Jury Instruction Issues

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I. Introduction: The Limits of Language

--Language is a inherently imperfect attempt to convey reality. Language is too imprecise, mutable and lacking in detail to fully and accurately describe the real world of things.

--Sapir-Whorf theory: Language is a subjective agreement by a group of people to conceptualize and verbalize their perceptions of reality in a certain way.

–Language shapes our thoughts and helps us understand and describe the world, but it also co-opts our innate cognitive ability, especially our ability to detect flaws in language itself.

--"Too much money"

--"Gracias a ustedes."

–"Catch-22"

–CALCRIM 220, Reasonable Doubt: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true."

II. Jury Instruction Basics

A. The Duty to Instruct

1. Sua sponte instructions

–"[G]eneral principals of law . . . those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

–Instruction worksheet (s, ss, rec, r)

–Sua sponte instructions to watch for

–Elements of the offense, including definition of terms not common knowledge (*People v. Flood* (1998) 18 Cal.4th 470; *People v. Kimbrel* (1981) 120 Cal.App.3d 869, 872).)

–Defenses, either expressly relied on or supported by the evidence and not inconsistent with the articulated defense theory (*People v. Maury* (2003) 30 Cal.4th 342, 424)

–LIO's

–Even over a defense objection, but see "invited error" (*Breverman*, 19 Cal.4th at p.154)
–CALCRIM notes lists many LIO's
–Attempt almost always an LIO
–LIO's of predicate or underlying offenses, e.g., felony murder, accessory
--Voluntary manslaughter is an LIO of murder (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)
--Involuntary manslaughter is an LIO of murder (Prettyman (1996) 14 Cal.4th 248, 274; but not in murder involving a vehicle (PC 192, subd. (b))
–LIO's of predicate or underlying crimes, e.g., felony murder predicate, accessory after the fact

–Burden(s) of Proof, including preponderance for predicate facts, priors acts, affirmative defenses; does some other instruction improperly shift or undermine the appropriate burden of proof?

–Viewing evidence with caution: accomplice statements (CALCRIM 334); defendant's statements (CALCRIM 358)

–Unanimity (CALCRIM 3500)

2. Instructions required on request:

–pinpoint instructions

–clarifying or amplifying instructions

–trial court has sua sponte duty to fix correctable defects in instructions proposed by defense (*People v. Falsetta* (1999) 21 Cal.4th 903, 924 [D proposed limiting instruction on Evidence Code section 1108 (prior sex crime evidence) was flawed in that it limited consideration to propensity, was confusing and improperly told jury how to weigh the evidence; held trial court should have corrected and given the instruction].)

3. Duty to instruct *correctly*– applies not only to sua sponte instructions but to any given instruction (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

–Standard instructions are not sacrosanct (*People v. V argas* (1988) 204 Cal.App.3d 1455, 1464.)

–Incorrect jury instruction generally not cured by correct statement on same point because jury likely confused *Henderson v. Harnischfeger* (1974) 12 Cal.3d 663, 673; see ambiguous instructions, *post.*

--When is an instruction incorrect?

1. Facially incorrect

–General versus overbroad:

--Example1: "Doves are birds." "Doves are grey."

–Example 2: CALJIC 5.56 Self Defense by Mutual Combatants:

"The right of self-defense is only available to a person who engages in mutual combat if he has done all the following:

1. He has actually tried, in good faith, to refuse to continue fighting;

2. He has clearly informed his opponent that he wants to stop fighting;

3. He has clearly informed his opponent that he has stopped fighting; and

4. He has given his opponent the opportunity to stop fighting.

After he has done these four things, he has the right to self-defense if his opponent continues to fight."

--*People v. Quach* (2004) 116 Cal.App.4th 294, 300 [held CALJIC 5.56 erroneously omits "sudden esclation" rule, reversed]

–CALCRIM 3471: Right to Self-Defense: Mutual Combat or Initial Aggressor:

"A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if:

1 (He/She) actually and in good faith tries to stop fighting;[AND]

2 (He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting(;/.)

<Give element 3 in cases of mutual combat.>[AND]

3 (He/She) gives (his/her) opponent a chance to stop fighting.]

If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight.

[If you decide that the defendant started the fight using non-deadly force and the opponent

responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]

2. Ambiguous: Instruction is erroneous if it is ambiguous or confusing such that it is reasonably succeptible to a legally incorrect interpretation. (*Calderon v. Coleman* (1998) 525 U.S. 141, 146; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 ; *Boyd v. California* (1990) 494 U.S. 370, 378; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

--These cases set up a two-pronged inquiry for the reviewing court:
a. Standard of Review: Is it "reasonably probable" the jury adopted an incorrect interpretation of the instruction?

b. Standard of Prejudice: Was the error prejudicial?
–Federal error: *Chapman*, "reasonable *possibility*"/harmless beyond reasonable doubt
–State error: *Watson*, "reasonable *probability" (College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 ["reasonable probability" means "merely a reasonable chance, more than an abstract possibility"].)

--*Middleton v. McNeil* (2004) 541 U.S. 433, 434-438 held:
-- Jury instructions must be viewed "as a whole." Accordingly, a single facially incorrect instruction, when contradicted by a *correct* instruction on the same point, amounts to an ambiguity and must be analyzed as such.
-- *Arguments by counsel to the jury* may be considered in determining the first prong, i.e., whether the instruction was erroneously ambiguous.

B. Preserving instructional error for appeal

1. Generally, no objection required (Pen. Code, § 1259 ["appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; *People v. Flood* (1998) 18 Cal.4th 470, 482., fn. 7.)

2. Objection generally required to complain of omission of non-sua sponte instruction (e.g., limiting, clarifying, amplifying, pinpoint) (*People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23; *People v. Kimble* (1988) 44 Cal.3d 480, 503.)

