, statement or act'" – was adequate to express the legal meaning of menace, and that sua sponte instruction is not required. (*People* v. *Elam*, *supra*, 91 Cal.App.4th at p. 307.)

However, while there is not direct case law authority, a good argument can be made that *Elam* is wrong, and that "menace" in the context of sex crimes has a particular legal meaning – and a meaning in which is subject to dispute – which requires sua sponte definition. In the same amendments which added and defined "duress" as a way of committing forcible rape, the Legislature also added "menace" as a way of committing rape, defining the term as "any threat, declaration, or act which shows an intention to inflict an injury upon another." (§ 261, subd. (c); Stats. 1990, ch. 630.) Although the court in *Elam* found that the Legislature's act of providing a specific statutory definition of "menace" does not signify that the word has a legal meaning different from the

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[2] Although *Valentine* doesn't reach this question, there is no conceivable reason why this change in the meaning of "duress" should not be held to apply to other forcible sex crimes, such as forcible lewd conduct under section 288(b), or forcible sodomy under section 286.

[3] This is a dubious conclusion. The California Supreme Court has made it clear that for the doctrine of invited error to apply, "it must be clear from the record that defense counsel made an express objection to the relevant instructions . . .", and "it must also be clear that counsel acted for tactical reasons and not out of ignorance or mistake."
(*People* v. *Bunyard* (1988) 45 Cal.3d 1189, 1234; accord, *People* v. *Duncan* (1991) 53 Cal.3d 955, 969-970.)

common meaning (*ibid*.), this begs the question as to whether it is fair to presume that the average juror understands this dictionary meaning of "menace," or would simply interpose common sense and decide that any annoying or threatening conduct amounted to "menace." As with "duress," it makes sense to challenge the assumption of *Elam* and other courts that because the definition in Webster's correlates with that of Black's or the Penal Code, that jurors would intrinsically understand this. Menace, like duress, is a fairly arcane term, and it's a pretty fair bet most average folks would be hard-pressed to come up with an effective definition of either. Thus, they are not, as used in sex crime statutes, words that are "commonly understood by those familiar with the English language . . ." (*Anderson*, *supra*, 64 Cal. 2d at p. 639.)

There is a secondary argument about the duty to correctly define "menace" raised in FORECITE. A comment to CALJIC 10.42, which sets forth the elements of a forcible lewd act under 288(b), refers to Civil Code section 1569 and 1570 for a definition of "menace." Section 1570 reads as follows:

> Menace consists in a threat:
>
> 1. Of such duress as is specified in subdivisions one and three of the last section;
>
> 2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
>
> 3. Of injury to the character of any such person.

Section 1569, to which the above section twice refers, reads as follows:

> Duress consists in:
>
> 1. Unlawful confinement of the person of the party, or the husband or wife of such party, or of an ancestor, descendent, or adopted child of such party, husband, or wife;
>
> 2. Unlawful detention of the property of any such person; or,
>
> 3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

If you have a case where the court gives a definition of "menace" based on the above Civil Code provisions, a strong argument can be made that the definition is both under- and over-inclusive. It is *under*-inclusive, as FORECITE points out, because it omits the requirement, codified in section 261(c), that the threat or act "shows an intention to inflict injury . . . ." (F 10.42 n1.) And it is *over*-inclusive because it classifies as "menace" threats of "injury to the character . . ." of a person (Civ. Code § 1570, subd. 3) and, if literally read as incorporating threats of duress, threats to unlawfully or fraudulently confine a person without any requirement of a threat of force. (Civ. Code §§ 1570, subd. 1 & 1569, subds. 1 & 3.)

FORECITE also makes the same point as to menace accepted by the court in *Valentine* as to duress: that "the recent Penal Code definition of menace should be given rather than the Civil Code version proposed by CALJIC" because (a) "any doubt or conflict about the correct statutory

definition should be resolved in favor of the defendant . . .” (F 10.42 n1, citing *People* v. *Bradley* (1983) 146 Cal.App.3d 721, 725) and (b) because “[sections] 288(a) and . . . 261 are in pari materia because they relate to the same subject or object (i.e., sex offenses) . . . (Ballantine’s Law Dictionary, 3d Ed.1969) . . . [and] [i]t is well settled that a word common to two statutes which are in pari materia must be given the same meaning in each enactment.” (F 10.42 n1, citing *Gonzales & Co.* v. *Dept. of Alc. Bev. Control* (1984) 151 Cal.App.3d 172, 178 and *Dieckmann* v. *Superior Court* (1985) 175 Cal.App.3d 345, 356.)

Thus, a strong argument can and should be made that the statutory definition of “menace” in section 261(c) must be given as to all charged sex crimes, and that the court’s failure to do so sua sponte is error.

C. **The CALJIC Hodgepodge and Opportunities for Definitional Errors as to Force, Duress & Menace.**

A review of the standardized CALJIC instructions shows that the required definitions of force, duress and menace are provided sparingly and inconsistently. When, as is typically the case, the CALJIC instructions are specifically followed to the letter, this will thus afford appellate advocates with numerous possible arguments about the failure to give the required definitions. For rape, CALJIC 10.00 includes, as one would expect, the statutory definitions of “menace” and “duress,” but includes no definition of “force.” Thus, if you have a case where there is any kind of factual dispute as to whether a rape was perpetrated by use of force, or whether the force employed was only to commit the act of penetration itself, the failure to give the correct definition of “force,” as recognized by the courts in *Elam*, *Mom* and *Bergschneider* would be error.

As to the triad of other forcible sex crimes, sodomy, oral copulation, and foreign object penetration (§§ 286, subd. (c)(2), 288a, subd. (c)(2) & 289, subd. (a)(1)), the pattern CALJIC instructions provide no definitions of force, duress or menace. (CALJIC Nos. 10.20, 10.10 & 10.30.) Thus, where there is weak or equivocal evidence of some or all of these elements, and the prosecution is relying on them to convict, the failure to define these terms becomes an arguable appellate issue.

For a forcible lewd act (§ 288(b)), the pattern instruction, CALJIC No. 10.41 defines “force” but not “menace” or “duress.” Thus when, as is often the case, the evidence of force used for a lewd touching is weak or equivocal, and the prosecutor falls back on “duress” or “menace” based often on the specific adult - child relationship, the failure to define these terms provides a clear argument for error. Finally, in child molest cases it bears noting that the crime of “aggravated sexual assault” under section 269, which elevates certain lewd acts to 15 to life crimes, usually includes, as an element, the commission of one of the foursome of sex crimes by means of force, menace, or duress (inter alia). Thus, the same arguments about sua sponte duty to define these terms will apply to most prosecutions under the draconian section 269.

D. **Federal Constitutional Error**.

The point of all this is that the failure to define a technical legal term which is an element of a charged crime is not just error, but is federal constitutional error in that it results in incomplete and/or misleading instructions on elements of charged crimes. (See, e.g., *People* v. *Harris* (1994) 9 Cal.4th 407, 424-425.)

Indeed, some late 1980s case law classified this type of error as requiring per se reversal, reasoning that the omission deprives the defendant of the right to have the jury determine every material element of the crime beyond a reasonable doubt. (*People* v. *Reynolds*, *supra*, 205 Cal.App.3d at p. 779; *People* v. *Shoals*, *supra*, 8 Cal.App.4th at pp. 489-490.) The reasoning of these cases does not logically survive more recent decisions from the high courts of California and the United States, which hold that *Chapman* harmless error analysis[4] applies even to the failure to provide any instruction on an element of a charged crime. (*People* v. *Flood* (1998) 18 Cal.4th 470, 492-504 and *Neder* v. *United States* (1999) 527 U.S. 1, 8-15.) After these cases, we should argue that the *Chapman* standard applies. Thus, when the jury lacks definitional guidance as to the unique meanings of force, duress and menace in sex crimes, reversal is required unless the prosecution can establish that it's "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. . . ." (*Neder*, *supra*, at p. 18.)

E. Here, But Not There?

It's not always going to be simple. Many times in sex crime cases the charges involve multiple crimes, each with its own separate instruction, some of which contain the pertinent definitions, and others of which do not. For example, your client could be charged with two counts of aggravated sexual assault on a child, based on a rape and an oral copulation, and a 288(b). On the rape-based 269, the jury would get the correct definitions of duress and menace, and on the 288(b), they'll get the correct definition of "force." Anticipate that the government will argue in its brief that the jury would have reasonably applied these correct definitions to all of the charged crimes, and the instructions, taken as a whole, are therefore correct and complete. (See, e.g., *People* v. *Burgener* (1986) 41 Cal.3d 505, 538, disapproved on other grounds in *People* v. *Reyes* (1998) 19 Cal.4th 743 [correctness of jury instructions determined from the entire charge, not parts of an instruction or a particular instruction].)

Your response to this line of argument – or, more effectively, your attack by anticipation in the opening brief – will be to point out that the instructions given as to each specific crime apply, by the express language of the instruction, *only* to these particular crimes, usually commencing with language to the effect of, "In the crime charged in count 3, forcible lewd act on a child [etc.]. . . ." The jury is told to apply that instruction only as to the particular crime for which it is given, and jurors, as we all know, are presumed to follow instructions carefully. (See, e.g., *People* v. *Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions."] The natural response of jurors, after being told that a particular definition of "menace" applies to one

[4] *Chapman* v. *California* (1967) 386 U.S. 18, 24.

crime, would not to be to apply the same definition to another crime – at least not without guidance from the court [or counsel] on this subject – but to apply the given definition of menace to the crime to which it is attached, and apply their own common sense understanding of the term to the others.

F. Related and Important Side-Issue: Attacking Sufficiency of Evidence Based on Insufficient Evidence of Force/Menace/Duress/Threats, etc.

This is supposed to be an extended essay about instructional error in sex crimes. However, a short tangent is necessary here. If you have a case where the evidence of the required elements is weak, or simply absent, you should, of course, raise a sufficiency of evidence argument, which you can then follow up with an instructional error claim, as discussed above, and/or a lesser included instructional error argument, as discussed below. If you can persuade a state or federal court that there wasn't sufficient proof of one of the required elements, then the conviction on that charge must be reversed, without any retrial of the charge.

