FORFEITURE, WAIVER, AND APPEALABILITY

General Principles

In general "in an appeal from 'a final judgment of conviction' under Penal Code section 1237, subdivision (a), the defendant has standing to raise a claim of error in any part of the record." (*People v. Gillespie* (1997) 60 Cal.App.4th 429, 433.) However, a failure to object to an error waives or forfeits the claim for purposes of appellate review. (Pen. Code, § 1259.) Although the distinction is often ignored, waiver and forfeiture are different. Waiver is an explicit and intentional relinquishment of a right, while forfeiture refers to loss of entitlement to raise an issue because of failure to follow procedures required to preserve it. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

Some Claims not Waived: Some claims are not waived or forfeited because of a failure to object. For instance:

Statute of Limitations: The statute of limitations is jurisdictional and may be raised for the first time on appeal because a court's "jurisdiction over the subject matter — cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver or estoppel, and hence that the lack of such jurisdiction may be raised for the first time on appeal. (*People v. Williams* (1999) 21 Cal.4th 335, 339-340.)

Failure to Hold a Competency Hearing: (*People v. Welch* (1999) 20 Cal.4th 701, 738; *People v. Pennington* (1967) 66 Cal.2d 508, 518.)

Failure to Inquire or Revoke Pro Per Status: Where substantial evidence points to defendant's incompetence to waive counsel arises after self-representation is granted, trial court must reconsider defendant's competence to represent self. (*People v. Teron* (1979) 23 Cal.3d 103.)

Sufficiency of the Evidence: This issue is never waived. (*People v. Parra* 70 Cal.App.4th 222, 224, fn. 2; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1121.)

Mandatory Jury Instructions: "It is settled that in criminal cases, even in the absence of a request, the trail court must instruct on general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Among the instructions that must be given are: reasonable doubt (*People v. Vann* (1974) 12 Cal.3d 220, 226), elements of the offense (*People v. Flood* (1998) 18 Cal.4th 470, 480), lesser included offenses (*People v. Breverman* (1998) 19 Cal.4th 142, 154), prosecutor's theory of liability (*People v Prettyman* (1996) 14 Cal.4th 248), and the theory of the defense (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047).

Prejudicial Jury Instructions: A catch-all for jury instructions is found in Penal Code section 1259, which states: "The appellate court may also review any jury 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."

Arguments Against Waiver or Forfeiture: What to do when the issue may not have been properly preserved.

No Objection Necessary: Where error is jurisdictional, obvious, or fundamental or involved purely legal issues or a sua sponte duty. (Pen Code, § 1259; *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10; *People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1383; *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [unauthorized sentence].)

No Meaningful Opportunity to Object: *People v. Bautista* (1998) 63 Cal.App.4th 865, 868-871.)

Whether Waiver Occurred is Close and Difficult Question: "Because the question of whether defendants have preserved their right to raise this issue on appeal is close and difficult, we assume that defendants have preserved their right, and proceed to the merits." (*People v. Champion* (1995) Cal.4th 879, 908, fn. 6 [citing examples in numerous other cases].)

Question of Law, Not of Fact: "Where ... the newly advanced theory presents only a question of law arising from facts which are undisputed, appellate review is authorized. The Evidence Code section 353 requirement of timely and specific objection before appellate review is available is not a universal prohibition. As pointed out by the Assembly Judiciary Committee comment following Evidence Code section 353: 'Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law.'" (*People v. Mills* (1978) 81 Cal.App.3d 171, 175-176.)

Adequate Objection Was Made: Even if trial objection was not exactly in

same form as on appeal, if it gave the trial court a fair opportunity to rule on the matter and gave the opponent an adequate chance to present argument and evidence on it, argue the objection was adequate. (*People v. Partida* (2005) 37 Cal.4th 428, 431, 435; *People v. Williams* (1988) 44 Cal.3d 883; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.)

Objection Requirement Unfair: If the case is a vehicle for newly announced objection requirement, it would be unfair to hold defendant to it. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

Objection Would Have Been Futile: Given either state of law at the time or the trial court's previous rulings, objection would have been futile. (*People v. Turner* (1990) 50 Cal.3d 668, 703; *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.)

