

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Advisory Committee on Criminal Jury Instructions
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DATE: May 1, 2007

SUBJECT: Jury Instructions: Approve Publication of Revisions and Additions to
Criminal Jury Instructions (Action Required)

Issue Statement

The Advisory Committee on Criminal Jury Instructions has completed its second set of revisions and additions to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)* that were first published in 2005.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective June 29, 2007: approve for publication under rule 2.1050(d) of the California Rules of Court the new and revised criminal jury instructions prepared by the advisory committee.

Upon Judicial Council approval, the instructions will be officially published in the latest edition of *CALCRIM*.

The table of contents for the proposed revisions and additions to the jury instructions is attached at pages 6–10. The revised and new criminal jury instructions are included separately with this report.

Rationale for Recommendation

The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that can be readily understood by the average juror. In August 2005, the council approved publication of

approximately 700 criminal jury instructions. In August 2006, the council approved additional new and amended criminal jury instructions. The Advisory Committee on Criminal Jury Instructions is charged with maintaining and updating those instructions.

The advisory committee drafted and edited the revisions and additions in this proposal, then circulated them for public comment (with an exception noted below). The official publisher (LexisNexis Matthew Bender) is preparing to publish both print and electronic versions of the revised and new instructions that are approved by the council.

Overview of Updates

The following instructions are included in this set: Nos. 100–102, 105, 200–202, 222–223, 225–226, 250–254, 302, 402–403, 521, 524, 540A–540C, 590, 602, 763, 840, 875, 970, 1123, 1154, 1180, 1203, 1300, 1400, 1402, 1806, 2040, 2201–2202, 2370, 2375–2377, 2411, 2542, 2656, 2801, 2812, 2900, 3131, 3145–3147, 3160–3163, 3402, 3453–3454, 3470, 3516–3519, 3577. Of these, 4 are completely redrafted and 61 are revised.

The instructions were added or revised based on comments or suggestions from judges, attorneys, staff, and advisory committee members. The advisory committee also revised instructions based on recent changes in the law. A representative sampling of the changes follows:

CALCRIM No. 100, *Trial Process (Before and During Voir Dire)*, was revised because a judge suggested changing the title and adding an explanation of jury selection as one of the “steps” of the trial.

CALCRIM Nos. 105, 226, *Witnesses*, were revised because an advocacy group and a Judicial Council advisory committee requested expanding the list of prohibited targets of bias. The changes in both the *Pretrial* and *Post-Trial Series* reflect the recommendation of Standard of Judicial Administration 10.20(a)(2), which requires that each judge should “in all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation” as well as California Code of Judicial Ethics, Canon 3(b)(5), prohibiting bias on the basis of: “race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.” A new bench note explains that the judge may strike any target that is clearly not implicated in a given case.

CALCRIM Nos. 250–254, *Union of Act and Intent Series*, were substantially revised in response to numerous comments from judges and practitioners that they were confusing, particularly in multiple-count cases. For example, references to “every crime” were changed to “the crime[s]” for clarity.

CALCRIM No. 402–403, *Natural and Probable Consequences Doctrine Series*, were revised after two advisory committee members noticed that the second element did not make clear that the aiding and abetting relationship must include the perpetrator of the ultimate offense in the situation when the prosecution seeks to extend liability beyond the party who clearly committed the homicide to others who just as clearly did not. Element 2 now states: “During the commission of _____ <insert target offense> a coparticipant in that _____ <insert target offense> committed the crime of _____ <insert non-target offense>). It also defines a coparticipant as “the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.”

CALCRIM No. 521, *Murder: Degrees*, was revised to keep it current with changes in the law. The committee added the word “substantial” to the “lying in wait” language pursuant to *People v. Poindexter* (2006) 144 Cal.App.4th 572, 584, and added an extra element to the instruction on “torture” to explain that the act causing death must involve a high degree of probability of death, as the Supreme Court required in *People v. Cook* (2006) 39 Cal.4th 566, 602.

CALCRIM No. 763, *Death Penalty: Factors to Consider — Not Identified as Aggravating or Mitigating*, was revised to reference the absence as well as the presence of a prior felony conviction in factor “c,” and to clarify the language for factor “k.”

CALCRIM No. 1806, *Theft by Embezzlement*, was revised because several commentators noticed that the requirement of intent to deprive the owner of property permanently in element 4 was not required. The committee decided to add a requirement that the defendant act “fraudulently.”

CALCRIM Nos. 2370, 2375–2377, *Simple Possession of Marijuana Series*, were revised to conform the compassionate use defense to the holding of *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821.