3. Invited error: Claim barred on appeal if 1) D caused the error and 2) record shows a tactical reason. (*People v. Hernandez* (1988) 47 Cal.3d 315, 353.) Mere *acquiescence* is not invited error (*People v. Moon* (2005) 37 Cal.4th 1, 28.)

C. Standard of review on appeal: Generally de novo

1. Given instructions: Was instruction incorrect? (*People v. Alvarez* (1996) 14 Cal.4th 155, 217)

2. Omitted sua sponte instructions and refused on-request instructions: Was there sufficient evidence for a reasonable jury to employ the legal principle contained in the instruction?

3. Note that these standards do *not* view the record "in the light most favorable to People."

D. Federalize (ADI Manual, §§ 5.42-5.44; ADI website, MCLE materials, Federalization, 2/09 (under Research Tools))

E. Prejudice (ADI Manual, §§ 4.50, et seq., 5.39; ADI website, MCLE materials, Standards of Review and Prejudice, 2/09 (under Research Tools))

F. Tips on Spotting Jury Instruction Error

1. Keep current on the law.

2. Watch for modified or "special" instructions

3. Examine blanks and bracketed language carefully.

4. Look for contradictions between instructions

5. Look for instructions that, while generally correct, are inappropriate given the evidence and legal theories in the particular case.

6. Watch for jury questions re instruction

–"Read it again" may be inadequate response, violating court's duty to give jury the law. (Pen. Code, § 1138 ["[I]f [jurors] desire to be informed on any point of law arising in the case, they must be brought into court, the information required must be given . . .."]; People v. Giardino (2000) 82 Cal.App.4th 454, 465; *People v. Gonzales* (1990) 51 Cal.3d 1179, 1212; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 252 ["The mere recitation of technically correct but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of facts."].

–Jury Q aids claim instruction is ambiguous

–Jury Q aids prejudice argument

7. Read arguments by counsel to jury, which may exacerbate or alleviate a jury instruction flaw.

III. Selected Jury Instruction Issues

A. Motive instruction, CALCRIM 370:

"The People are not required to prove that the defendant had a motive to commit (any of the crimes/the crime) charged. In reaching your verdict you may, however, consider whether the defendant had a motive.
Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

CALJIC 2.51, Motive:

"Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty."

–**The problem**: Some offenses and special findings include a motive as an element.
--**Examples**:
–**Annoy or molest** adult D believes to be a child while "motivated by an unnatural or abnormal sexual interest in children. . .." (Pen. Code § 647.6, subd. (a)(2)). Motive instruction held error in *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127, on ground the instruction removed an element from jury's consideration.
--**gang enhancement**, Pen. Code, § 186.22, subd. (b) ["for the benefit of . . . criminal street gang. . .."] *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1140 held CALCRIM 370 was not inconsistent with intent element of gang enhancement allegation, distinguishing *Maurer* and finding that if mental element in 647.6(a)(2) was phrased, "intent" rather than "motivation," the motive instruction would be proper].)
–But are some "intents" synonymous with "motive," making the applicable statute's terminology merely semantics?
–**Murder special circumstances**, including murder to prevent witness from testifying (Pen. Code, § 190.2, subd. (a)(10)) *People v. Heishman* (1988) 45 Cal.3d 147, 178 rejected ths argument, holding CALJIC 2.51 was not error because CALJIC 2.51 clearly applied only to determining guilt of the substantive offense and not the finding on

the special circumstance.
–**Lewd act with minor**, Pen. Code, § 288, lewd act "with the intent of arousing, appealing to, or gratifying the lust passions, or sexual desires of that person or the child"
–**Hate crime enhancement** Pen. Code, § 422.55, when crime is committed in whole or part because of race, religion, sexual orientation, etc. Note, CALCRIM 523 and 135 both use "motivation."

B. "Slight" corroboration instructions (CALCRIM 376, 359, 334)

CALCRIM 376 Possession of Recently Stolen Property as Evidence of a Crime:

"If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/extorted), you may not convict the defendant of <insert crime> based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed <insert crime>.
The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove (his/her) guilt of <insert crime>. . . .
Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."
–**The problem:** 1) amounts to an improperly argumentative pinpoint instruction, focusing on some of the People's evidence and suggesting an inference from it; 2) Misstates the burden of proof. (See sample argument.) CALCRIM 376 was held not to be a sua sponte instruction in *People v. Najera* (2008) 43 Cal.4th 1132, 1141, but the court did not consider the above-mentioned challenge to the instruction.
--**CALCRIM 359, Corpus delecti**: has adopted the similar language: "That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed"; compare with predecessor instruction CALJIC 2.72, which does not say "slight".
--**CALCRIM 334, Accomplice Testimony Corroboration**:

"Supporting evidence, however, may be slight." Compare with predecessor instruction CALJIC 3.11-3.12, which do not say "slight."

C. Attempted Murder, CALCRIM 600:

"The defendant is charged [in Count] with attempted murder.
To prove that the defendant is guilty of attempted murder, the People must prove that:
1 The defendant took at least one direct but ineffective step toward killing (another person/ [or] a fetus);
AND
2 The defendant intended to kill that (person/ [or] fetus).
A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt."

–The problem: Para 2, fourth sentence, tells jurors that the presence of element 2 indicates element 1 is fulfilled.