Trial Counsel's Waiver Not Effective Due To Fundamental Right: Where trial counsel and defendant disagree over defendant's desire to exercise fundamental right, such as right to testify, or right to jury trial, defendant's desire must prevail over trial counsel. (*People v. Harris* (1993) 14 Cal.App.4th 984, 991.) Defendant must personally and timely assert right to testify to preserve claim. (*People v. Hayes* (1991) 229 Cal.App.3d 1226.)

Trial Counsel Ineffective: (*In re Rocha* (2005) 135 Cal.App.4th 252; *People v. Burnett* (1999) 71 Cal.App.4th 151; *People v. Mitchell* (2008) 164 Cal.App.4th 442.)

Appellate Court Has Discretion To Reach Merits: "Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent[]' or 'correct[]' the claimed error in the trial court does not compel the conclusion that, by operation of his default, the appellate court is deprive of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. Indeed, it has the authority to do so. ... Whether or not it should do so is entrusted to its discretion." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

Exercise Discretion in Interests of Justice: (*People v. Lyons* (1992) 10 Cal.App.4th 837; *Conservatorship of Waltz* (1986) 180 Cal.App.3d 722.)

Exercise Discretion in Interests of Fundamental Due Process: (*People v. Barber* (2002) 102 Cal.App.4th 145, 150; *People v. Allen* (1974) 41 Cal.App.3 196, 201, fn. 1; *People v. Norwood* (1972) 26 Cal.App.3d 148, 152-153.)

Judicial Economy Favors Overlooking Default: *(In re Kacy S.* (1998) 68 Cal.App.4th 704, 713.)

State of Law Unsettled, No Presumption From Silent Record That Trial Court Correctly Applied Law: (*People v. Fuhrman* (1997) 16 Cal.4th 930, 945.)

Lower Court Bound by Authority Appellant Seeks to Overrule: Where issue could not have been decided below because lower court bound by rulings of higher court, issue may be raised for first time on appeal. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.)

SEARCH AND SEIZURE

Failure to renew suppression motion after an information is filed precludes appellate review. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896; Pen. Code, § 1538.5, subd. (m).)

The government will often try to assert a new theory of admissibility on appeal. The California Supreme Court frowns on that practice. "To allow a reopening of the question on the basis of new legal theories to support or contest the admissibility of the evidence would defeat the purpose of Penal Code section 1538.5 and discourage parties from presenting all arguments relative to the question when the issue of admissibility is initially raised. (*People v. Brooks* (1980) 26 Cal.3d 471, 483, quoting *Lourenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

MOTIONS IN LIMINE

Motions in limine are subject to the reiteration rule. (*People v. Morris* (1991) 53 Cal.3d 152, 189-190.) That means objection made before trial during in limine motion should be renewed during trial or the issue could be waived. However, failure to object at trial after losing an in limine motion does not necessarily waive the issue.

The basic requirements for raising in limine motion issue on appeal are set at page 190 or the *Morris* case:

(a) Specific legal ground for exclusion of evidence must be advanced below and raised on appeal;

(b) The motion must be directed to a particular, identifiable body of evidence; and

(c) The motion must be made a time either before or during trial when the trial judge can determine the evidentiary question in its appropriate context.

In *Morris* the California Supreme Court reconciled two contrary lines of cases. One line said that a motion in limine was sufficient to preserve an evidentiary issue on appeal. Another said that the party making the in limine motion must also object at trial to preserve the issue for appeal.

To reconcile these lines of cases, the Court looked to the purpose behind the rule. Evidence Code section 353, subdivision (a) broadly states that a judgment may not be reversed for erroneous admission of evidence unless

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion;

The purpose behind the rule is to provide the trial court the opportunity to rule on the objection or motion in the proper context. In *Morris* the Supreme Court reached the in limine issue absent renewed objection at trial. The defendant had made a motion to exclude all the testimony of two witnesses. At page 189, the Court said:

> "The motion was clearly and unequivocally denied. The objection was specific, it was directed to an identifiable body of evidence, and it was advanced at a time when the trial judge could give fair consideration to the admissibility of the evidence. Moreover, the Attorney General does not point to any event in the trial occurring after the in limine ruling and before

the evidence was offered that so changed the context as to constitute a basis for reconsideration of the ruling. Under these circumstances, defense counsel was justified in concluding that mere repetition of the same objection advanced on the motion in limine would serve no useful purpose."