Of course, sufficiency claims face a very tough, uphill road because the standard of review is so unfavorable. Although it is settled that substantial evidence must support each essential element of the offense (*People* v. *Johnson* (1980) 26 Cal.3d 557, 576; *People* v. *Ceja* (1993) 4 Cal.4th 1134, 1138), we are normally doomed by the relaxed standard as to what is "substantial," in which the reviewing court examines the entire record in the light most favorable to the judgment and presumes the existence of every fact that can reasonably be deduced from the evidence, asking ". . . whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.". (*People* v. *Towler* (1982) 31 Cal.3d 105, 117, quoting *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319.) Keep in mind, though, that sometimes you can win this claim on one of several convictions where the showing is insubstantial. Sometimes in multi-count cases, there is solid proof as to some or most counts, but a failure to prove that one or more of the acts involved force, duress, menace or threats. In those cases – particularly where a partial reversal will still leave the defendant with a lengthy sentence – reversals are to be had as to the counts with the weak evidence. Also, often the court can simply reduce the conviction to a lesser included crime – e.g., a nonforcible lewd act under section 288(a), rather than a forcible 288(b) – which can benefit your client in terms of the sentence that can be imposed.[5]

My other point here would be that even where you think there's enough for court to hang its hat and find sufficient evidence, raising a sufficiency argument helps to set up related arguments on instructional error as to elements, and/or LIO instructional error. I always like to make the most detailed argument about how weak the evidence was in a sufficiency claim; you can then refer back by way of more cursory summary in your prejudice discussion of instructional error.

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[5] Although 288(a) and (b) inexplicably have the same 3, 6, 8 sentence range, the forcible crime is subject to the full term consecutive provisions of subdivisions (c) and (d) of section 667, while the nonforcible crime is not.

Keep in mind that a claim of insufficient evidence is always federal constitutional error because the defendant has a due process right to have the prosecution prove all the elements beyond a reasonable doubt. In this regard you must *always* cite the applicable U.S. Supreme Court case law – i.e., *Jackson* v. *Virginia*, *supra*, 443 U.S. 307 and, if the insufficiency is to an enhancement provision which increases the maximum term, *Apprendi* v. *New Jersey* (2000) 530 U.S. 466 – in order to preserve your client's rights to raise the sufficiency claim in a federal habeas petition. (See *Duncan* v. *Henry* (1995) 513 U.S. 364 [requirement that federal constitutional claim be presented and exhausted in state court before collateral federal review is allowable]; and 28 U.S.C. § 2254(d)(1) [AEDPA requirement that state court's decision only be reversed if it is "'contrary to or involves an unreasonable application of, clearly established federal law as determined the but Supreme Court of the United States"].)

However, a word of warning as to sufficiency claims involving the force-duress-meance-threats elements, which applies equally to prejudice arguments for instructional errors on the same elements. Often a case is presented to the jury, in terms of evidence and prosecution argument, based on more than one theory of crime – that a parental figure's lewd acts were committed by force and duress, force, menace or threat, etc. To sustain a sufficiency argument, you will have to persuade the appellate court that there was a failure of proof as to each such element, discussed separately, since even if there's insufficient proof of force, it's enough if the court can find an atmosphere of compulsion amounting to duress in the surrounding circumstances of sexual acts.

Of course, similar problem will arise in prejudice discussion of errors on definition of elements, and in failure to give lesser included instructions. You may have a strong case that the court gave erroneous instructions on "duress" that included threat of hardship, but lose because the court finds overwhelming evidence of "force" in the crime, rendering any error harmless. Here too you will have to argue the weakness of proof of all the various paths to conviction for which evidence and/or argument are presented by the prosecution. You can, for example, argue in the context of instructional error, subject to the stringent *Chapman* standard, that the erroneous instructions on duress require reversal because the evidence of force, though arguably strong enough to survive a sufficiency challenge, it was sufficiently weak or equivocal that there is not a strong likelihood that the jury would have convicted on this theory, and thus it is not "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. . . ." (*Neder*, *supra*, 527 U.S. at pp. 18-19.)

In this regard, always keep in mind that your prejudice arguments, even more than sufficiency arguments, are your chance to put together the great closing argument trial counsel probably didn't make; since you are not, in such an argument, restricted to a review of the evidence in a light favorable to the government's case, a prejudice argument as to instructional error gives you the chance to painstakingly point out all of the weaknesses and inconsistencies in the prosecution's case, and all the ways in which a rational jury, properly instructed, could have doubted the sufficiency of proof of duress, force, or what have you. Remember: if you've got something to argue, never make weak or abbreviated prejudice argument on the facts; and if you've only got a little bit to argue, make the most of it, emphasizing the strict nature of the "harmless beyond a reasonable doubt" test.

Finally, if you lose on sufficiency grounds, keep plugging with the various instructional arguments presented here as a more fruitful area of attack.

II. **Other Instructional Error Element Issues**

A few suggestions of some additional instructional error issues concerning the elements of sex crimes is provided here, with no claim of being exhaustive. You should always look for your own, comparing the language of statutes with instructions, and utilizing the frequently updated resource of FORECITE for guidance.

A. **Error in Sodomy Instruction re: Penetration Element**

(Note: You will find this argument in FORECITE (F-10.20e.) However, I can attest that it was I who dreamed it up while assisting our panel attorney Jan Stiglitz on a case, and that it was passed on to FORECITE after I phoned Tom Lundy to ask if anyone had ever raised the issue, and, as it turned out, no one had. I say this not only to beat my own drum, which I do enjoy doing, but also to encourage all of you to share your own instructional error ideas with FORECITE. Although Tom and his colleagues are making some dough from FORECITE, its value as a collective resource is nearly immeasurable, and we owe it to each other to pass on our own brain work about instructional issues – good, crazy or clever – to FORECITE for dissemination to the appellate and trial counsel cadre.)

The statutory definition of sodomy is "sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (§ 286.) This creates *two* discrete elements of the actus reus of the crime, the first being "contact" and the second "penetration"; from this statutory language, it is obvious that no conviction is proper unless both these elements are proven. Since penetration, by definition, is more significant than mere "contact," it's the second element, penetration, which is controlling. At least one case, *People* v. *Joiner* (1989) 204 Cal.App.3d 221, 224, holds that failure to instruct on penetration is constitutional error.

The 5th Edition of CALJIC defined sodomy as follows: "An act of sodomy is sexual conduct consisting of any penetration, however slight, of the anus of one person by the penis of another." (CALJIC No. 10.20 - 10.26 (5th ed. 1988).) This instruction properly resolves the ambiguity of the statute by making it clear that *penetration* is the real requirement.

This correct instruction was inexplicably altered in the 6th Edition of CALJIC, where the definition of sodomy reads as follows:

> "Sodomy" is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.

(CALJIC Nos. 10.20 - 10.26 (6th Ed., 1996.)

Of course, this instruction has the beauty of more accurately tracking the language of the statute. But, in so doing, it erroneously suggests that "penetration, however slight" *means the same thing* as "contact"; this is not so. Clearly, mere "contact" is lesser and different than penetration. You can have contact with a permeable object without penetrating it. To take an unrelated example, I can achieve a "touching" of a ripe peach without penetrating its skin, even though not much is required for such a penetration.

Thus, the instruction is defective in failing to explain that penetration means something more than mere "contact." If the trial court instructs pursuant to an unmodified version of the current CALJIC No. 10.20 et seq., a strong argument can be made that the court is giving the jury misleading and incorrect instructions on the crime of sodomy. Instructions on sodomy are incomplete if they do not make it plain that the requirement of "contact" and "penetration" are *separate* elements requiring proof, and mere evidence of contact does not prove penetration.

The requirement of "penetration" is an element of the charge requiring proof beyond a reasonable doubt. (*Neder* v. *United States*, *supra*.) Mere evidence of contact does not prove penetration and, hence, the current CALJIC instruction implicates the federal constitutional right to full and accurate instructions on the elements of charged crime. (*Ibid*.)

This means that this type of error triggers the strict *Chapman* test, compelling reversal unless the error can be shown to be harmless beyond a reasonable doubt. Of course, if the evidence unquestionably shows penetration, the error will be harmless even under this standard. However, in many sodomy cases, there may be strong evidence of a touching but weak or equivocal evidence of penetration. In such cases, a sufficiency argument will generally fall on deaf ears, under the relaxed "substantial evidence" standard. However, on the same facts, the instructional error argument presented here would require reversal under *Chapman* harmless error analysis.

B. Odd Facts Make Bad Law, But Try to Make Something Out of it: 288's Where the D Directs the V to Do the Touching, for D's or V's Gratification, and the Requirement of a Modified Instruction on Actus Reus and Specific Intent.

It has been clear for some time now that a defendant can be culpable for a violation of section 288(a) where the touching is done by the child victim on his or her own person at the instigation of a defendant acting with the required specific intent. (*People* v. *Austin* (1980) 111 Cal.App.3d 110, 115-116; accord, *People* v. *Meacham* (1984) 152 Cal.App.3d 142, 152-154, *People* v. *Gaglione* (1994) 26 Cal.App.4th 1291, 1300.) Putting the holdings of these three cases together, a violation of section 288(a) can be committed without an actual touching by the defendant where (a) the defendant instructs or directs a child under the age of 14 to touch his or herself, (b) the child actually touches herself and (3) the defendant has the specific intent to arouse, appeal to or

gratify the sexual desires of either party. (*Ibid*.) [6]

You may think this odd type of crime is one you'll never see. But I've had one such case, and have seen or heard about several others, mostly connected with the taking of lewd photographs or videos, where the defendant never actually touches the victim, but directs him or her to touch himself or herself in a lewd manner.

In any case, special instructional guidance is required when a 288(a), or other sex crime is charged based on the victim doing the touching his or herself. In addition to the standard instructions given pursuant to CALJIC No. 10.41, a proper instruction, modeled after the holdings in the above cases, would read as follows:

> The touching required by section 288(a) may be done by the child of his or her own person if the following elements have been proven beyond a reasonable doubt: (a) the defendant instructed or directed the child under the age of 14 to touch his or herself, (b) the child actually touches his or herself and (3) the defendant has the specific intent to arouse, appeal to or gratify the sexual desires of himself or of the child.