A

CALCRIM INSTRUCTION WORKSHEET[1]

"s"= sua sponte duty in every case "ss"= sometimes sua sponte, depending on the facts
"rec"= not sua sponte, but recommended "r"= must be given if requested

Pretrial General Instructions

□	100	trial process
□s	101	cautionary admonition
□	102	note taking
□s	103	reasonable doubt
□	104	evidence
□s	105	witnesses
□r	106	juror questions

Pretrial Admonitions

□ss	120	service provider for disable juror (when one is used)
□rec	121	duty to abide by ct translation
□ss	122	corporation is a person (when defendant is a corporation)
□ss	123	witness identified as J. Doe (when victim is id'd as such)
□s	124	separation admonition

Post-Trial Introductory

□s	200	duties of judge and jury
□s	201	do not investigate
□rec	202	note taking
□ss	203	multiple defendants (when multiple D's are on trial)
□ss/r	204	restrained defendant (if seen by jury)
□	205	charge removed from jury consideration
□	206	a defendant removed from the case
□	207	proof need not show actual date

General Legal Concepts

□s	220	reasonable doubt
□ss	221	reasonable doubt/bifurcated trial (when bifurcated proceedings)
□	222	evidence
□s	223	direct & circumstantial evidence: defined
□ss	224	circumstantial evidence: sufficiency of evidence (if DA substantially relies on it)
□ss	225	circumstantial evidence: intent/ mental state (if DA subst. relies as evid. of intent)
□s	226	witnesses

Causation

□ss	240	causation (when it's at issue)

Union of Act and Intent

□ss	250	union act & intent: general intent (when charged with general intent crime)
□ss	251	union act & intent: specific intent (when charged with specific intent crime)
□ss	252	union act & intent: general & specific together (when charged with both types)
□rec	253	union act & intent: criminal negligence
□	254	union act & intent: strict liability

[1] This list does not include fact and crime-specific instructions which must also be given.

General Evidentiary Instructions

□r 300 all available evidence
□s 301 single witness's testimony
□s 302 evaluating conflicting evidence (unless corroborating evidence is req.)
□r 303 limited purpose of evidence
□r 304 multiple defendants: ltd. admissibility of evidence
□r 305 multiple defendants: ltd. admissibility D's statements
□ 306 untimely disclosure of evidence

Witnesses

□r 315 eyewitness identification
□r 316 witness credibility, other conduct
□ 317 prior testimony unavailable witness
□ 318 prior statements as evidence
□ 319 prior statements of unavailable witness
□r 320 exercise of privilege by witness
□r 330 testimony of child 10 yrs or less
□r 331 testimony of witness with disabilities
□ss 332 expert witness testimony (when expert testimony received at trial)
□r 333 opinion testimony of lay witness
□ss 334 accomplice testimony corroborated: (if evid. suggests witness can be accomplice)
□ss 335 accomplice testimony: (when no dispute witness is an accomplice)
□r 336 in-custody informant
□ss 337 witness restrained (when seen by jury)

Character Evidence

□r 350 character of defendant
□r 351 cross-exam of character witness

Defendant's Testimony

□r 355 defendant's right not to testify
□r 356 Miranda-defective statements.
□ss 357 adoptive admissions (when such evidence is admitted)
□ss 358 evidence of defendant's statements (for out-of-court oral statements by D)
□ss 359 corpus delicti (if 357 given & whenever stmts. form part of prosecution evid.)
□ 360 statements to experts
□ 361 failure to explain/deny adverse testimony
□ss 362 consciousness guilt: false stmt. (when such inference can be drawn from D's stmt.)

Particular Types of Evidence

□ 370 motive
□ 371 consciousness guilt: suppress/fabricate evidence
□ss 372 flight (when DA relies on it to show consciousness of guilt)
□r 373 other perpetrator
□ss 374 dog tracking evidence (when they are used to prove id of defendant)
□r 375 1101(b) evidence
□ss 376 possession of recently stolen property (if there is evid. of such property)

Aiding & Abetting & Related Doctrines

□ss 400 aiding & abetting: general principles (when DA relied on it as theory of liability)

□ss 401 aiding & abetting: intended crimes (when DA relied on it as theory of liability)
□ss 402 natural & probable consequences (target and non-target offense charged)
□ss 403 natural & probable consequences (only non-target offense charged)
□r 404 intoxication

Defenses and Insanity

□ 3400 alibi
□r 3428 mental impairment as defense

Concluding Instructions

□ss 3500 unanimity (if DA presents evid. of multiple acts to prove a single count)
□ 3501 unanimity: generic test. presented
□ss 3502 unanimity: election by prosecutor (if DA has picked a specific factual basis)
□r 3515 multiple counts: separate offenses
□ss 3516 multiple counts: alternative charges (if D alt. charged with mult. cts. for 1 event)
□ss 3517 LIO's or degrees w/o Stone Instruction (where 1 or more LIO submitted to jury)
□ss 3518 LIO's or degrees w/ Stone Instruction (where 1 or more LIO submitted to jury)
□ss 3530 judge's comment on evidence (when the court comments)
□ss 3531 service provider for disabled juror (when one is used)
□s 3550 pre-deliberation instruction
□ss 3575 substituting alternate juror during deliberations (when alt. juror is seated)
□s 3590 final instruction on discharge of jury

B

Erroneously Ambiguous Jury Instructions
(2/20/08)
Neil Auwarter

On appeal, the most common claim of instructional error is that an instruction is *incorrect*, i.e., it affirmatively misstates a legal principle. But another avenue of attack, vastly underutilized by appellate counsel, is that an instruction is *ambiguous*. An ambiguous instruction is not facially incorrect, but is confusing enough to be susceptible to an incorrect interpretation by jurors. The seminal cases on ambiguous instructions are *Boyd v. California* (1990) 494 U.S. 370, 378, *Estelle v. McGuire* (1991) 502 U.S. 62, 72 and *Calderon v. Coleman* (1998) 525 U.S. 141, 146. The California Supreme Court has adopted the same rule for assessing ambiguous jury instructions under state law. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

These cases set up a two-pronged inquiry for the reviewing court. First, is it "reasonably probable" the jury adopted an incorrect interpretation of the instruction? While this inquiry uses the familiar "reasonably probable" language found in California's *Watson* standard of prejudice, it is *not* a prejudice test. Instead, it is a standard of review to determine whether the instruction was erroneously ambiguous. If this inquiry is answered in the affirmative, then the reviewing court poses the second part of the inquiry--was the erroneous ambiguity prejudicial in the context of the case? If the ambiguity implicates a federal constitutional right, the applicable prejudice test is the *Chapman* "harmless beyond a reasonable doubt" test. If the ambiguity implicates only a state law principle, then the prejudice test is that of *Watson*, i.e., is there a "reasonably probability" of a more favorable outcome absent the error.