INVITED ERROR

The invited error doctrine bars appellate challenge to a trial court ruling that is made at defendant's request. (*People v. Marshall* (1990) 50 Cal.3d 907, 931-933.) It most often is asserted on jury instruction issues. However, for the doctrine to apply the record must demonstrate that defense counsel invited the error due to a tactical purpose and not from ignorance or mistake. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

Where trial court has sua sponte duty to instruct other than requested by defense counsel, defense counsel must have articulated tactical purpose. (*People v. Wickersham* (1982) 32 Cal.3d 307, 300.) In *Wickersham*, the trial court neglected to give a second-degree murder LIO and there was no objection by trial counsel to the omission. In *Bradford*, the trial court did not give an LIO for theft in felony-murder case. Court of Appeal rejected invited error argument. Trial counsel said when asked about LIOs for robbery, "The evidence, your honor, just doesn't in my opinion warrant any lessers in this case other than second degree murder, and that is the only thing I'm asking for." (*Id.* at p. 1057.) The *Bradford* court said that trial counsel's response as a request for omission of LIO instruction and was instead a mistaken belief that the evidence did not warrant the instruction. (*Ibid.*)

In *Marshall*, the Supreme Court clarified the rule for articulation of a tactical purpose relied upon in *Wickesham* and *Bradford*. The *Marshall* court said that articulation of a tactical purpose is required where trial court had sua sponte duty to instruct otherwise. In other situations, if the record demonstrates trial counsel's tactical purpose, articulation is not required. (*People v. Marshall, supra* 50 Cal.3d at pp. 931-932.) The Court said "It is manifest that he requested the challenged instruction in order to structure the issues as favorably as he could in view of the case he had chosen to present. It is also manifest that in making relevant decisions he acted reasonably. The defense case and the instructions were tailored the one to the other." (*Id.* at p. 931.)

JURY INSTRUCTION CLAIMS - FORFEITED?

***Where a claim is *merely* that a pinpoint instruction should have been given or that an instruction needed more clarification, it is forfeited for appeal without an objection. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1134.) HOWEVER, most instructional error claims are arguable, regardless of objection because of the following:

1) Any claim of instructional error that **AFFECTS THE SUBSTANTIAL RIGHTS** of a defendant can be raised for the first time on appeal. (Pen. Code, § 1259.)

2) It is the **SUA SPONTE DUTY** of the trial court: "(1) to instruct on general principles of law relevant to issues raised by the evidence [citation]; and (2) to give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law [citation]." (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 779, citations omitted.) A trial court must "fully and fairly instruct[] on the applicable law" to the facts of the case. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088, internal quotation omitted.) Therefore:

a) An omitted instruction (standard or non-standard) that leaves the jury without adequate instruction on general principles of law "necessary for the jury's understanding of the case" violates a court's fundamental instructional duty. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, internal quotations omitted.)

I) An example is *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777, where in a Penal Code section 69 and 148 prosecution, jury was instructed the officers had to be engaged in a lawful duty and that a lawful arrest occurs where an officer has reasonable cause to believe individual committed a felony. Court found that despite correct instructions, there was error because court also had sua sponte duty to instruct that exigent circumstances were necessary to justify arrest without warrant.

b) An erroneous or ambiguous instruction violates a court's fundamental instructional duty.

I) Instructional error because of ambiguous instructions occurs where there is a "'reasonable likelihood' that the jury understood the charge as the defendant asserts [citations.]" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed. 2d 385; *People v. Kelly* (1992) 1 Cal.4th 495, 525.)