A failure to instruct on each of these three non-standard elements – the act of direction or instruction by the defendant, the requirement of an *actual touching* by the victim, coupled with the required sexual intent on the part of the instigator – leaves the jury to speculate as how the defendant could have committed the requisite "touching" element of a violation of section 288(a), and how to apply the mental state requirement of the law. Since instructions on this element of the crime as committed are essential to a proper finding of aiding and abetting culpability, an instruction on such "constructive touching" (*People* v. *Meacham*, *supra*, 152 Cal. App.3d at pp. 152-154) is required sua sponte as a general principle of law relevant to the issues raised by the evidence. (*People* v. *Breverman* (1998) 19 Cal.4th 142, 154; *People* v. *St. Martin* (1970) 1 Cal.3d 524, 531.)

This type of instructional omission triggers the *Chapman* test for harmless error analysis because it implicates a defendant's right to jury findings, beyond a reasonable doubt, as to all of the elements of a charged crime. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 69, *People* v. *Harris*, *supra*, 9 Cal.4th at pp. 424-425.) Although a harmless error argument, even under *Chapman*, may be hard to make with certain factual scenarios, a strong argument can be made when, as is often the case with such charges, the lewd touchings by the victim of his or herself were done for the purpose of

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[6] Presumably, the reasoning of these cases could apply to other nonforcible sex crimes involving minors. For example, digital penetration under section 289, subdivision (j), requires that the defendant "participate" in an act of penetration of the genital opening of a person under 14, and ten years younger than the defendant, by a foreign object, and that such act be done with the purpose and specific intent to cause sexual arousal, gratification, or abuse. A defendant could be charged with this crime if he instigated such conduct by a minor for his or the victim's sexual gratification, abuse, etc.

facilitating the taking of video or photographs. One can at least argue that the defendant's intent was to disseminate the videos or photographs, for profit or other motives, and not for sexual gratification. Without proper instructional guidance, a jury could convict based on a self-touching by the victim where the *victim* had the required lewd intent. With proper instructions, the same jury could reasonably rejected the "lewd intent" requirement as applied to the defendant's mental state at the time of the touching, signifying that the error was not harmless beyond a reasonable doubt.

C. **Aiding and Abetting Instructional Errors.**

If your client is not the actual perpetrator of some or all charged crimes, instructions will have to be given as to aiding and abetting culpability. Typically, this means the jury is given the standard instructions pursuant to CALJIC Nos. 3.00 and 3.01, and nothing else. These instructions are deficient in several respects, two of which are highlighted here. First, the instruction fails to convey the requirement that an aider and abettor act with a *specific intent* to facilitate the perpetrator's commission of the charged crime. (See *People* v. *Mendoza* (1998) 18 Cal.4th 1114, 1131.)

This omission is very problematical for *general* intent offenses, such as rape and other forcible sex crimes, where the jury is particularly instructed that only general criminal intent is required. In such cases, as in *Mendoza*, which involved a general intent target crime of shooting at an occupied building, the instructions on aiding and abetting, which vaguely suggest a required "purpose" of facilitating the charged crime, are trumped by the general intent instructions, which tell the jury that the defendant need only intend to commit the act, and need not even know that it is criminal.[7]

A second failing in the standard instruction under CALJIC No. 3.01 is the absence of any requirement that the jury find that the perpetrator committed the underlying crime. That instruction requires proof that a person, acting with (1) knowledge of the perpetrator's unlawful purpose and

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[7] FORECITE also suggests a corollary argument for specific intent crimes, based on the state supreme court's holding in *People* v. *McCoy* (2001) 25 Cal.4th 1111, contending that the holding in that case means that where aiding and abetting is not presented on a "natural and probable consequences" theory, the government must prove that an aider and abettor has *both* a specific intent to facilitate the perpetrator's commission of the crime, *and* that the aider and abettor must also share the perpetrator's specific intent – malice in a murder case such as *McCoy*, and, by analogy to our framework, lewd intent in the case of a specific intent sex crime such as 288(a) or (b). (See F 3.01n, discussing *McCoy*.) However, *McCoy* may be limited to its unusual facts (homicide aider and abettor convicted of greater crime than perpetrator), based on settled case law holding that an aider and abettor need have the same specific intent as the perpetrator, but is rather said to "'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People* v. *Beeman* (1984) 35 Cal. 3d 547, 560.)

(2) the intent or purpose of facilitating the commission of the offense, (3) aid, promote, encourage, or instigate, through act or advice, the commission of a crime. (CALJIC 3.01; *People* v. *Beeman*, *supra*, 35 Cal.3d at p. 561.) There is a gaping hole in this pattern instruction in that nowhere is a jury told that to find liability of an aider and abettor, they must *first determine the culpability of the perpetrator*. Decisional law makes it clear that this is a prerequisite to aider and abettor liability. (See, e.g., *People* v. *Woods* (1992) 8 Cal.App. 4th 1570, 1586; *People* v. *Patterson* (1989) 209 Cal. App.3d 610, 614; and *People* v. *Luparello* (1986) 187 Cal.App.3d 410, 439; see also the post-*Prettyman* version of the "natural and probable consequences" corollary to aiding and abetting culpability, which requires, inter alia, findings (1) that the charged crimes were committed and (2) that the defendant intended to aid and abet a lesser crime and that (3) a co-principal in the crime which the defendant intended to aid and abet committed the charged crimes. (CALJIC 3.02 (6th Ed.).)

Both these errors implicate a defendant's federal constitutional rights since proper instruction on the elements of aiding and abetting is the equivalent of instructions on the elements of crimes when the prosecution relies on an aiding and abetting theory. (*Martinez* v. *Borg* (9th Cir. 1991) 937 F.2d 422, 423-425.)

I have attached sample briefing from a case involving both these two issues *and* the failure to instruct on constructive touching, as applied to an aider and abettor. (See Sample Brief No. 1.)

III **A Big Instructional Error Tip: Always Watch For Jury Questions on Elements of Crimes, and the Court's Response**.

One of the best ways to find a winning instructional error argument is by effectively mining the deliberating jury's requests for clarification or explanation of instructions. The leading case on this subject is *People* v. *Thompkins* (1987) 195 Cal.App.3d 244, where the court artfully explains the enhanced nature of the trial court's instructional duties when a deliberating jury requests clarification on an issue.

> A jury's request for reinstruction or clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration. Why has the jury focused on this issue? Does it indicate the jurors by-and-large understand the applicable law or perhaps it suggests a source of confusion? If confusion is indicated, is it simply unfamiliarity with legal terms or is it more basically a misunderstanding of an important legal concept?

(*Id*., at p. 250; cited with approval in *People* v. *Beardslee* (1991) 53 Cal.3d 68, 97.)

When such queries are presented to a trial judge, the usual temptation is to reiterate instructions already given, or emphasize particular parts of them. However, as the court in *People* v. *Moore* (1996) 13 Cal.App.4th 1323, 1331 notes, questions from a deliberating jury "can present a court with particularly vexing challenges . . .", and the trial court must weigh the "urgency to

respond with alacrity . . . against the need for precision in drafting replies that are accurate, responsive, and balanced." The trial court's duty to respond requires that the court "do more than figuratively throw up its hands and tell the jury it cannot help. It must consider how it can best aid the jury and decide whether further explanation is desirable, or whether the reiteration of previously given instructions will suffice." (*Ibid*.)

Thompkins teaches that the typical trial court response, taking the easy way out and reiterating instructions already given, though "having the virtue of simplicity . . .", will often be "inadequate . . . " [and] will suggest[] that the court failed to consider what was motivating the jury's questions." (*People* v. *Thompkins*, *supra*, at pp. 250-251.) Misinstruction, or failure to give required instructions in response to a deliberating jury's question can strongly enhance the argument that the error was not harmless. As *Thompkins* explains, "there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." (*Id*., at pp. 252-253.) With most instructional error, our job as counsel on appeal is to comb the record to see if there are indications whether a particular error could have effected the jury's deliberations and verdict; but in cases involving inadequate or improper instructions in response to a deliberating jury's query, it is transparently obvious by the nature of the error itself that the jury had zeroed in on the issue in question, and there is thus an overwhelming inference that the faulty, erroneous, or inadequate instructions from the trial court improperly influenced the jury's verdict.

I have attached a sample argument in sex crime case involving a jury's query about aiding and abetting culpability. (See Sample Brief No. 2.)

IV. **Lesser Included Instructions.**

In a case with weak or equivocal proof of required elements in a sex crime – e.g., of the force/duress/menace/threats element, or of penetration – it will sometimes be difficult or impossible to put together either a winning sufficiency claim or successful instructional error argument. With such facts, the next best recourse will often be an argument of reversible error for failure to sua sponte give required instructions on lesser included offenses, or "LIOs" as we like to call them for short.

A. **The Rules to the LIO Game.**

I will assume that most of this is already known to most folks reading this, or will be covered in the homicide materials. So, I will go through this quickly.

We all know the *Breverman-Birks* saga.[8] A couple years back we were all worried about review grants by the state supreme court in *Breverman* and *Birks* which appeared to respectively threaten the long-settled requirement that judges sua sponte instruct on lesser included offenses

[8] *People* v. *Breverman* (1998) 19 Cal.4th 142; *People* v. *Birks* (1998) 19 Cal.4th 108.

shown by the evidence, and the more recent rule of *People* v. *Geiger* (1984) 35 Cal.3d 510 requiring a judge to instruct on lesser related (and not included) offenses ("LROs") upon request. We lost two thirds of the battle. In *Birks* the court obliterated the *Geiger*-created right to requested instructions on related-but-not-included crimes; however, the same court, on the same day, reaffirmed in *Breverman* the right to instructions on lesser included crimes, but deprived us of our cherished *Sedeno* standard of all-but per se reversal, leaving us with the weak *Watson* harmless error test.[9]

The loss of access to alternative verdicts on lesser-related crimes is damaging in the sex crime arena, where many of the crimes lack meaningful included offenses when there is a failure to prove a required element. However, we still have lesser-includeds to kick around, and can often make good use of this rule, even with the relaxed prejudice test. Also, as noted briefly below, there remain some creative strategies for attempting to federalize LIO instructional error and for arguing for a right to LRO instructions under the rubric of instructions on the "defense theory of the case."