A later Supreme Court decision, *Middleton v. McNeil* (2004) 541 U.S. 433, added a couple of important nuances to the law on ambiguous instructions. First, the court held that since jury instructions must be viewed "as a whole," a single facially incorrect instruction, when contradicted by a *correct* instruction on the same point, amounts to an ambiguity and must be analyzed as such. (*Id.* at 434-437.) So, for example, even if one of the CALCRIM instructions discussed above is facially incorrect, the giving of other, correct, instructions on burden of proof may cause the reviewing court to assess the claim as one of ambiguity rather than facial incorrectness.

The second nuance added by *Middleton v. McNeil* was the court's finding that *arguments by counsel to the jury* may be considered in determining the first prong, i.e., whether the instruction was erroneously ambiguous. In *Middleton v. McNeil*, the jury was instructed ambiguously on the defense of imperfect self-defense, with one instruction stating incorrectly that the defendant must have "reasonably" believed there was imminent peril. The state court had held comments made by the prosecutor during argument resolved the ambiguity in favor of the defendant and so avoided the error. The United States Supreme Court approved of this analysis. (*Middleton v. McNeil*, 541 U.S. at p. 438.)

The most apparent impact of this part of *Middleton v. McNeil* is that it allows the parties to argue in the first prong of the inquiry (i.e., was there error?) that comments by trial counsel either ameliorated or exacerbated an ambiguous instruction. By contrast, where an instruction is facially incorrect, comments of trial counsel are relevant only to determining prejudice. But where the claim of error is ambiguity, under *Middleton v. McNeil* those comments are relevant to the initial determination of error.

A less obvious aspect of the comments-of-counsel holding in *Middleton v. McNeil* is that it permits a reviewing court to find an instruction erroneously ambiguous in the context of a particular case, *without necessarily finding the instruction is erroneous in other cases.* This is significant because it may be easier to convince a pragmatic reviewing court that an instruction was erroneous in the context of the present case if so holding does not necessarily disapprove the same instruction in other cases.

C

II

THE TRIAL COURT PREJUDICIALLY DEPRIVED APPELLANT OF DUE PROCESS WHEN IT GAVE CALCRIM NO. 376 OVER DEFENSE OBJECTION

A. Procedural Background

During a discussion of instructions, the prosecution expressed concern over whether the court should instruct the jury with CALCRIM No. 376, which informs the jury that it cannot convict a defendant of burglary solely on his possession of stolen property, but that any additional evidence only has to be "slight" to justify a conviction. The parties engaged in the following discussion:

THE COURT: 376.

MR DAVIS: Your Honor, did the court look at the use notes?

THE COURT: Yes.

MR. DAVIS: This is a dangerous instruction. I wanted to get the court's opinion on this.

THE COURT: That's a sua sponte instruction. It is an instruction that I believe should be looked at carefully. But the use notes on 376 indicate that if the factual situation is such that there is evidence that a defendant had recently stolen property in his possession, this is a sua sponte instruction.

And Mr. Ziegler, it's intended, even though it doesn't sound like it, to be a defense-oriented instruction.

MR. ZIEGLER: Well, I find that hard to believe. Thank you. But it looks like a suicidal instruction to me, not sua sponte. If you're going to give it, you're going to give it. I don't want it.

THE COURT: You're objecting to it?

MR. ZIEGLER: I'm saying thank you, no.

MR. DAVIS: Well, I think that I want it because of the unique nature of the evidence in this case. I do know that sometimes it's fraught with peril, and that's why I was inviting the court's attention

to the use notes. Specifically, we have a robbery, burglary, or theft of stolen property charged as in the *People v. Mcfarlan*, a 1962 case, 58 Cal.2d 748. They also have the burglary instructions. Some of the other use notes on page 135 of the spring 2008 edition of CALCRIM.

If the court has any reluctance or hesitancy to it, I'll be more than happy to listen to the court. You can see that I put on the submitted instructions 'discuss with judge and counsel' when I modified it. Hopefully, you got the colored edition so it sticks out. Because I know it's a dangerous thing. I'm more than happy to submit to the court's analysis.

THE COURT: Well, the court's analysis is the following from CALCRIM. "The instruction should be given sua sponte if there is evidence of possession of stolen property and corroborating evidence of guilt,' which there is in this case. Therefore, it will be given.

MR. DAVIS: Thank you.

MR. ZIEGLER: Over the defense's objection, just so it's noted. I don't want it.

THE COURT: *People v. Smith*, which is cited in the bench notes, 'failure to instruct that unexplained possession alone does not support a finding of guilt was in error.' That's why I say this was intended to be a defense-oriented instruction.

Over the objection of the defense, it will be given.

(2 R.T. 257-258.)

The jury was thereafter instructed as follows:

As to counts 1, 2, and 3, if you conclude that the defendant knew he possessed property, and you conclude that the property had, in fact, been recently stolen, you may not convict the defendant of burglary, theft of a firearm, or receiving stolen property based on those facts alone.

However, if you also find that supporting evidence tends to prove his guilt, you may then conclude that the evidence is sufficient to prove that he committed a burglary, theft of a firearm, or receiving stolen property. The supporting evidence need only be slight and need not

be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of burglary, theft of a firearm, or receiving stolen property. Remember that you may not convict the defendant at any time unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.

(1 C.T. 99; 3 R.T. 286-287; CALCRIM No. 376.)