3) Where a request was necessary but not made and the absence of such request was prejudicially unreasonable, the claim might be arguable if framed as **INEFFECTIVE ASSISTANCE OF COUNSEL.**

AVOIDING THE PINPOINT INSTRUCTION TRAP

The trial court has a sua sponte duty to instruct correctly on all general legal principals relevant to the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Often when appellant argues the trial court should have given an instruction not included in the basic, standard instruction, respondent argues this amounts to a pinpoint instruction, which is waived absent a defense request. (See *People v. Sears* (1970) 2 Cal.3d 180, 190 [pinpoint instruction directs jurors attention to particular facts in relation to a legal issue and must be requested].)

An instruction is not merely a pinpoint instruction if, in its absence, the standard instruction is either incorrect or confusingly ambiguous. If the given instruction is either incorrect or ambiguous without an additional instruction, then no defense objection was required to preserve the issue for appeal.

A. Standard Instruction Incorrect Without Additional Instruction

Some standard instructions are actually erroneously incomplete or overbroad as categorical statements of the law. They are nonetheless given for the sake of simplicity. But if in a particular case the facts implicate a principal missing from the standard instruction, the instruction on this principal is not a pinpoint instruction, but an instruction required to make the standard instruction complete.

Example: CALJIC 5.56 (now CALCRIM 3471) defines the right to self-defense by a mutual aggressor as requiring the defendant to first actually communicate to his opponent his desire to stop fighting.. The standard instruction omits the "sudden escalation" rule, which obviates communication if the opponent suddenly escalates the fight with the use of deadly force. The sudden escalation rule is not merely a pinpoint instruction because without it the standard instruction in an erroneously overbroad statement of the law. This is because it is not true categorically that a mutual combatant must communicate the desire to stop before exercising the right to self-defense. Accordingly, where there is evidence of sudden escalation, is prejudicial error to omit instruction on it. (People v. Quach (2004) 116 Cal.APp.4th 294, 300-303.)

Attached is a sample argument on when an instruction is a pinpoint versus a necessary qualification of an erroneously overbroad standard instruction.

B. Standard Instruction Confusingly Ambiguous

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 fairly recent 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 ambuguity rather than facial incorrectness.

The second nuance added by *Middleton v. McNeil* was the court's holding 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 California Supreme 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.

Often, a standard instruction attacked on appeal will have been requested by *defense counsel.* To preempt a claim of "invited error" by respondent, it can be noted that a defense request or acquiescence to a standard instruction is not "invited error" unless the record establishes some tactical reason for seeking the instruction. (*People v. Moon* (2005) 37 Cal.4th 1, 28.) Ordinarily, the record will not demonstrate any tactical defense reason to have jurors misinstructed on the nature and apportionment of the burden of proof.

Sample Argument on Pinpoint Versus Necessary Qualification

While CALJIC No. 5.56 is commonly given, it is nonetheless an incorrect statement of the law because it instructs categorically that self-defense is unavailable to a mutual combatant unless he has stopped fighting and successfully communicated his withdrawal to his opponent. In fact, it is well settled that when persons are engaged in non-felonious mutual combat, i.e. ordinary assault, and one suddenly escalates the fight by using deadly force, the other may immediately use deadly force in self-defense if withdrawal is not possible. (*People v. Hecker* (1895) 109 Cal. 451, 463-464; *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75; 1 Witkin, California Criminal Law, Defenses,§ 75, p. 410; accord, *People v. Roe* (1922) 189 Cal. 548, 557-558.)

While CALJIC instructions are widely used distillations of the law, they are not sacrosanct, and a particular CALJIC instruction may be erroneous. (*People v. Vargas* (1988) 204 Cal.App.3d 1455, 1464; *People v. Mata* (1955) 133 Cal.App.2d 18, 21.) Significantly, an earlier version of CALJIC contained a self-defense instruction reflecting the "sudden escalation" rule. CALJIC No. 663 provided:

> Where a person seeks or induces a quarrel which leads to the necessity in his own defense of using force against his adversary, the right to stand his ground and thus defend himself is not immediately available to him, but, instead he must first decline to carry on the affray, must honestly endeavor to escape from it, and must fairly and clearly inform his adversary of his desire for peace and of his abandonment of the contest *unless the attack is so sudden and perilous that he cannot withdraw*. Only when he has done so will the law justify him in thereafter standing his ground and using force upon his antagonist. [*People v. Sawyer*, *supra*, 256 Cal. at p. 75, fn. 2, italics added.]