CALCRIM Nos. 3516–3519, *Lesser Included Offenses Series*, was completely redrafted in response to comments from CALCRIM users that the instructions did not reflect the different practices for instructing on lesser offenses in different counties across the state. The trial judges on the advisory committee formed a subcommittee that produced the current completely new drafts to replace the prior CALCRIM Nos. 3516–3518.

Updates That Did Not Circulate for Public Comment

On April 4, 2007, the Court of Appeal published *People v. Salcido* (2007) 149 Cal.App.4th 356. In that case, the court admonished the advisory committee to consider reviewing and revising CALCRIM No. 1400, *Active Participation in Criminal Street Gang* to follow *People v. Ngoun* (2001) 88 Cal.App.4th 432, 435 to expressly state that direct perpetrators, as well as aiders and abettors, fall within the prohibition of Penal

Code section 186.22(a). Accordingly, the committee conferred and revised the instruction to follow the court’s suggestion for *CALCRIM* No. 1400 as well as for *CALCRIM* No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gangs*, which contains the same provisions. Because courts give these instructions frequently, the committee recommends that the council approve the proposed changes now to comply with the Court of Appeal’s suggestion. The committee will then circulate them for public comment with the next round of *CALCRIM* revisions.

Alternative Actions Considered

Rule 10.59 of the California Rules of Court requires the advisory committee to update, amend, and add topics to *CALCRIM* on a regular basis and to submit its recommendations to the council for approval. The proposed revisions and additions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore the advisory committee did not consider any alternative action.

Comments From Interested Parties

The advisory committee received many comments from *CALCRIM* users. The advisory committee evaluated the comments and made some changes to the instructions based on the recommendations. A chart summarizing the public comments and the committee response is included at pages 11–28.

The revisions that generated the most attention from commentators were those involving *CALCRIM* Nos. 2370, 2375–2377 (compassionate use defense to marijuana possession) as well as 2411, *Duress*. Many members of the criminal defense bar objected that the new language, which states that the defendant must “produce evidence tending to show” that the defense applies, diminished the People’s burden of proof.

In choosing the new language, the advisory committee was responding to concerns that the language of the original draft conflicted with the holding in *People v. Frazier* (2005) 128 Cal.App.4th 807, 816:

Defendant claims his only burden under the Compassionate Use Act is to raise the issue of his compassionate use and then the burden remains with the prosecution to prove beyond a reasonable doubt that he has no defense of compassionate use. He is wrong.

The new language follows *Frazier*, and the committee concluded that it must be retained.

Implementation Requirements and Costs

Implementation costs will be minimal. Under the publication agreement, the official publisher will make copies of the update available to all judicial officers free of charge. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC will provide a broad public license for their use and

reproduction by noncommercial publishers. With respect to commercial publishers other than the official publisher, the AOC will license their publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters that may be necessary.

Attachments

CRIMINAL JURY INSTRUCTIONS
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Instruction	Commentator	Summary of Comments	Committee Response
Generally	Mr. Mike Roddy Executive Officer Superior Court of California, San Diego County	Agree with proposed changes.	No response required.
Generally	Hon. Philip H. Pennypacker, Superior Court of Santa Clara County	Good modifications. Why no definition of admission/confession?	This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for comment.
Generally	Superior Court of Los Angeles County	Unless otherwise specifically noted, the instructions are approved as revised.	No response required.
100, Trial Process (Before or During Voir Dire)	Hon. S. Rebecca Riley, Superior Court of Ventura County	Is this an instruction that judges give to the whole panel? I do not give it until I have a jury so it was fine the way it was before. Also, shouldn't the reference to the defense opening statement include their option to not give an opening at all as they have no burden of proof? The language is "may" but I always add this to what I say to the jury.	The second and third paragraphs are bracketed as optional so that the judge may give this instruction either before or after jury selection. The committee agrees to explain that defense opening is optional.
101, Cautionary Admonitions	Hon. Harold W. Hopp, Superior Court of Riverside County Hon. David Sotelo, Superior Court of Los Angeles County	The word "Internet" should be capitalized. CALCRIM 101 should include: "During presentation of the trial, do not consider punishment."	The committee agrees. CALCRIM 200 (Post-Trial Series) contains such an admonition. The committee considered adding this language to CALCRIM 101 but decided it was more important to give the admonition in the Post-Trial Series.
102, Note-Taking	Superior Court of Los Angeles County	Replace "I do not mean to discourage you from taking notes, but" with "Although you may find it helpful to take notes."	The committee considered this language but prefers the current formulation instead.