B. The Trial Court Erroneously Determined It Was Required To Give CALCRIM No. 376

The prosecution's concerns were well-founded, and the trial court was wrong when it concluded the instruction was required. In *People v. Najera* (2008) 43 Cal.4th 1132, the Supreme Court recently found there is no sua sponte duty to give the jury CALJIC No. 2.15, the CALJIC version of CALCRIM No. 376. In so holding, the Supreme Court disapproved of *People v. Clark* (1953) 122 Cal.App.2d 342, 346 [failure to instruct that unexplained possession alone does not support finding of guilt was error], as well as *People v. Smith* (1950) 98 Cal.App.2d 723. (*People v. Najera, supra,* 43 Cal.4th at pp. 1140-1141.)

The Supreme Court emphasized not only were the cases relied upon by the trial court in this case wrong, other jurisdictions also refused to impose a sua sponte duty to give such an instruction:

> Neither *Smith* nor *Clark* offers a justification for imposing a duty on trial courts to supply an instruction on their own motion about the possession of recently stolen property in all theft-related cases. Indeed, neither even mentions the basic principles governing a trial court's duty to instruct on its own motion. To the extent these two opinions can be read to impose such a duty in all theft-related prosecutions, they are disapproved.
>
> Finally, we note that our sister states have similarly declined to impose on trial courts a sua sponte duty to instruct on the limited significance of possession of recently stolen property in theft-related prosecutions. (*People v. Huynh* (Colo.Ct.App. 2004) 98 P.3d 907, 914 ["Because no instruction emphasized that the jury could draw an inference of guilt from defendant's unexplained possession of the stolen credit cards, there was no corresponding need to emphasize any precautionary principles."]; *Foust v. State* (Ind. 1981) 428 N.E.2d 776, 779 [issue was adequately covered by instructions on the burden and standard of proof]; *Commonwealth v. Lutz* (1980) 9 Mass. App. Ct. 357 [401 N.E.2d 148, 152]; *State v. Price* (1941) 348 Mo. 361 [153 S.W.2d 353, 354–355]; *State v. Pastore* (1975) 133 N.J. Super. 168 [336 A.2d 4, 6] ["the principle is nothing more nor

> less than a statement of elementary logic which anyone, judge or juror, would apply as a matter of common sense in evaluating this single piece of circumstantial evidence in the setting of all the other evidence in the case"]; *McDoulett v. State* (1971) 1971 OK CR 122 [486 P.2d 654, 656]; *State v. Kirkman* (1967) 20 Utah 2d 44 [432 P.2d 638, 638–639]; *Benson v. State* (Wyo. 1977) 571 P.2d 595, 598–600.)

(*People v. Najera*, *supra*, 43 Cal.4th at p. 1141.)

Accordingly, there is no sua sponte duty to give this instruction. Given the prosecution's concerns about the instruction being "fraught with danger," and defense counsel's argument that the instruction was "suicidal" for the defense rather than "defense oriented" as stated by the trial court, the trial court in this case erred by relying on outdated authority.

C. Instructing The Jury That Only "Slight" Evidence Is Required For Corroboration Does Not Benefit The Defendant And Constitutes An Improper Pinpoint Instruction That Focuses Attention On Specific Prosecution Evidence

In *People v. Parson* (2008) 44 Cal.4th 332, the California Supreme Court held that CALJIC No. 2.15 is properly given in cases in which the defendant's intent to steal is contested, and that the instruction "does not create a mandatory presumption that shifts the People's burden of proof to the defense." (*Id.* at p. 356.) The court stated that the instruction "merely permits, but clearly does not require, the jury to draw the inference described therein." (*Ibid.*) The court did not address appellant's claim that the instruction improperly directed the jury to focus on specific evidence and encouraged it to make the permissive inference allowed by the instruction. Nor did the court address the claim that the instruction, which has the stated purpose of protecting the defendant, offers no such protection when it includes the "slight corroboration" language. And finally, the Supreme Court did not consider the historical context of the instruction or the question of whether there is any actual authority for a jury finding guilt beyond a reasonable doubt in reliance upon "slight corroboration" of a fact which, in itself, is not sufficient to prove guilt. To the extent the *Parson* court rejected constitutional claims made here, appellant respectfully disagrees and submits the claim to preserve for federal constitutional review.

In *People v. Harden* (2003) 110 Cal.App.4th 848, 857 this court upheld giving CALJIC No. 2.15 on the logic that the instruction, if properly worded "would inure to the defendant's benefit because it would warn the jury not to infer the existence of the element of robbery or burglary of a special circumstance allegation from the defendant's conscious possession of recently stolen property, without corroborating evidence." (See also *People v. Snyder* (2003) 112 Cal.App.4th 1200 [CALJIC No. 2.15 (now CALCRIM No. 376) is designed "partly as a prophylactic in favor of the accused," since it admonishes the jury of

"the well-established principle that evidence of possession of recently stolen property, standing alone, will not support a conviction for a theft crime"].)

In fact, CALCRIM No. 376 improperly pinpoints the prosecution's evidence. The defense should be able to ask for its exclusion on the same basis that defense instructions are routinely rejected. For example, *People v. Wright* (1988) 45 Cal.3d 1126, 1137 holds that a defense pinpoint instruction is improperly argumentative if it directs the jury's attention to specific evidence and "impl[ies] the conclusion to be drawn from that evidence." (See also *People v. Harris* (1989) 47 Cal.3d 1047, 1098, fn 31 ["the defendant's right to 'pin-point' instructions is to instructions directed to the theory of the defense, not those aimed at specific evidence. As to the latter, the defendant is free to argue the import of the evidence, but does not have a right to an instruction that would improperly imply the conclusion to be drawn from that evidence.")