1. **The Two Starting Rules**

The beginning question: what is a lesser included offense? The simple and settled response is that there are two answers, equally valid. First under the "statutory elements" test, a lesser offense is necessarily included in a greater one is "if the greater statutory offense cannot be committed without committing the lesser because all of the elements of the lesser offense are included in the elements of the greater. . . ." (*People* v. *Clark* (1990) 50 Cal.3d 583, 636.) Second, under the "pleadings" test, a crime is included "if the charging allegations of the accusatory pleading include language describing it in such a way that if committed in that manner the lesser offense must necessarily be committed." (*Ibid*.)

In the easy cases, the statutory elements test will suffice. A nonforcible lewd act with a child (§ 288(a)) is clearly included in a forcible lewd act (§ 288(b)). (*People* v. *Ward* (1986) 188 Cal.App.3d 459, 470-472.) But the demise of the LRO instructions requires us to creatively apply the pleadings test to the unique facts of a particular case, to try to fit certain crimes within the LIO rubric. For example, statutory rape (§ 261.5) is not necessarily included in the statutory elements of the crime of forcible rape because you can, of course, commit the greater crime without committing the lesser by raping someone over the age of 18. (See *People* v. *Montero* (1986) 185 Cal.App.3d 415, 433.) However, if the pleading in your case contains allegations indicating that the victim named in the charged forcible rape was under the age of 18, you may be able to make out an argument that statutory rape is included under the pleadings test.[10]

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[9] *People* v. *Sedeno* (1974) 10 Cal.3d 704, 720-721; *People* v. *Watson* (1956) 46 Cal.2d 818, 826.

[10] Bear in mind, though that the "pleadings" test has been limited to the accusation of the substantive crime itself, excluding even punishment enhancements, such as personal use of a firearm. (See *People* v. *Wolcott* (1983) 34 Cal.3d 92.) While I entirely agree with the analysis of Chief Justice Bird's dissent in that case, which holds that you should consider the entire accusatory pleading, I am still waiting for the first one of her dissents to become the law of this

The second question is, assuming we can show the charged crime has a lesser included offense subsumed within it under either test, under what factual scenario is a court obligated to instruct? Here too the rule is well settled (though frequently ignored in unpublished appellate opinions, at least in my anecdotal experience). The court must instruct on a lesser included offense "when there is evidence from which a jury composed of reasonable persons could conclude the defendant was guilty of the lesser crime." (*People* v. *Glenn* (1991) 229 Cal.App.3d 1461, 1465, citing *People* v. *Wickersham* (1982) 32 Cal.3d 307, 325.) The standard for determining whether there is sufficient proof favors the defendant, at least in theory:

> In making the determination whether to instruct on a lesser included offense, the "trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury." (*People* v. *Flannel* [(1979) 25 Cal.3d 668,] . . . 684.) "'[T]he fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon.'" (*Ibid*., quoting *People* v. *Carmen* (1951) 36 Cal.2d 768, 773.) As an obvious corollary, if the evidence is minimal and insubstantial the court need not instruct on its effect. (*Ibid*.; *People* v. *Kaurish* (1990) 52 Cal.3d 648, 696.) *Any doubts about the sufficiency of the evidence to warrant a requested instruction should be resolved in favor of the defendant.* (*Flannel*, *supra*, 25 Cal.3d at p. 685.)

(*People* v. *Glenn*, *supra*, ellipses in *Glenn*, emphasis added to make a point.) The upshot of this standard is that your client's testimony that there was no force, or no penetration, is good enough to require instruction on a lesser crime, even if the trial judge doesn't believe a word he says. This point needs to be hammered home, as it is frequently lost on appellate courts and the deputy attorneys general who ghost-write their opinions, who will often find a failure to instruct based on the absence of credible evidence, reasoning with perfect circular logic that since the jury convicted your client, they obviously didn't believe a word he said. Don't let them get away with it!

The other point as to the sua sponte duty is the unique one that instructions on LIO's are required without a request from the defense, even if a conviction on the lesser crime is inconsistent with the defense put forward at trial, and even when the defense specifically requests that such instruction not be given. (See *People* v. *Barton* (1995) 12 Cal.4th 186, 195-201, reaffirming *Sedeno* on this point.)[11]

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state. Perhaps if you are clever you can fashion an argument to the effect that *Wolcott* is no longer controlling because, under *Apprendi*, there is no longer any difference between substantive crimes and enhancements that increase the maximum punishment for crimes.

[11] However, be aware that if trial counsel requests that an LIO instruction not be given, and this request appears based on valid tactical considerations, the failure to instruct on the LIO, though error, will likely be found to be "invited error" which cannot be challenged on appeal. (See *Barton*, *supra*, at p. 198, citing *People* v. *Graham* (1969) 71 Cal.3d 303, 317-319.) But recall the point made above: it's only "invited error" if there is an *express* objection to the

This last point is an important one to keep in mind. Take, for example, a fairly typical 288(b) prosecution, with less-than overwhelming evidence of force, duress, menace or threats. Generally speaking, the defense presented in such cases will be that the acts described by the child never took place, and that the victim is making it all up for one reason or another. If the evidence presented by the prosecution as to the aggravating elements is such that a reasonable jury could find the defendant guilty of the lesser crime of nonforcible lewd acts under section 288(a), but have reasonable doubt as to the greater crime, the court has a sua sponte duty to instruct on this lesser even though the defense presented is entirely inconsistent with the defendant's conviction on this lesser crime.

The lesson here is an important one for the appellate practitioner: when looking for LIO's, don't be limited by defenses or arguments presented at trial, but look for them between the cracks in the prosecution's case.

B. **What are the LIOs in Sex Crime Cases?**

What follows is a summary of several accepted sex-crime LIOs, with a couple suggestions for some novel arguments. There is no effort to be exhaustive. I highly recommend FORECITE as a compendium of available and unavailable lesser included crimes. (See F LIO VI(A) "Lesser Included Checklist.") I also strongly recommend that you approach each case with an open mind – where there's a will, and facts showing something other than an overwhelming case, there's a possible LIO.

1. **Attempt**: An attempt to commit a crime is always a lesser included of the greater crime. (See § 1159, *People* v. *Vanderbilt* (1926) 190 Cal. 461, 464.) Clever wags may want to persuade you that attempt isn't a lesser included, because it requires a specific intent to commit the target crime, and the crime itself does not. To quote the sage Pat Paulsen, "Poppycock!" Attempt is a lesser included crime by fiat of statute and case law, at least until the state supreme court says otherwise. However, keep in mind that as to some crimes, such as assault, there *is* no attempted crime, and thus no lesser of attempt to instruct on. (*In re James M.* (1973) 9 Cal.3d 517, 521-522.) Similarly, it's hard to imagine a crime such as attempted continuous sexual abuse of a child under section 288.5.

If your case involves any kind of issue as to whether there was a completed actus reus, attempt is the relevant lesser. For instance, in the type of situation discussed above under sodomy, where there is weak or ambiguous evidence regarding penetration, attempted sodomy would be available.[12]

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pertinent instruction, and the objection is made for bona fide tactical reasons, and "not out of ignorance or mistake." (*People* v. *Bunyard*, *supra*, 45 Cal.3d at p. 1234.)

[12] Bear in mind, though, that if the case is a One Strike, Three Strike, or aggravated sexual assault case, conviction on this lesser makes no practical difference because the punishment will be the same, since the "one half" punishment rule of section 664 does not apply

Here's a twist, though: is there such a thing as an attempt to commit an "aggravated sexual assault" of a child under section 269? This would depend on whether that provision of the Penal Code describes a "substantive crime" or is just a "penalty provision." (*People* v. *Bright* (1996) 12 Cal.4th 652 [no crime of "attempted first degree murder"].) One of the few cases interpreting section 269 contains analysis strongly suggesting that it is a "penalty provision" and not a substantive crime. (*People* v. *Jiminez* (2000) 80 Cal.App.4th 286, 291 [§ 269 "increases penalties for enumerated sexual offenses . . ." in specified circumstances, indicating Legislature's intent to "aggravate punishment for forcible sexual offenses . . ." in these situations] Normally our side will want to argue that there is no such lesser. For example, if your client is charged with a 269 based on the underlying crime of forcible rape, and there is weak evidence of penetration, you will want to argue that the lesser included crime is attempted rape, not attempted aggravated sexual assault, since a reduction to that charge would involve a far lower sentence.

2. **Other Sex Crime LIOs:**

a. **Kidnap > False Imprisonment**: False imprisonment is a lesser of simple or aggravated kidnaping. (*People* v. *Magana* (1991) 230 Cal.App.3d 1117, 1120.) If you have a case where simple kidnap under section 207 or kidnap for rape is charged under section 209, and the evidence of forced movement that is substantial and/or increases risk of harm is weak (i.e., asportation wasn't far or risk-enhancing) or equivocal (the evidence indicates the victim may have voluntarily got into the defendant's car and traveled with him), argue error in failing to give instruction on the LIO of false imprisonment.

b. **Rape > Assault with Intent to Commit Rape > Attempted Rape**: In a forcible rape charge where evidence of penetration is weak as to one or all counts, argue LIO error in failing to instruct on the lesser crimes of assault with intent to commit rape (§ 220, *People* v. *Ghent* (1987) 43 Cal.3d 739, 756) or attempted rape. (*People* v. *Garcia* (1985) 166 Cal.App.3d 1056, 1067-1069.) Yes, I know the reasoning that a 220 is a lesser included of rape is suspect, since the logic of its required analysis – that every forcible rape necessarily includes an act of assault – would also mean that there is no difference between an attempted rape and an assault with an attempt to commit rape. But if the Lucas court says it's an LIO, then it's an LIO, at least until the George court says otherwise.

Of course, if the charged crime is a section 220 assault with intent to commit rape or oral copulation, you should argue that attempted rape or attempted oral copulation is a required lesser. (See *People* v. *Carapeli* (1988) 201 Cal.App.3d 589, 595 [rape]; *People* v. *Saunders* (1991) 232 Cal.App.3d 1592, 1598 [oral copulation].)

c. **Rape > or Ý Statutory Rape**: As noted above, if consent is the defense in a rape charge of a victim between the ages of 14 and 17, and the age of the victim is part of the accusatory pleadings, argue error in failing to sua sponte instruct on statutory rape (See *People* v. *Collins* (1960)

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to this type of indeterminate term.