Unfortunately, the sudden escalation rule is nowhere reflected in current CALJIC No. 5.56 or elsewhere in the CALJIC. As a result, the current instruction is erroneously incomplete, and the error is critical where there is evidence from which jurors could conclude the defendant was a mutual combatant confronted by a sudden escalation of deadly force by his opponent.

Such evidence was present in *People v. Gleghorn*, *supra*,193 Cal.App.3d 196, where testimony suggested the defendant had been the initial aggressor in a fight, but that the alleged victim had escalated the fight by shooting the defendant with an arrow, to which the defendant responded by severely beating the alleged victim. (*Id.* at pp. 199-

200.) Reflecting the rule of *People v. Hecker*, *supra*, the trial court gave jurors the following special instruction: "Where the original aggressor is not guilty of a deadly attack, but of simple assault or trespass, the person assaulted has no right to use deadly or other excessive force. And, where the counter assault is so sudden and perilous that no opportunity be given to decline further to fight and he cannot retreat with safety he is justified in slaying in self-defense." (*Gleghorn*,193 Cal.App.3d at p. 201.)

Such an instruction was required in appellant's case. A trial court must instruct jurors sua sponte on the general principles of law relevant to the issues in the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) General principles of law include defenses. (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) In this case, the evidence appellant fired only after being fired at necessarily implicated the defense of self-defense. Accordingly, the trial court was required to instruct sua sponte on self-defense.

The obvious corollary to the requirement to instruct on a potentially applicable defense is the requirement to instruct correctly. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.) CALJIC No. 5.56 is incorrect in that it informs jurors without qualification that self-defense is unavailable to a mutual combatant who has not withdrawn from the fight and successfully informed his opponent of this fact. As detailed above, the error of CALJIC No. 5.56 is that a mutual combatant engaged in an ordinary assault who encounters a deadly counter-assault may lawfully do exactly what CALJIC No. 5.56 purports to forbid, i.e. defend himself immediately without withdrawing.

Respondent may argue that the sudden escalation rule of *People v. Hecker* amounts to a "pinpoint instruction," rather than a sua sponte instruction, and that as such it must be requested by the defense. Any such argument should be rejected. A pinpoint instruction is one that "that directs attention to evidence from a consideration of which a reasonable doubt of [the defendant's] guilt could be engendered." (*People v. Sears* (1970) 2 Cal.3d 180, 190.) A pinpoint instruction is one "relating particular facts to any legal issue." (*Ibid.*) The right to a pinpoint instruction entitles a defendant to fashion an instruction that pinpoints the theory of the defense. (*People v. Noguera* (1992) 4 Cal.4th 599, 648; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

It is inherent in a pinpoint instruction that it accepts the correctness of the more general instructions given, but focuses one or more of those instructions on the particular defense theory. (See *People v. Sears* (1970) 2 Cal.3d 180, 190.) In the present case, by contrast, the problem is that the given general instruction was simply incorrect: It is plainly contrary to the law to state, as CALJIC No. 5.56 does, that a mutual combatant may not exercise self-defense unless he has first withdrawn from the

fight and communicated this fact to his opponent. CALJIC No. 5.56 could be called erroneously *overinclusive* because it bars the use of self-defense in all situations where a combatant has not first withdrawn from the fight; or it could be called erroneously *incomplete* because it omits the qualification, "*unless the attack is so sudden and perilous that he cannot withdraw*," as former CALJIC No. 663 provided. Under either view, CALJIC No. 5.56 is a incorrect statement of the law of self-defense. The trial court erred by giving the instruction.

B. Appellant's Challenge To the Denial of Probation Is Not Waived

Appellant submitted a lengthy, detailed sentencing memorandum to the court. (C.T. pp. 48-204.) At the sentencing hearing, defense counsel argued vigorously in favor of probation and offered statements from appellant and appellant's best friend. (III R.T. pp. 72-88.) After the court denied probation, it proceeded immediately to sentencing, offering appellant no meaningful opportunity to object to the denial. (III R.T. p. 98.) (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) Although appellant realizes the California Supreme Court held a trial court need not issue a tentative decision before sentencing, it did find "the meaningful opportunity to object" rule applies where the trial court fails to afford adequate opportunity for objection. (*Id.* at. p. 752.) That is the case here, where the trial court denied probation and immediately proceeded to impose a state prison term. (III R.T. p. 98.)