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		The CALCRIM 202 reference to the court reporter's record should also be here. The paragraph in CALCRIM 104 discussing the court reporter's record should be moved to this instruction.	The committee discussed this issue but decided on the current language.
105, Witnesses	Superior Court of Los Angeles County	Approve as revised but question the necessity of adding ethnicity, which is adequately covered by race or national origin.	The changes reflect the recommendation of Standard of Judicial Administration 10.20(a)(2), which requires that each judge should "in all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity , and sexual orientation." Moreover, a bench note indicates that characteristics that do not apply in a given case need not be used.
200, Duties of Judge and Jury	John Aquilina, Attorney, Riverside County Superior Court of Los Angeles County	Disagrees with statement that jury is to "decide what happened." Issue is whether prosecution has proven its case beyond a reasonable doubt. Approve as revised although some concern that use of either "alone" or "exclusively" leaves a possible inference that the juror should make his or her decision by himself or herself rather than after proper deliberations with fellow jurors. The committee may wish to consider deleting either word.	This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for comment. The committee agrees with this comment and revised the instruction to address it.
202, 222, Note-Taking and Evidence	Hon Rebecca S. Riley, Superior Court of Ventura County	It seems that these instructions should use consistent language with regard to the court reporter's "record" or "notes."	The committee considered that issue but decided to use the current language.

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	Los Angeles County Public Defender	<p>202: It is false to state that the court has a sua sponte duty to give instruction 202, the rule just requires that the trial judge must inform jurors that they may take written notes during trial. They need not hear this particular instruction. The change into short sentences makes the instruction choppy and difficult to read or to have read out loud. The change to the term “record” instead of a simple reference to the court reporter reading back relevant portions of the testimony is a bad change that is very vague. Jurors may not understand the term “record.” CALJIC 1.05 is much better.</p> <p>222: “You must accept the reporter’s notes as accurate” is problematic. What is the authority for this claim? If this claim means that the reporter’s notes must be accepted regardless, then it is of dubious correctness. A juror or jurors may have a recollection that differs; the jurors should be able to bring their concerns to the judge’s attention for review by counsel and the court.</p>	<p>In response to this comment, the committee revised the language about the sua sponte duty. The committee considered the other concerns raised but prefers the language of the current draft.</p> <p>The committee believes that in the context of an instruction about how jurors may use their notes, this admonition is appropriate and clear.</p>
226, Witnesses	Superior Court of Los Angeles County	<p>See comment to CALCRIM 200 above—consider deleting the word “alone.”</p> <p>Approve as revised with same comment as to CALCRIM 105 re lack of need for term “ethnicity.”</p>	<p>See response to CALCRIM 200 above.</p> <p>See response to CALCRIM 105 above.</p>
250–252, Union of Act and Intent	San Diego District Attorney’s Office	<p>250: Do not delete the word “intentionally” and use the correct legal terminology namely, “general criminal intent.”</p> <p>251: Use the term “specific intent.” Why retain the word “intentionally” here? Be consistent.</p> <p>252: Why delete “intentionally” and why not use terms “general and specific intent”? Use their specific revision to address these concerns.</p>	<p>The committee agrees to use the word “intentionally” consistently.</p> <p>The instruction contains the words “specific intent.”</p> <p>The committee will use “intentionally.” The terms “general and specific intent” are legal terms</p>

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Instruction	Commentator	Summary of Comments	Committee Response
250	Hon. Lauren Weis Birnstein, Superior Court of Los Angeles County	Change the order of the last two sentences thus: “In order to be guilty of the crime of simple battery, a person must not only commit the prohibited act, but must do so intentionally or on purpose. However, it is not required that he or she intend to break the law. The act required is explained in the instructions for each crime.”	that are not helpful to jurors so the committee avoids their use when possible. The committee considered this language but prefers the current language.
250	Superior Court of Los Angeles County	Revise the second paragraph as follows to make clear that the issue is intent and not awareness of legality of the act committed. Eliminate list of various counts when all counts are general intent crimes: “The crime[s] [or other allegation[s]] charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent. For you to find a person guilty of the crime[s] charged, that person must not only commit the prohibited act [or fail to do the required act], but must do so with wrongful intent. A person acts with wrongful intent when he or she does a prohibited act on purpose; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime [or allegation].	The committee has changed the language to reflect that intent, and not awareness, is the issue. The further suggested changes involve important redrafting that will be considered at the next full advisory committee meeting.
251	Superior Court of Los Angeles County	See comments to 250 above. Delete optional third paragraph. Instruction should read: “The crime[s] [(and/or) other allegation[s]] charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent. For you to find a person guilty of the crime[s] charged [or to find the allegation[s] true], that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ (and/or) mental state). The	See comment above.