54 Cal.2d 57, 59-60), but if there is no such allegation in the pleadings, you are out of luck. (*People* v. *Gutierrez* (1982) 137 Cal.App.3d 542, 547-548.)[13]

d. **Continuous Sexual Abuse of Child (§ 288.5) > or Ý Lewd Conduct with a Child (§ 288(a))**: Section 288.5 is a unique crime, since it requires, as elements of its commission, *either* the commission of three or more lewd acts with a child under section 288 or three or more acts of "substantial sexual conduct" as described in section 1203.066 (a probation ineligibility provision) within a prescribed period. Thus, on the bare allegation of a commission of a violation of section 288.5, your argument that a nonforcible lewd act under section 288(a) is a lesser included crime will fail, since you can commit the greater crime by means of the substantial sexual conduct route, which would not be a violation of section 288(a). (See *People* v. *Avina* (1993) 14 Cal.App.4th 1303, 1313-1314.) However, you still may have an argument that section 288(a) is a lesser under the pleadings test, if the prosecutor, as sometimes happens, alleges specific acts of violating section 288(a) in the accusatory pleading.[14]

I had a case once where there was weak evidence of the required number of acts with lewd intent, a substantial showing that the jury was having a very hard time convicting under section 288.5, but no 288(a) lesser for them to fall back on. While there was no specification of section 288(a) in the accusatory pleading, the prosecutor in that case had specifically elected in argument and via instructions to proceed solely on the theory that the underlying acts were violations of section 288(a), and not acts of substantial sexual contact. In that case, I tried to argue my way around the strict pleadings requirement, contending that the prosecutor's election effected an implied amendment of the accusatory pleadings that made section 288(a) a lesser included to section 288.5. The Kline-less panel of Division Two of the First District didn't buy my argument, but I think it was correct, not to mention extremely clever. So, I have attached the sample briefing of this issue. (See Sample Brief No. 3.)

C. **Arguing Harmless Error.**

The sample briefing argues both that the error was not harmless under the *Watson* test adopted in *Breverman*, but also recasts the error as violative of federal due process under *Clemons* v. *Mississippi* (1990) 494 U.S. 738, 746, thus requiring *Chapman* analysis. In all LIO cases, I suggest that you adopt such arguments: assume that the California courts will give you *Watson* only, since that's all *Breverman* requires; but federalize the LIO argument under *Clemons* and the due process clause of the Fourteenth Amendment, since this will at least arguably turn your claim into

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[13] Also, bear in mind that forcible lewd conduct (§ 288(b)) is not an LIO of forcible rape, even if the victim's age is alleged in the pleadings, because the specific intent requirement in the lesser crime is absent from the greater crime. (*People* v. *Stansbury* (1993) 4 Cal.4th 1017, 1069.)

[14] Of course, a prosecutor may choose to charge the underlying 288(a)s in the alternative, with the "either/or" instruction given under CALJIC No. 17.03, which will obviate the need for LIO instructions.

one cognizable under AEDPA in a federal habeas petition.

As with all prejudice arguments, in your *Watson* argument, pull out all the stops: utilize all of the record to demonstrate how close the facts were on the disputed elements, how the arguments of counsel hotly disputed this point, and why the jury's lengthy deliberations, queries to the judge, and/or partial acquittals or hangs show what a close case this was as to this issue.

V. **Affirmative Defense Instructions**

A close cousin of the lesser included instruction requirement is the rule requiring sua sponte instructions on "affirmative defenses." (See *People* v. *Sedeno*, *supra*, 10 Cal.3d at p. 716.) The sua sponte duty to instruct on such defenses arises in a slightly more narrow category of situations than for LIO's. Such a duty arises "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People* v. *Sedeno*, *supra*, at p. 716.)

A. **What is an affirmative defense?**

The answer is not particularly simple. There are two such types of defenses – those where the defendant has a burden to prove the facts establishing the defense by a preponderance of evidence, such as entrapment (see, e.g., *People* v. *Barraza* (1979) 23 Cal.3d 675), and those where a set of facts related to, but in addition of, the actus reus of the crime negate the mens rea of the crime, such as a reasonable but mistaken belief in consent to a sexual act, where the jury must acquit if it has reasonable doubt whether criminal intent is shown in light of the defense presented. (See *People* v. *Mayberry* (1975) 15 Cal.3d 143.) The best way to define an affirmative defense, and thus requiring sua sponte instruction, is to contrast it to a "pinpoint" type defense, in which the defendant seeks to draw the jury's attention to particular facts in the record, such as intoxication, which negate criminal intent, and for which a defense request is necessary. (See *People* v. *Saille* (1991) 54 Cal.3d 1103, 1119.) (More on this type of defense in a moment.)

All right, I'm going to tell you the truth. There's no good definition of an affirmative defense. Let's just say that it's any defense in which a particular "affirmative" set of facts negates guilt for some accepted policy reason – the right to defend yourself, the non-culpability of acts based on reasonable mistakes, etc. Of course, if the courts have classified a particular defense as one for which sua sponte instruction is required under *Sedeno*, then you will simply argue error based on the authority of these cases. If you've got a defense which is not classified, simply argue by analogy that it matches those classified as affirmative defenses.

B. **What Prejudice Standard Applies?**

Speaking of unsettled points, no one really knows any more what the prejudice standard is for failure to instruct on an affirmative defense. Prior to *Breverman*, the answer was clear: the *Sedeno* test applied, compelling reversal unless "it is shown that 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given

instructions.'" (*People* v. *Stewart* (1976) 16 Cal.3d 133, 141, quoting *Sedeno*, *supra*, at p. 721; see also *People* v. *Lemus* (1988) 203 Cal.App.3d 470, 478.)

The $64,000 question is, when *Breverman* overruled *Sedeno* as to LIO instructional error, did it implicitly overrule *Stewart* as well? At least two post-*Breverman* lower appellate cases have eschewed the per se reversal route without directly holding that *Breverman* has superseded the *Stewart*-*Sedeno* standard. (*People* v. *Elize* (1999) 71 Cal.App.4th 605, 616; *People* v. *Gonzales* (1999) 74 Cal.App.4th 382, 391.) However, you should argue that until the state supreme court says otherwise, lower appellate courts are still bound by the *Stewart* rule, and must follow it. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.) Of course, while making this point, be sure that you also assume, *arguendo*, that *Watson* applies, and put together a strong argument that the error was not harmless under this test.

C. **Federalize, Federalize, Federalize.**

Instructional error involving a failure to instruct on defenses – whether styled "affirmative" or "pinpoint" – should always be argued as federal constitutional error. The Ninth Circuit has held, in a series of cases, that a criminal defendant is entitled under the Constitution to defense-requested instructions on a primary defense theory of the case which is supported by the evidence. (See *United States* v. *Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202; *Bashor* v. *Risley* (9th Cir. 1984) 730 F.2d 1228, 1240; and *Conde* v. *Henry* (9th Cir. 1999) 198 F.3d 734, 739.) Of course, after AEDPA, citation of Ninth Circuit authority is inadequate, and there is arguably no direct U.S. Supreme Court authority on this point. However, *Conde* was an AEDPA case which held that this right derives from U.S. Supreme Court authority, and the Ninth Circuit is where all our cases are going. So, raise and preserve this issue, and put something like the following paragraph into your arguments raising issues of instructional error concerning a defense theory of the case.

> A criminal defendant is entitled under the Constitution to defense-requested instructions on a primary defense theory of the case which is supported by the evidence. (*Mathews* v. *United States* (1988) 485 U.S. 58, 63-64; see also *United States* v. *Escobar de Bright*, *supra*, 742 F.2d at 1201-1202; *Bashor* v. *Risley*, *supra*, 730 F.2d at 1240; and *Conde* v. *Henry*, *supra*, 198 F.3d at p. 739.) This principle derives from the due process requirement of proof beyond a reasonable doubt of each of the elements of a charged crime (*In re Winship* (1970) 397 U.S. 358), and from the general rule from the Supreme Court that habeas relief is available when an erroneous instruction so infects the entire trial that the resulting conviction violates due process. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 72; *Hendricks* v. *Vasquez* (9th Cir. 1992) 974 F.2d 1099, 1106.)

I promise you that this magical paragraph will get you over the AEDPA hump, or will at least get you an order to show cause in federal district court. Well, it's worked for me so far, anyway.

D. **The *Mayberry* Defense of Reasonable Belief in Consent, Its Limitation in *Williams* to "Equivocal Conduct," and a Due**

Process Argument Attacking *Williams*.

As noted above, *Mayberry* established that in sex crimes involving adults, a reasonable, good faith belief that the alleged victim consented to the acts is a full defense. (*Mayberry*, *supra*, 15 Cal.3d 143.) In *People* v. *Williams* (1992) 4 Cal.4th 354, the Lucas court severely limited the *Mayberry* defense, holding, over a fine dissent by Justice Mosk, that it applies only when the defense comes forward with evidence which shows that the defendant was *mistaken* in his belief about consent. In light of *Williams*, *Mayberry* defense instructions are no longer required where, as in *Williams* itself, the defense case shows that the victim initiated and consented to the sexual acts, because this is "evidence of actual consent, not reasonable and good faith mistake as to consent." (*Id*., at p. 363.) Most troubling, after *Williams*, "a defendant must adduce evidence of the victim's *equivocal* conduct on the basis of which he erroneously believed there was consent." (*Id*., at p. 361.)

FORECITE makes a strong argument that this additional limitation on the *Mayberry* defense is unconstitutional. (F 10.65 n2.) Previous case law made it plain that conduct by the alleged victim which *unequivocally* demonstrates consent provides a stronger showing in support of the defendant's reasonable and good faith belief in consent than equivocal conduct. (See *People* v. *Burnham* (1986) 176 Cal.App.3d 1134, 1147.) This was a sound holding, and *Williams* provides no logical reason for departing from it.

An alleged victim of a rape could reasonably believe she was not consenting to such an act, but, at the same time, give indications to the defendant through her conduct which, to him, reasonably *and without equivocation* communicated consent. In such a case, a jury would be hard pressed to find that the victim had "actually consented," and exonerate the defendant on such basis. On these facts, though, the jury could find that the defendant reasonably, and in good faith, had a mistaken belief that the victim consented. However, the *Williams* requirement of "equivocal conduct" would mean that a defendant *would not even be entitled to* a *Mayberry* instruction on these facts. Thus, the defense will have presented evidence which negates the defendant's criminal intent, but would be precluded from raising and arguing his *Mayberry* defense based on *Williams*.