A functionally equivalent prosecution pinpoint instruction must therefore be held improperly argumentative as well. "There should be absolute impartiality as between the People and the defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-27; *accord, Reagan v. United States* (1895) 157 U.S. 301, 310 [5 S.Ct. 610, 39 L.Ed. 709].)

There are several sources for the language of "slight corroboration" language in both CALJIC No. 2.15 and CALCRIM No. 376, including *People v. McFarland* (1962) 58 Cal.2d 748, 755 and *People v. Anderson* (1989) 210 Cal.App.3d 414. As shown below, these citations do not provide reliable authority for the "slight corroboration" portion of the jury instruction.

In *McFarland*, the defendant was charged with several burglaries. When questioned about the crimes, the defendant replied that he did not want to discuss the matter, that he was already in enough trouble, and that the police could not help him. When asked whether another person had helped him with a particular burglary, he explained that his wife was not with him, and how it was possible for one person to commit that crime. The defendant asserted that he had bought various items legally, but was evasive when asked the exact source of his purchases. When asked how he could have carried an air compressor by himself, due to the weight, the defendant stated that he took it in three pieces. One of his fingerprints was found at the scene of one of the burglaries. (*People v. McFarland, supra*, 58 Cal.2d at pp. 753-754.)

In discussing the jury instructions applicable to possession of recently stolen property, the Supreme Court did refer to the statement that such possession is so incriminating that only slight corroborating evidence was needed to warrant a conviction. (*People v. McFarland, supra*, 58 Cal.2d at p. 754.) Immediately after this portion of the decision, however, the court went on the quote with approval from *People v. Lyons* (1958) 50 Cal.2d 245, 258, to the effect that where one is found in possession of recently stolen property, and no satisfactory explanation of the possession is made, that then an incriminating inference may be drawn. (*People v. McFarland, supra*, 58 Cal.2d at p. 754.)

After summarizing various cases in both California and other jurisdictions, the *McFarland* court concluded that "[t]he rule may be stated as follows: Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt, an inference of guilt is permissible and it is for the jury to determine whether or not the inference should be drawn in light of all the evidence." (*People v. McFarland, supra*, 58 Cal.2d at p. 755.) It is clear that "the rule" according to *McFarland* does not state that once possession of recently stolen property is shown, there need only be "slight corroboration" in order for guilt to be inferred.

It is true that the jury instruction used at trial in *McFarland* did use the phrase "[t]he corroboration of the possession of stolen property need only be slight in order to sustain a conviction." (*People v. McFarland, supra*, 58 Cal.2d at p. 759.) However the California Supreme Court did not give this instruction a ringing endorsement, concluding as follows:

> There can be no question that the instruction complained of was correct to the extent that it dealt with the incriminating effect of false explanations and statements constituting admissions, and such conduct on the part of defendant was shown to be present as to every count relating to possession except the one concerning the recently stolen toolbox, which defendant had in his possession at the same time and place as the recently stolen property involved in the other counts. In the light of the entire record, the instruction, although not worded as clearly as would have been desirable with respect to consideration of defendant's silence upon questioning by the police, cannot be said to have resulted in a miscarriage of justice.

(*People v. McFarland, supra*, 58 Cal.2d at pp. 759-760.)

It is clear that the high court did not give its imprimatur to the language in the jury instruction about "slight corroboration," and at best reached the conclusion that although the jury instruction was lacking, in light of the record in the case before it, no prejudice was shown.

Some cases have interpreted *McFarland* to mean that the "slight corroboration" language in the jury instruction is entirely proper. (E.g., *People v. Anderson, supra*, 210 Cal.App.3d 414, 421.) Other cases have concluded that *McFarland* stands for the principle that proof of conscious possession of recently stolen property simply leads to a permissible inference that the person knew the property was stolen, but that the jury must determine guilt in light of such inference as well as all of the evidence in the case. (*People v. Dupre* (1968) 262 Cal.App.2d 56, 59; *Rollins v. Superior Court* (1963) 223 Cal.App.2d 219, 222.) As outlined above, appellant contends that the *Dupre/Rollins* line of analysis is the correct interpretation.

Another line of authority cited in support of the "slight corroboration" language is 2 Witkin & Epstein, Cal. Criminal Law (2d Ed. 1988), sec. 667.

Witkin notes that the early rule was simply that possession of stolen property was not sufficient evidence to prove guilt, and that corroborating evidence had to be shown. (citing *People v. Boxer* (1902) 137 Cal. 562, 564.) However Witkin cites language in *McFarland, supra*, 58 Cal.2d at p. 755, noting that in *People v. Citrino* (1956) 46 Cal.2d 284, 288, the court referred to "slight corroboration." Allthough *McFarland* refers to *Citrino*, however, it does not embrace the "slight corroboration" language in its holding.

Furthermore, *Citrino* itself is not valid authority for the "slight corroboration" portion of the rule. The language in *Citrino* is based upon earlier cases such as *People v. Morris* (1932) 124 Cal.App. 402, 404; *People v. Taylor* (1935) 4 Cal.App.2d 214, 217; *People v. Russell* (1939) 34 Cal.App. 665, 669; and *People v. Thompson* (1953) 120 Cal.App.2d 359, 363. (*Citrino, supra*, 46 Cal.2d at p. 288.) These cases do not support the conclusion that only "slight corroboration" is necessary, but in turn rely upon isolated language in even older cases that do no make such a finding.

For example, *People v. Morris* relies upon language in *People v. Russell* (1932) 120 Cal.App. 622, which in turn relies upon *People v. Smith* (1889) 79 Cal. 554; *People v. Murphy* (1928) 91 Cal.App. 53; *People v. Lang* (1904) 142 Cal. 482; *People v. Reed* (1922) 58 Cal.App. 7; and *People v. Howard* (1922) 58 Cal.App. 340, 344. (*People v. Russell, supra*, 120 Cal.App. at p. 625.)