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252	Superior Court of Los Angeles County	<p>act and the specific (intent/ (and/or) mental state) required are explained in the instruction for that crime [or allegation].</p> <p>See comments to 250 above. Delete optional fourth paragraph and merge 3rd and 4th sentences as follows: “A person acts with wrongful intent when he or she does a prohibited act on purpose; however, it is not required that he or she intend to break the law.”</p>	The committee has changed the language to reflect that intent, and not awareness, is the issue. The further suggested changes involve important redrafting that will be considered at the next full advisory committee meeting.
253–254, Union of Act and Intent	Hon. Rebecca S. Riley, Superior Court of Ventura County	The language in these two instructions should be consistent.	The committee agrees with this comment and has made the appropriate change.
402–403, Natural and Probable Consequences Doctrine	Los Angeles County Public Defender	The words “beyond a reasonable doubt” should be inserted between “prove” and “that.” Failure to state the burden of proof is error.	The committee notes that the jury receives other admonitions about the burden of proof and believes it is not necessary to repeat it here.
521, Murder: Degrees	<p>San Diego District Attorney’s Office</p> <p>Elaine Alexander, Executive Director, Appellate Defenders, Inc.</p>	<p>There is no authority for adding the word “substantial” to the lying in wait requirement. If “substantial” is retained, use “The period of waiting and watching does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation.”</p> <p>The case law suggests that foresight, not hindsight, is necessary in construing the element of <i>high probability</i>. The circumstance of torture serves to elevate a killing that otherwise might be second degree murder to first degree. Outside the felony murder context, subjective malice is normally required for murder. Causation is also required. Borrow the language from CALCRIM 520: 3. The natural consequences of the act[s] inflicting</p>	<p><i>People v. Poindexter</i> (2006) 144 Cal.App.4th 572, 582–585 is authority for using the word “substantial.” The committee has considered the suggestion to rephrase and adopted it.</p> <p>The committee would like to devote further time to reviewing and researching this comment, so it will consider it at the next full committee meeting.</p>

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		<p style="text-align: center;">torture involved a high probability of death;</p> <p style="text-align: center;">4. At the time the defendant acted, (he/she) knew the act[s] involved a high probability of death;</p> <p style="text-align: center;">AND</p> <p style="text-align: center;">5. The torture was a cause of death.</p>	
524, Second Degree Murder: Police Officer	First District Appellate Project, California Appellate Project Los Angeles, Central California Appellate Program, Sixth District Appellate Program, Appellate Defenders	Delete “uses the weapon to commit < <i>insert description of crime specified in Pen. Code section 12022.5</i> > because it is inadvertently misleading.	The committee agrees and has deleted the language.
540A–C, Felony Murder	Elaine Alexander, Executive Director, Appellate Defenders	The lesser included offenses section of all of these instructions should not include attempted murder. There is no such crime as attempted felony murder.	The committee agrees and has deleted this language.
763, Death Penalty: Factor to Consider	Superior Court of Los Angeles County	<p>As written this instruction does not accurately reflect factor “c” because it refers to a “conviction” rather than a “prior conviction.” We suggest following the “whether or not” format followed in factor “b” (where the absence of a factor is mitigating also). If this were done it would read: “(c) Whether or not the defendant has been convicted of any prior felony other than the crime(s) of which he was convicted in this case.” While this latter version is arguably academic since a trial judge would presumably not admit a felony conviction that did not occur before the commission of the death eligible crimes, it could be necessary when factor (b) violent criminal conduct, occurring after these death eligible crimes, was proved with certified copies of court documents showing a conviction thereof.</p> <p>Paragraph four of (4) states: “If you find there is no evidence of a factor, then you should disregard that factor.” There is a potential problem because under factor (b) there is rarely evidence that the defendant does not have a prior felony conviction. Usually, there is simply no</p>	The committee agrees with these suggestions and has made the appropriate changes.