As my esteemed colleague Dallas Sacher wrote, under his FORECITE nom de plume,

> [T]he due process clause forbids a state from defining its criminal laws in such a way as to offend "'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citation]." (*McMillan* v. *Pennsylvania* (1986) 477 U.S. 79, 85.) Thus, due process is violated if a state uses "a freakish definition . . . [which] finds no analogue in history or the criminal law or other jurisdictions . . . ." (*Schad* v. *Arizona* (1991) 501 U.S. 624, 640 (plurality opn. of Souter, J.).)
>
> [T]he "equivocal conduct" limitation certainly qualifies as being both "freakish" and contrary to traditional common law. Indeed to the extent that the limitation is truly irrational, it cannot be countenanced under both procedural and substantive due process principles. (See, e.g., *Gray* v. *Whitmore* (1971) 17

> Cal.App.3d 1, 21.) [¶] [T]he constitution specifically allows a defendant to present relevant evidence in support of his cause, (*Rock* v. *Arkansas* (1987) 483 U.S. 44, 55-56.) In any system of ordered liberty, a defendant must have the right to have the jury consider any competent evidence offered to disprove criminal intent. Our traditional notions of fair play require no less. (*McMillan* v. *Pennsylvania*, *supra*, 477 U.S. at p. 85.)

(F 10.65 n2, citation format altered to conform to *California Manual of Style*.)

Thus, if a case presents itself to you with a *Mayberry* defense, but there is no evidence of *equivocal* conduct on the part of the victim, you should raise and federalize the claim of instructional error based on the above reasoning. Of course, when raised as federal constitutional error, in violation of due process, the applicable prejudice standard would be *Chapman*, and the presence of unequivocal evidence of consent, combined with the absence of any way the jury could apply such facts to exonerate the defendant, will likely require reversal.

E. **Other Sex Crime Affirmative Defenses.**

Here are a couple of other affirmative defenses available in sex crimes.

1. **Reasonable belief in majority of sex partner in statutory rape case.** (See *People* v. *Hernandez* (1964) 61 Cal.2d 529, 535-536.) This defense also applies to other "statutory" sex crimes of consented sexual conduct – sodomy, oral copulation, and digital penetration – with persons aged 16 and 17. (CALJIC No. 10.67, Use Note.) However, it has always been found inapplicable to any violation of section 288(a) (*People* v. *Olsen* (1984) 36 Cal.3d 638, 649), and has recently been found equally unavailing in the crime of lewd conduct with a 14 or 15 year old under subdivision (c) of section 288. (*People* v. *Paz* (2000) 80 Cal.App.4th 293.)

2. **Another *Mayberry* Defense Applicable to the crime of rape by intoxication.** Subdivision (a)(3) of section 261provides that a defendant commits the crime of rape by intoxication if the victim's incapacitating level of intoxication "was known, or reasonably should have been known by the accused." Therefore, an honest and reasonable but mistaken belief that a sexual partner is not too intoxicated to give legal consent negates the required criminal intent, and provides a complete defense to the crime of rape by intoxication. (F 10.02 c, citing *People* v. *Giardino* (2000) 82 Cal.App.4th 454, 471.)

VI. **Pinpoint Instructions**

As discussed above, the next category of instructions bearing on proof of the elements of the crime are the so-called "pinpoint" instructions, a rump category of instructions for which sua sponte instruction is not required. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. . . . [and] are required to be given upon request when there is evidence supportive of the theory. . . ." (*People* v. *Saille* (1991) 54 Cal.3d 1103, 1119.) Common examples of such defenses would be (1) voluntary intoxication to negate specific intent (*ibid*.), a defense which could apply in the sex crime situation

to crimes such as lewd conduct under section 288; and (2) inadvertent touching in a 288(a) charge, which FORECITE argues should be given upon request. (See F 10.41c.)

You can argue instructional error if a request for such instructions has been made, and the requested instructions are legally correct and non-argumentative.[15] California courts are applying the *Watson* standard to a refusal to give instructions pinpointing a defense to an element of a charged crime, reasoning that this merely effects the defense right to present some evidence, and not the right to present a particular defense. (See, e.g., *People* v. *Humphrey* (1996) 13 Cal.4th 1073, 1089.) However, you should federalize this issue by arguing that a failure to instruct on intoxication, or of a misinstruction that intoxication is irrelevant, deprives the defendant of consideration by the jury of the fact of his intoxication, and thus obliterates a defense permitted by California law, in violation of his fundamental right to present a defense. (*United States* v. *Sayetsitty* (9th Cir. 1997) 107 F.3d 1405 [defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense]; see *Crane* v. *Kentucky* (1986) 476 U.S. 683, 687 .)

VII. **Cautionary Instructions and "Uncharged Crime" Instructions**.

A. **Generally Speaking**.

A final category of instructional error involves instructions which caution the jury against inappropriate use of certain potentially prejudicial evidence, or limit the jury's consideration of such evidence. Here there is something of a hodgepodge as to whether instruction is required sua sponte, or a request is needed to require instruction. For example, if your client in a rape case has a prior conviction, a cautionary instruction pursuant to CALJIC 2.23 may be required sua sponte if the prosecution impeaches his credibility with the fact of such a prior conviction. (See *People* v. *Mayfield* (1972) 23 Cal.App.3d 236, 245, *People* v. *Lomeli* (1993) 19 Cal. App.4th 649, 654-655; but see *People* v. *Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [no sua sponte duty].)

However, if the same prior conviction is used as an uncharged crime to prove intent or common plan pursuant to Evidence Code section 1101(b), a cautionary instruction is normally not required absent a request. (*People* v. *Collie* (1981) 30 Cal.3d 43, 63-64.) While *Collie* states the general rule that there is no sua sponte duty to give other-crime limiting instructions, it also hypothesizes an exception where instruction is required without request because uncharged evidence is a crucial part of the prosecution's case. (*Ibid*.) At least two courts have found that such an instruction was required sua sponte in sex crime cases. (*People* v. *Willoughby* (1985) 164 Cal.App.3d 1054, 1067 and *People* v. *Nottingham* (1985) 172 Cal.App.3d 484, 497.) Also, keep in mind a related principle, namely that even if there is no request for a cautionary instruction concerning other crimes, if one is given, a court must give a correct instruction, and the failure to

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[15] A court can properly refuse "argumentative" pinpoint instructions, i.e., those which refer to "specified items or evidence" from which the jury is asked to draw "inferences favorable to the defendant." (*People* v. *Wright* (1988) 45 Cal.3d 1126, 1135.)

request a corrected version does not preclude a challenge to the court's error on appeal. (*Ibid*., citing *People* v. *Key* (1984) 153 Cal.App.3d 888, 899; see also *People* v. *Rubalcado* (1922) 56 Cal.App. 440, 443-444.)

Sua sponte instruction is also required for another category of cautionary instruction in sex crime cases, when the prosecution presents evidence of "rape trauma syndrome" or "child sexual abuse accommodation syndrome" (CSAAS). In such cases, the trial court has a sua sponte duty to advise the jury, along the lines of CALJIC No. 10.64, that such evidence can't be considered to show that the victim is telling the truth, but is only admissible to show that the victim's reactions are not inconsistent with rape or molestation. (*People* v. *Bledsoe* (1984) 36 Cal.3d 236, 251 [rule of limited admissibility] and *People* v. *Houseley* (1992) 6 Cal.App.4th 947 [sua sponte duty to instruct].)

B. **Propensity Instructions: 1108 issues**.

1. **Burden-Reducing Instructions**.

Once upon a time there was a hard and fast rule that uncharged crimes could sneak into a case for all sorts of reasons, but could never be used to show a propensity to commit crime or a criminal predisposition. (See. e.g. *People* v. *Garceau* (1993) 6 Cal.4th 140, 186.) All that ended when Evidence Code section 1108 was enacted, and upheld against a due process challenge by the California Supreme Court in *People* v. *Falsetta* (1999) 21 Cal.4th 903.[16]

A much more fertile area for appellate challenge arose out of this new law in the area of jury instructions. Following the model of section 1101(b) evidence, DA made-up instructions, and the original CALJIC instructions on uncharged crime propensity evidence directed jurors to first find the truth of the "preliminary fact" of the uncharged crimes by a preponderance of evidence, and then allowed them to infer, in a two step process, that (a) the defendant had a propensity to commit sex crimes, and (b) then infer from this that he was likely to commit, and did commit the charged crime. (See CALJIC 2.50.01 (6th ed. 1996).) Sensing that the DA's and courts had unwittingly handed us an unconstitutional burden-reducing instruction on a silver platter, appellate practitioners pounced in for the kill.

The results were rather puzzling. A pair of early opinions found constitutional error requiring reversal, but were then depublished by the state supreme court, without a review grant. Since then, nearly every court in the state has weighed in on this issue, with a virtually even split as to whether the instruction is an improper burden-reducer or just a typical inartful instruction with any possibility of confusion as to burden of proof cured by other instructions. (Compare *People* v.

[16] I leave out the entirely analogous section 1109, and domestic violence, only because it is not germane to the topic of sex crime instructions, and because the analysis can be carried over from one to the other.

Vichroy (1999) 76 Cal.App.4th 92, *People* v. *Orellano* (2000) 79 Cal.App.4th 179, *People* v. *James* (2000) 81 Cal.App.4th 1343, *People* v. *Frazier* (2000) 89 Cal.App.4th 30 and *People* v. *Younger* (2001) 84 Cal.App.4th 1360 [it's unconstitutional!] with *People* v. *Van Winkle* (1999) 75 Cal.App.4th 133, *People* v. *O'Neal* (2000) 78 Cal. App. 4th 1065, *People* v. *Regalado* (2000) 78 Cal. App.4th 1056, *People* v. *Jeffries* (2000) 83 Cal.App.4th 15, 22-25 and *People* v. *Waples* (2000) 79 Cal.App.4th 1389 [it's OK].) Of course, under Rule 29(a)(1), the supreme court is supposed to grant review when there is this kind of dispute to achieve "uniformity of decisions"; but the supremes have continued to deny review.