Even if this court were to find the trial court provided defense counsel with a meaningful opportunity to object, this court should reach the issue on this merits, because there could be no conceivable reason for counsel's failure to object to the trial court's reasons for denying probation, so his omission could not have been the result of an informed tactical decision. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426.) Where there is no conceivable rational tactical explanation for an omission, nothing more is necessary to establish counsel's inadequacy. (See e.g., *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, fn. 3 [failure to move to delete references to unproven other crimes from tape and transcript admitted into evidence]; *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366 [failure to object on collateral estoppel grounds to felony murder instructions].) Here, defense counsel filed a 156 page statement in mitigation, and argued vigorously for a grant of probation. (C.T. pp. 48-204; R.T. pp. 72-85.) There can be no conceivable rational tactical explanation for his failure to object to the trial court's erroneous reasons for denying appellant probation.

The statement in mitigation, as well as the arguments of counsel, should be deemed to have preserved for appeal the trial court's abuse of discretion in denying appellant probation. However, should this court find the court's stated reasons were not adequately addressed by counsel, this is either due to a lack of a meaningful opportunity to object because of the trial court's denial of probation and immediate imposition of a prison sentence, or trial counsel's failure to adequately preserve the issue for appeal. Either way, this court should reach the merits of this issue.

SENTENCING ISSUES - FORFEITED?

***The general rule is: A defendant must object to a court's consideration of improper sentencing factors: "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) Yet, exceptions exist, and this rule is not always clear-cut. The following questions are helpful:

1) **IS THE SENTENCE ARGUABLY UNAUTHORIZED?** There is no forfeiture where a sentence is UNAUTHORIZED, which means that it "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Common examples of unauthorized sentences are Penal Code section 654 violations, imposition of a term not provided in a statute, and imposition of an enhancement that does not apply.

2) **WAS THERE A MEANINGFUL OPPORTUNITY TO OBJECT?** An exception to forfeiture exists where there was no meaningful opportunity to object: "This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) The court must take time to consider any objections from the parties prior to actually imposing sentence. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) The meaningful opportunity is necessary as a due process protection and requires "notice and an opportunity to be heard" (*People v. Zuniga* (1996) 46 Cal.App.4th 81, 84-85), but there is no requirement of advance notice (*Gonzalez*, at p. 754). If sentencing factors relied upon by the court had previously been offered by the prosecution in a statement in support of aggravation or by probation in a probation report, then an appellant had received the necessary meaningful opportunity to object. (E.g., *People v. Steele* (2000) 83 Cal.App.4th 212, 226.)

3) **IS IT POSSIBLE TO ARGUE COUNSEL ADEQUATELY BROUGHT THE ISSUE TO THE COURT'S ATTENTION AND/OR THAT ANY OBJECTION WOULD HAVE BEEN FUTILE BECAUSE THE COURT CONSIDERED THE ISSUE?** Even where one of the above exceptions do not exist, sentencing issues often arguably are preserved for appeal through counsel's argument at the sentencing hearing and or sentencing memorandum. For example, where counsel argues for the low term, an abuse of discretion argument for another term likely arguably is preserved. An argument for the low term, though, probably would not alone preserve an argument of impermissible dual-use of a factor. Yet, if the court, in its statement of reasons, notes a potential dual-use problem but its contrary conclusion, then an argument probably could be made that an objection would have been futile [and the rationale behind the objection requirement was fulfilled] because the court had already made its decision on the issue. (*People v. Scott* (1994) 9 Cal.4th 331, 353, 356.) In appropriate cases, it could be argued the trial court had a fair opportunity to rule on the essence of the matter and the state had an adequate chance to address it. (E.g., *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.)

4) **IF COUNSEL NEEDED TO OBJECT AND DID NOT, WAS IT INEFFECTIVE ASSISTANCE OF COUNSEL?**