People v. Smith lends no support for the inclusion of a "slight corroboration" instruction. The only mention of the issue suggests that the rule in cases of burglary is that the reviewing court must consider all the evidence presented to the jury. (*People v. Smith, supra*, 79 Cal. at p. 556.) Similarly, the court in *Murphy* relied upon *Lang*. (*People v. Murphy, supra*, 91 Cal.App. at p. 54.) In *Lang* the court simply concluded that evidence of possession of recently stolen property, together with other evidence in the case, can suffice to uphold a conviction for burglary. (*People v. Lang, supra*, 142 Cal. at p. 485), with no language saying only "slight corroboration" was required.

In *Reed* the court announced the rule that the fact of possession of recently stolen property, by itself will not sustain a conviction for theft; but when there is also evidence that the possessor did not adequately explain his possession of the property, a conviction can stand. (*People v. Reed, supra*, 58 Cal.App. at p. 8.) Again, there is no mention of "slight corroboration."

Interestingly, in *People v. Howard*, the court held that where a person is found in possession of recently stolen property, and he gives a false report about the origin of the goods, this is "presumptive evidence that he stole the goods . . . ." (*People v. Howard, supra*, 58 Cal.App. at p. 344.) This seems to suggest that once the prosecution has presented evidence of recent possession, plus a failure to explain the source of the goods, that the burden of proof then shifts to the defendant. Such a shifting of the burden suggests that *Howard* would be overturned if reviewed today. Be that as it may, *Howard* does not stand for the proposition that once possession of recently stolen property is shown, that there

need only be "slight corroboration" in order to show guilt of the taking of the goods.

It is clear, therefore, that neither *Russell* nor *Morris* provide support for the language in *Citrino*, leaving only the citations to *Taylor* and *Thompson*. *Taylor* relies on the "slight corroboration" language in *Russell* and *People v. King* (1932) 122 Cal.App. 50. (*People v. Taylor*, *supra*, 4 Cal.App.2d at p. 217.) As shown above, *Russell* does not support this proposition. And *King* simply relates that possession of recently stolen property "together with guilty behavior on the part of a defendant is sufficient" to uphold a jury verdict of guilty of a charge of theft. (*People v. King*, *supra*, 122 Cal.App. at p. 53.) *King* does not attempt to describe how much corroborating evidence is necessary to show guilt.

In *Thompson* the court stated that "[w]hile the mere possession of stolen property is not alone sufficient to sustain a conviction of theft, such possession plus slight corroborative evidence of other inculpatory circumstances will suffice, and where there is substantial evidence tending to support the verdict of the jury, an appellate court cannot, as a matter of law, substitute its judgment on the facts for that of the jury." (*People v. Thompson*, *supra*, 120 Cal.App.2d at p. 363, citing *People v. Wissenfeld* (1951) 36 Cal.2d 758.) *Wissenfeld* in turn relied upon a line of cases that either do not use the "slight corroboration" language, or rely on earlier cases which do not stand for that proposition. (*People v. Wissenfeld*, *supra*, 36 Cal. At pp. 763-764, citing *People v. Holland* (1947) 82 Cal.App.2d 310, 312; *People v. Leary* (1946) 28 Cal.2d 727, 735; *People v. Cataline* (1921) 54 Cal.App. 36, 38; *People v. Fain* (1929) 100 Cal.App. 439, 440; *People v. Jennerjohn* (1931) 115 Cal.App. 447, 451; *People v. Swanson* (1932) 120 Cal.App. 173, 176; and *People v. King*, *supra*, 122 Cal.App. at p. 53.)

It appears that the early rule on recent possession of stolen property was that it was a fact that the jury could take into consideration, and could use to make an inference that the defendant had taken the property in question (although it was insufficient, by itself, to so prove). (*People v. Boxer* (1902) 137 Cal. 562, 564.) Some later cases, by misconstruing the holdings of the early cases, stated that the corroborating evidence had only to be slight. And later still, courts began approving of such language in jury instructions. Even if one were to presume that the "slight corroboration" language is applicable, it is limited to the question of the quantum of evidence needed to sustain a conviction on appeal.

In the cases which utilize the "slight corroboration" language, this is always in the context of a defendant who has challenged the sufficiency of evidence to support his theft (or burglary, or receiving stolen property) conviction. The quantum of proof necessary at trial, and to sustain a conviction on appeal, are obviously different. At trial, the prosecution must show the charge by proof beyond a reasonable doubt. On appeal, the test to determine the sufficiency of evidence to support a finding of guilt is whether, viewing the entire record in a light favorable to the judgment, a rational trier of fact could find the appellant

guilty beyond a reasonable doubt of the offense of which he was convicted. (*People v. Johnson* (1980) 26 Cal.3d 557, 562.)

Thus when a defendant challenges his conviction on appeal, the evidentiary scales are weighted against him. Every reasonable inference which could be made from the evidence, favorable to the judgment of conviction, must be made. (*People v. Johnson, supra*, 26 Cal.3d at pp. 576-578; *People v. Lawler* (1973) 9 Cal.3d 156, 160.) On the appellate level, the court does not retry the case using a "beyond a reasonable doubt" standard. All the reviewing court needs to find is that, making all presumptions in favor of the conviction, there was sufficient evidence so that a rational juror could have found such proof.

It appears that the cases which mention "slight corroboration" as a trial level standard have confused the burden of proof at the trial level with that of the appellate level. For example, in *People v. Russell, supra*, 120 Cal.App. 622, the defendant challenged the sufficiency of the evidence to sustain his conviction for burglary. (*Id.*, at p. 623.) In reviewing this contention, the court noted that "when [stolen] property is found in the possession of a defendant shortly after it has been stolen the corroborating evidence required to sustain a conviction need be but slight . . . ." (*Id.*, at p. 625.) It is clear that the court meant that the rule at the appellate level is that the corroborating evidence need only be slight. But in *People v. Morris, supra*, 124 Cal.App. 402, 404, the court appears to confuse this appellate rule, where the level of proof to sustain a conviction is much less, with a trial level rule. This is simply incorrect.