The only imaginable reason why the supreme court refuses to grant review is that the court may believe that the 1999 revision to CALJIC No. 2.50.01 takes care of the burden shifting problem. The new version adds the following paragraph:

> However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide.

(CALJIC No. 2.50.01 (1999 & 2001 rev.) Dicta in *Falsetta* suggests that this instruction is proper. (*Falsetta*, *supra*, 21 Cal.4th at pp. 923-924.) Recently an appellate court held that the new instruction suffered from the same constitutional infirmity as the old, concluding that the added paragraph was "insufficient to clearly delineate for the jury the use of the lesser standard of proof to establish the prior sexual offense and use of the inference to be drawn therefrom in connection with finding appellant guilty of the present crime beyond a reasonable doubt." (*People* v. *Reliford* (2001) 93 Cal. App. 4th 973, 978; but NOTE: review granted Feb. 13, 2002, case not citable, so slap my wrist for quoting it for informational purposes.)

As indicated, the supreme court has now, at last, granted review to consider the constitutionality of the revised CALJIC 2.50.01 instruction. (*Ibid*.) A negative result seems pre-ordained by the dicta in *Falsetta*. However, a constitutional challenge to both the new and old versions of CALJIC 2.50.01 as a burden reducing instruction should be raised in all cases to preserve the issue for federal habeas review.

Rather than lay out the constitutional argument as to why 2.50.01 violates due process by allowing a shortcut to conviction based on evidence and inference not subject to the reasonable doubt requirement, I have attached a short sample brief from a review petition I recently filed as to the older version of 2.50.01. (See Sample Brief No. 4.)

2. **Obligation to Instruct That 2.50.01 Doesn't Apply to Nonsex Crimes.**

A rump argument which has never been addressed in a published opinion is whether a court errs when it give propensity instructions under section 1108 but fails to limit the applicability of the instruction to sex crimes. By its plain terms, section 1108 only applies where the charged crime in question, as well as the prior crime, is one which fits the definition of a "sexual offense" in

subdivision (d)(1). (Evid. Code § 1108, subd. (a).)

The pattern instruction tells the jury that they can consider evidence of the uncharged crime to prove the defendant's propensity to commit sex crimes, and infer from this intermediary fact that "he was likely to commit and did commit the *crime or crimes of which he is accused*." (CALJIC 2.50.01.) Thus, the jury is likely to infer from this that the uncharged crime and propensity evidence applies to all crimes, in violation of section 1108's express limitations, and of due process limits on propensity evidence.

As noted above, there is typically no sua sponte duty to give limiting instructions without a request. (*People* v. *Collie*, *supra*, 30 Cal.3d at pp. 63-64.) However, where, as is frequently the case in the 1108 situation, evidence, argument and instructions concerning the uncharged crime take up a substantial part of the case, and are used to directly prove and infer the defendant's guilt, the *Collie* caveat applies because the evidence is "so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel's inadvertence [in failing to request a limiting instruction]. . .." (*People* v. *Nottingham*, *supra*, 172 Cal.App.3d at p. 497, quoting *Willoughby*, *supra*, at p. 1067, ellipses in *Willoughby*.)

Further, *Key*, *supra*, 153 Cal.App.3d 888, noted above, is almost directly on point. In that case, the trial court admitted evidence of a prior sex crime under section 1101, and gave a cautionary instruction under CALJIC 2.50 which failed to correctly advise the jury that they could consider the other crime evidence only to rape charges, and not to other counts to which the evidence was not admissible. The reviewing court in *Key* found error, despite the apparent absence of any request for such a limiting instruction. First, the court noted that "[i]t is the court's obligation to insure that given instructions correctly state the law and adequately assist the jury in resolving the issues those instructions address." (*Id*., at p. 898.) Then, citing as authority the supreme court's decision in *People* v. *Rollo* (1977) 20 Cal.3d 109, 122-123 & fn. 6, which required the trial court to "identify the precise evidence to which the other crimes evidence relates" (*Key*, *supra*, at p. 899), the court in *Key* concluded that there was a "corollary duty on the trial court to assist jurors by telling them the precise issues to which the evidence is limited." (*Ibid*.) Finally, the court, citing *Collie*, noted that while there is normally not a sua sponte duty to give the jurors a limiting instruction on other crime evidence, "when a trial court does give such an instruction specifically calling their attention to the significance of this substantially prejudicial evidence, it should do so accurately." (*Ibid*; see also *People* v. *Rubalcado* (1922) 56 Cal.App. 440, 443-444.)

Given the tendency of courts to blindly adhere to the *Collie* rule of "no request, no error," you should raise, as a backup, a claim of ineffective assistance of counsel in failing to request an instruction limiting the propensity instructions to the charged sex crimes. It's impossible to conceive of any tactical reason for not wanting to limit deadly propensity evidence to the crimes to which section 1108 allows it to be considered, given the highly prejudicial nature of such evidence. Where counsel's failure to take a particular action cannot be "explained on the basis of acceptable tactics or other reason which brings the conduct within the range of reasonable competence," the failure constitutes ineffective

assistance as a matter of law. (*People* v. *Cummings* (1993) 4 Cal.4th 1233, 1339; see *People* v. *Guizar* (1986) 180 Cal.App.3d 487, 492.)

3. **Error in Confusing Instructions Where Priors Admitted under More than One Theory**.

Very often when uncharged crime evidence is admitted under section 1108, it may also come in under section 1101(b) to show common plan, intent, identity, or to negate a *Mayberry* defense. The same prior may also come in for impeachment purposes. Rather than crafting a unified instruction which deals with all these subjects, what normally happens is that the court gives the jury several instructions covering the same evidence from different angles, each of which contains language telling the jury they can only consider the evidence of the prior criminal conduct for a specific purpose, and no other. Some effort has been made to correct this in recent revisions, which contain language to the effect that the jury not consider the evidence for any other purpose "unless instructed otherwise. . . ." (CALJIC No. 2.50.01, 2001 rev.)

Where instructions contradict each other in this manner, consider arguing that the confusing limiting instructions are impossible to follow, and thus so vague as to have no meaningful limiting impact.

VIII. **Sex Registration Instructions**

I know what you're thinking. The sex registration laws, and violations of section 290, are not really sex crimes, and issues of instructional error as to this crime don't really fit within this topic. But consider this: appeals of jury tried section 290 cases are compensated at $85 per hour under the guidelines; and, prosecutions under this section are the most severe version of collateral punishment, giving our clients sentences for as much as 25 to life based on their prior crimes and some petty act of failing to update registration. So, consider these former misdemeanors as sex crimes by default.

A. **A Sample Instruction.**

If you have ever sat down and tried to read Penal Code section 290, you probably couldn't finish; and if you did, you couldn't possibly remember half of what you read. It's one of the longest statutes ever written, it's impossibly complex and convoluted; odds are that by the time you finished reading it the Legislature will have amended it two or three times.

To make matters worse, you can peruse CALJIC until the cows come home, but will not find an instruction on the crime of failure to register or failure to notify of a change of address under section 290. In practice, this means the prosecutors write the instructions on this crime, which produces badly written instructions that tend to mix and match statutory language and case law to achieve the desired result of conviction. You should review such instructions carefully, looking both to the significant statutory provisions and relevant case law, and identify and raise your own instructional errors.

FORECITE has put together a sample instruction on section 290. (See F 18.56 b) It appears to be a largely accurate description of the elements of a violation of section 290 based on an *initial* failure to register within 5 days of coming into a new city or county, or after being released from custody. In my view, the FORECITE instruction has two deficiencies. First, it does not include a very common way of violating the statute, a failure, under subdivision (f) of section 290, to notify authorities within 5 days of a change of "residence address or location." Second, the FORECITE sample instruction describes the "knowledge" requirement, which the supreme court recently correctly engrafted into the law in *People* v. *Garcia* (2001) 25 Cal.4th 744, in terms which I consider to be too vague, without focusing on the requirement that the defendant have knowledge of a duty to register, not just generally speaking ("I'm a sex offender; I must register"), but contextually ("when I move or have a birthday, I must reregister").

Thus, I include the sample instruction below, with my own additions to the FORECITE text underlined.

Sex Offender Registration (PC 290): Elements

You may not convict the defendant of violating Penal Code section 290, willfully failing to register as a sex offender, unless all of the following are proven beyond a reasonable doubt:

1. [He] [She] suffered a qualifying sex offense for which he was required by law to register;

2. [He] [She] [resides] [attends school] [works] in the state of California;

3. [He] [She] willfully failed to register with the _____ [law enforcement agency] in which [he] [she] [temporarily resided] [was domiciled] [attended school] [worked], [within 5 working days of [coming into that [city] [county]] [[his] [her] birthday]] [of changing [his][her] [residence] [location]].

4. When [he] [she] was paroled or released from the place where [he] [she] was confined because of the commission of a sex offense which required registration, [he] [she] was informed of [his] [her] duty to register under Penal Code section 290 by an official in charge of the place of confinement and [he] [she] signed the form required by the Department of Justice stating [his] [her] duty to register under Penal Code section 290 will be explained to [him [her].

5. In addition to being formally notified by the appropriate officers as required by Penal Code section 290, the defendant actually knew of [his] [her] duty to register during the time period of [coming into that [city] [county]] [[his] [her] birthday] [changing [his][her] [residence] [location]].

If you have a reasonable doubt as to whether one or more of the above elements was proven, you must give the defendant the benefit of that doubt and find [him] [her] not guilty.

If you have a reasonable doubt as to whether the defendant willfully failed to register with actual knowledge of the duty to do so, you must give the defendant

the benefit of that doubt and find [him] [her] not guilty.

(F 18.56b, with WMR amendments underlined.)

If you do trial work, insist that this instruction be used, since it is the most authoritative instruction defining sex registration violations out there. For appellate work, carefully review the instruction given in your client's case, and see how it matches up with the FORECITE/Robinson instruction.

B. **Suggested 290 Instruction Issues**

In the discussion that follows, I focus on three issues concerning instructions in sex registration cases: (1) the meaning of "residence" in section 290; (2) the nature of a correct instruction on the "knowledge" element of sex registration violations; and (3) the implied inclusion of a "substantiality" requirement with respect to recent amendments to section 290 requiring re-registration when a person without a residence has a "change of location."

I have no doubt there are more "hot" issues out there. The law is such a jumble, and the prosecutors write the instructions, and no more fertile ground for error can be imagined. If you have one, let me know about it, let FORECITE know about it, and pass it around.

1. **"Residence"**

Subdivision (f) of section 290 requires a sex registrant to notify the authorities within five days of any "change of residence." But what is a "residence" for purposes of this statute? FORECITE suggests the following definition of "residence":

> As used in this instruction, the term "residence" means a dwelling place of some permanence which one keeps and to which one intends to return. A residence is not a place where one rests or shelters during a trip or a transient visit.

(F 18.56a, citing *People* v. *Horn* (1998) 68 Cal.App.4th 408, 414.) Unfortunately, the one case to visit this issue has ruled that there is no sua sponte duty to define "residence" because the word is used in its ordinary sense in section 290. (*People* v. *McLeod* (1997) 55 Cal.App.4th 1205, 1218-1219.) *McLeod* further holds that residence does not require definition even if requested by a deliberating jury. (*Id*., at p. 1219.) This latter conclusion is very questionable. There is sound authority for the proposition that even if a statutory term does not require sua sponte definition, a court must provide a correct definition when requested to do so by a deliberating jury. (See *People* v. *Miller* (1981) 120 Cal.App.3d 233, 236 [no sua sponte duty to define "great bodily injury," but court must do so when jury requests definition], cited with approval in *People* v. *Murtishaw* (1989) 48 Cal.3d 1001, 1022.)

Thus, if any issue arises in a case you are handling as to the meaning of "residence," and no

guidance is given to the jury, or guidance is given which is contrary to the above definition, an appellate issue may be present. I am attaching sample briefing on a related issue, concerning a deliberating jury's request for clarification about the meaning of "temporary residence," where this issue is intertwined with the problem of DA written instructions which confuse statutory elements and a court's duty to respond properly to a deliberating jury. (Sample Brief No. 5.)

C. **What Does *Garcia*'s "Knowledge" Requirement Mean?**

In *Garcia*, the supreme court held that where a violation of section 290 involves a "failure to act," the statute "requires the defendant to actually know of the duty to act." (*Garcia*, *supra*, 25 Cal.4th at p. 752.) This conclusion is based on the Legislature's use of the word "willfully" as an element of a violation of the registration requirement; after noting that "willfully" connotes "a 'purpose or willingness' to make this omission . . ." the court concluded that "[l]ogically one cannot purposefully fail to perform an act without knowing what act is required to be performed." (*Ibid*.) Noting that a jury could properly "infer knowledge from notice . . ." of the duty to register, the court added that "notice alone does not necessarily satisfy the willfulness requirement . . .", because "section 290 requires actual knowledge of the duty to register." (*Ibid*.)

The question left open by the ruling in *Garcia* is whether the "knowledge" requirement is a general one or a contextual, specific one. In other words, is it enough to satisfy *Garcia* and the willfulness requirement if the prosecution proves that the defendant knew that he was obligated to register as a sex offender, or must the prosecution prove that appellant knew *in the context of the particular alleged failure to notify the authorities*, that he had an obligation to act?

The latter interpretation must be the correct one, or else the "knowledge" requirement would have no meaningful significance. For example, if the evidence shows that a registrant (a) knew he was obligated to register annually at his birthday, but (b) was never told, and was unaware, of the requirement that he notify the authorities if he set up a second, temporary residence with his girlfriend every weekend (see, e.g., *People* v. *Horn*, *supra*, 68 Cal.App.4th 408), the prosecution has failed to prove that "the defendant to actually kn[ew] of the duty to act." (*Garcia*, *supra*, 25 Cal.4th at p. 752.)

In a recent unpublished opinion, a panel of the Sixth District agreed with this interpretation, finding that the state had to prove that the mentally handicapped homeless defendant knew that under the registration laws he was required to notify the authorities as to his temporary "locations" when he was homeless . (*People* v. *Kemp*, H018453, filed 4/23/02.)[17]

The new knowledge requirement of *Garcia*, especially as interpreted here, provides several

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[17] Of course I am not citing this unpublished opinion as authority, just to let you know what a right-thinking court we have in the Sixth District. You can find this and all other unpublished opinions on the state court website, at http://www.courtinfo.ca.gov/opinions/nonpub.htm.

promising areas for appellate challenge. In all appeals which you handle where the trial was held prior to the opinion in *Garcia*, you should begin by arguing that the evidence was insufficient because of a failure to prove the "knowledge" element – i.e., because there was no evidence that the defendant was advised about, or otherwise aware of, a requirement that he notify the authorities when he started sleeping under the Bay Bridge, instead of the Golden Gate Bridge, there was no proof that he "actually kn[ew] of the duty to act." (*Garcia*, *supra*, 25 Cal.4th at p. 752.) The backup argument would be one of instructional error. Assuming there was enough evidence on "knowledge" – from the notices given to the defendant, or from his testimony or actions – to survive a sufficiency attack, the failure to instruct on the "knowledge" requirement is federal constitutional error along the lines of *Flood* and *Neder* in omitting an element of the crime,[18] which cannot, on the facts of the case, be harmless beyond a reasonable doubt under *Chapman*.

If your case was tried after *Garcia* was decided, and the court and/or counsel were aware of *Garcia* (which is more than what often happens), there will probably have been some kind of instruction on "knowledge" as part of the 290 charge. In this situation, both the sufficiency and instructional error argument will have to be more narrowly tailored to address the lack of evidence and/or instructions on knowledge of the *particular* obligation to notify the authorities.

Assume, for example, that the instruction on knowledge was as generalized as the FORECITE suggested instruction, saying only that the prosecution must prove "that the defendant actually knew of [his] [her] duty to register. . . ." (F 18.56b) Assume further that in this hypothetical case, there was evidence that the defendant knew *generally* of his obligation to register, but either no evidence, or weak or equivocal evidence that he knew of the obligation to register when he started staying at his girlfriend's house on the weekends. In this situation, it can be argued that the generalized instruction on knowledge was constitutionally deficient because it either failed to adequately spell out the knowledge requirement or was, at best, ambiguous as to whether the knowledge element had to do with the general obligation to register or the contextual obligation to register when establishing a new second residence. The test for deciding whether confusing or ambiguous instructions constitute error is described in *Boyde* v. *California* (1990) 494 U.S. 370, 384. Instructions are erroneous if there is a "reasonable likelihood" that the jury understood the instruction in the improper manner complained of by the defendant. (*Ibid*.; see *People* v. *McPeters* (1992) 2 Cal.4th 1148, 1191.) Here, if we can win the battle on whether the "knowledge" requirement of *Garcia* is general or contextual, there is clearly a reasonable likelihood the jury would have understood the instruction as only requiring them to find that the defendant knew as a general matter that he had an obligation to register as a sex offender, and was thus erroneous.

1. Does the Law Requiring Notification of a "Change of Location" Mean that a Homeless Person Has to Notify the Police if He Moves His Sleeping Bag From One Side of a Doorway to Another, or is

[18] *Flood*, *supra*, 18 Cal.4th 470; *Neder*, *supra*, 527 U.S. 1.

There an Implied Requirement that Changes in Location Be "Substantial" Before There is A Duty to Notify the Authorities?[19]

In 1998, section 290 was amended to add language, now in subdivision (f)(1), which requires notification when a person required to register "changes his or her residence address *or location*. . . ." (Stats. 1998, ch. 930.) In a currently pending Sixth District case, a homeless defendant was convicted (and sentenced to prison for 25 years to life under the Three Strikes law) for violation of these "change of address or location" provisions based on evidence that he failed to notify the authorities that he moved the car he was sleeping less than a city block.

On these facts, the obvious question is whether "change of location" is intended by the Legislature to contemplate *any* change of the place where a homeless person resides, or whether the Legislature intended, and the courts should find, an implied requirement that such change of location be "substantial" in the sense of "more than slight or trivial." The obvious analogy is to the law of kidnaping. Early case concerning that crime, holding that kidnaping under section 207 occurred when there was forcible restraint accompanied by *any* movement, was overruled by the California Supreme Court four decades ago, with the court holding, in a series of cases, that the asportation requirement of kidnaping required "substantial" movement of a victim. (See, e.g., *People* v. *Cotton* (1961) 56 Cal.2d 459; *People* v. *Daniels* (1969) 71 Cal.2d 1119 and *People* v. *Stanworth* (1974) 11 Cal.3d 588.)

By parity of reasoning, the requirement that a homeless sex registrant notify the authorities of change of "location" must be construed as requiring a "substantial" change of location. Courts interpreting penal statutes must "avoid 'absurd consequences' and achieve a sensible construction." (*Stanworth*, *supra*, at p. 601, quoting *Cotton*, *supra*, at p. 465.) Our supreme court has noted in a different context:

> There is no principle of statutory or constitutional construction that takes precedence over the rule that an interpretation which leads to unreasonable and inequitable results will not be adopted if there is a reasonable alternative. [citations] Sutherland calls this the 'golden rule of statutory interpretation.' (2A Sutherland, Statutory Construction (4th ed. 1984) § 45.12, p. 54.)

(*Mutual Life Ins. Co.* v. *City of Los Angeles* (1990) 50 Cal.3d 402, 420.) Furthermore, any ambiguity in a penal statute must be resolved in favor of a defendant. (*People* v. *Hicks* (1993) 6 Cal.4th 784, 800; *People* v. *Davis* (1981) 29 Cal.3d 814, 828.)

Thus, the requirement that a sex registrant notify the authorities if he or she "changes his or her . . . location (§ 290, subd. (f)(1)) must be construed by the courts as applying only when there is a *substantial* change of location. If the evidence in a particular case fails to demonstrate a

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[19] I just had to sneak in one of my long headnotes.

substantial change of location – i.e., if a homeless person moves down the street, and not to another part of town – a strong sufficiency of evidence argument can be made. And, even if there is sufficient evidence to convict, a failure to instruct on the implied requirement of a "substantial change of location" would be federal constitutional error in the sense of inadequate instructions on an element of an offense, subject to the *Chapman* harmless error test.

CONCLUSION

Well, I've managed to write a rambling treatise that is longer than section 290, but hopefully not as confusing or poorly organized. Here is hoping that it's a useful resource for those of you working on sex crime cases for the first time, as well as for others who, like me, have been doing the work for many years.