The jury is not similarly instructed in situations of other permissive inferences based upon a defendant's conduct. Where a defendant makes a willfully false statement before trial, attempts to dissuade a witness to testify falsely, attempts to suppress evidence against himself, or flees immediately after a crime is committed, jurors are instructed they may consider such conduct, along with all the other evidence presented at trial, in their determination of guilt or innocence. (CALJIC Nos. 2.03, 2.04, 2.06, 2.52.) However in none of these situations is the jury then instructed that only "slight corroboration" is necessary in order to reach an inference of guilt. In fact, under CALJIC Nos. 2.03, 2.04, and 2.06, the jury is specifically told that the "weight and significance" of such conduct is solely for the jury to decide. However in the situation of possession of recently stolen property, the instruction inferentially tells the jury that the weight of such evidence is for the judge to decide, in that he has explained to them that only "slight evidence" in corroboration is necessary. Thus the jurors are limited in their ability to weigh the possession of recently stolen property evidence.

It appears, therefore, that with instructions such as CALJIC Nos. 2.03, 2.04, and 2.06 it is explained to the jury that if they find there is evidence of X, they may (but are not required to) make the inference of Y. In such instances, the jury is not limited to what additional evidence they may require in order to establish guilt. If the jury determines that the probative force of the inference is not great, they may well require a great deal of additional evidence. However CALCRIM

No. 376 as given in this case takes away that jury discretion. The instruction tells the jury that if they find the defendant was in possession of recently stolen property (as he conceded he was), the inference that the defendant took that property is especially strong, and the jury is then to utilize the standard of "slight corroboration" in order to reach a finding of guilt.

Such an instruction invades the province of the jury, much in the way that a directed verdict does. Obviously, directed verdicts are prohibited in criminal cases. (*People v. Figueroa* (1986) 41 Cal.3d 714, 732-733.) Although CALCRIM No. 376 does not go as far as a directed verdict, it goes a long way in that direction by directing the jury that if they find the predicate fact (possession of recently stolen property), they must accord it great weight, requiring only slight corroboration to find guilt. "[N]o fact, not even an undisputed fact, may be determined by the judge." (*Roe v. United States* (5th Cir. 1961) 287 F.2d 435, 440.) As Justice Scalia pointed out in his concurring opinion in *Carella v. California* (1989) 491 U.S. 263, 265 [109 S.Ct. 2419, 105 L.Ed.2d 218], "the problem would not be cured by an appellate court's determination that the record unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury."

Although the judge in the instant case did not go so far as to instruct the jury that an element of the offense had been established as a matter of law, the effect of giving CALCRIM No. 376 was essentially the same. The judge told the jury that if you find that the defendant was in possession of recently stolen property (and the defendant did not dispute that he was), then you need only find slight evidence tending to prove his guilt for the burglary. Based on the evidence in this case, the instruction was close enough to a directed verdict for the burglary that it should be treated as such.

D. Instructing The Jury According To CALCRIM No. 376 Deprived Appellant Of His Right To Due Process And Trial By Jury, And Reversal Is Required

In material part, CALCRIM No. 376 allowed the jury in this case to convict appellant of burglary when his possession of the stolen property was combined with only "slight" corroborating evidence. Use of the term "slight" rendered the instruction constitutionally defective.

In *United States v. Gray* (5th Cir. 1980) 626 F.2d 494 the trial court first instructed the jury that "slight evidence"of a defendant's participation in a conspiracy would suffice for conviction. (*Id.*, at p. 500.) After a defense objection to this instruction, the court then instructed the jury that "as to that slight or little evidence, you must be convinced, beyond a reasonable doubt, that he participated." (*Ibid.*) In holding the foregoing instructions to be unconstitutional, the appellate court reasoned that "[t]he 'slight evidence' reference can only be seen as suffocating the 'reasonable doubt' reference." (*Ibid.*)

The same analysis applies to CALCRIM No. 376. By using the term "slight," the instruction manifestly tells the jury that guilt may be inferred on the basis of evidence which does not rise to the standard of proof beyond a reasonable doubt. Thus, per se reversal is required whenever the instruction is used. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281 [113 S.Ct. 2078, 124 L.Ed.2d 182] [an instructional error which misadvises the jury regarding the reasonable doubt standard compels reversal per se].)

In *Sullivan*, the court considered an erroneous instruction on reasonable doubt. The instruction differed from the standard reasonable doubt instruction only by informing the jury that such a doubt "must be such . . . as would give rise to a grave uncertainty . . . , " and must be a " "s "substantial doubt." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 276, referring to the same instruction considered in *Cage v. Louisiana* (1990) 498 U.S. 39 [111 S.Ct. 328, 112 L.Ed.2d 339].) Although the *Cage* court did not indicate that the offending instruction differed greatly from the standard reasonable doubt instruction, it varied enough so that it was in error. (*Id.*, at pp. 40-41.)

In reviewing the prejudice caused by such error, the high court pointed out that the standard of "harmless beyond a reasonable doubt" could not be utilized. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-279.) Since the jury did not evaluate the case using the correct standard of proof, there was no "object, so to speak, upon which harmless-error scrutiny [could] operate." (*Id.*, at p. 280.) Such scrutiny is inappropriate "where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings." (*Id.*, at p. 281.)

The same principle applies in the instant case. The jury was instructed to utilize the wrong burden of proof, namely that only slight evidence of corroboration was required after it concluded appellant had been found in possession of recently stolen property. Since the jury must be assumed to have followed the instruction, it follows that their determination of appellant's guilt on the burglary charge and theft of the gun was based on an incorrect and unconstitutional burden of proof. Hence the error is reversal per se.