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		evidence of a prior felony conviction. Technically, lack of evidence is not evidence of the contrary. It would be easier to simply add the words “where applicable” to the first sentence in paragraph four. That sentence would then read: “Under the law, you must consider, weigh, and be guided by specific factors where applicable.”	
875, Assault With Deadly Weapon	Elaine Alexander, Executive Director, Appellate Defenders Superior Court of Los Angeles County	The definition of semiautomatic gun is out of place in the middle of a discussion on application of force. It should be moved into the list of weapons definitions. Same as above comment.	The committee agrees and has made the appropriate change.
970, Shooting Firearm/BB Device in Grossly Negligent Manner	Elaine Alexander, Executive Director, Appellate Defenders	The instruction distinguishes a firearm from a BB device. Both weapons should be mentioned in the heading and in the first sentence of the instruction.	The committee agrees and has made the appropriate change.
1154, Prostitution: Soliciting Another	Superior Court of Los Angeles County	Disagree with the proposed revision because <i>People v. Norris</i> (1978) 88 Cal.App.3d Supp 32, 38 held: “[W]e hold that solicitation of an act of prostitution in violation of Penal Code section 647, subdivision (b) is a specific intent crime and that the specific intent involved is ‘to engage in prostitution.’” In contrast to the rule of <i>Norris</i> the revision states that the specific intent required is that the defendant intended to cause the person solicited “to engage in an act of prostitution.” This formulation is similar to the elements of pandering and therefore unnecessary here. If the revision is based on the assumption that if the customer is soliciting a prostitute, only the prostitute is “engaging in prostitution” statutory and case law indicate otherwise. (Penal Code section 647(b) and <i>Leffel v. Municipal Court</i> (1976) 54 Cal.App.3d 569, 575.) It may be advisable to clarify that	The committee agrees and has made the appropriate change.

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		customers, as well as prostitutes, can “engage in an act of prostitution.”	
1180, Incest with a Minor	Elaine Alexander, Executive Director, Appellate Defenders	Age of the partner is irrelevant for purposes of incest under section 285, so why is there a separate instruction for incest with a minor?	The committee agrees with this comment and has deleted the unnecessary references to minors.
1203, Kidnapping: For Robbery, Rape, or Other Sex Offenses	<p>First District Appellate Project, California Appellate Project–Los Angeles, Central California Appellate Program, Sixth District Appellate Program</p> <p>Elaine Alexander, Executive Director, Appellate Defenders</p> <p>Los Angeles County Public Defender</p>	<p>The reference to “lewd and lascivious act” leaves out that the victim can be either a minor under the age of 14 or a person age 14 or 15 when the defendant is ten years older. “Forcible sexual penetration” and “rape with a foreign object” overlap with other parts of the instruction. Delete “sexual penetration” and “rape with a foreign object” and include “forcible sexual penetration” only. “Rape with a foreign object” is subsumed in “forcible sexual penetration (section 289) and “sexual penetration” without force is not based on anything in Penal Code section 209(b).</p> <p>Same comments as those above. Additionally, this instruction should mention section 264.1 and the “in concert” provision.</p> <p>This is a specific intent crime. The word “specific” should be inserted into elements 1 and 2.</p> <p>Element 2: insert the language “when the movement commenced” since if the defendant lacked the specific intent to commit robbery, rape or [____] at the time the movement commenced, and/or formed the specific intent</p>	<p>The committee agrees with this comment and has made one change to address it generally.</p> <p>The committee agrees with this comment and has made one change to address it generally. However, adding the in concert provision would involve significant rewording which will be deferred until the next full committee meeting.</p> <p>The committee has consistently declined to use the term “specific intent,” choosing instead to describe what must be specifically intended.</p> <p>This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for</p>

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Instruction	Commentator	Summary of Comments	Committee Response
	Superior Court of Los Angeles County	<p>at some time after the movement commenced, then he or she is not guilty of the offense. See <i>People v. Tribble</i> (1971) 4 Cal.3d 826.</p> <p>Substantial Distance: change definition of “substantial distance” to include that brief movements to facilitate the crime of robbery, rape or other sex offenses are incidental to the commission of that crime (See <i>People v. Daniels</i> (1969) 71 Cal.2d 1119, 1134).</p> <p>Defense: Good Faith Belief in Consent: The bench notes state that the victim’s consent to go with the defendant may be a defense. This is incorrect. A person’s lack of consent is an element of kidnapping, not a defense. See <i>People v. Hill</i> (2000) 23 Cal.4th 853, 855; <i>People v. Moya</i> (1992) 4 Cal.App.4th 912, 916.</p> <p>Defense: Consent Given: Element 3 should delete the word “maturity” and replace it with “mental capacity.” The word “maturity” is an oversimplification in an attempt at using plain language, and instead implies that if an individual is not sufficiently “mature” then that person cannot consent. This is particularly important in cases where the complaining witness is young.</p> <p>Approve as revised with the additional recommendation that the language added to elements 1 and 4, namely: “or rape with a foreign object/ [or] a lewd and lascivious act/ [or] forcible sexual penetration” also be added to the list of crimes contained in the paragraph defining <i>substantial distance</i> and the two paragraphs following that definition.</p>	<p>comment.</p> <p>This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for comment.</p> <p>This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for comment.</p> <p>This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for comment.</p> <p>The committee agrees with this comment and has inserted the appropriate language as adjusted pursuant to the comments above.</p>
1300, Criminal Threat	Los Angeles County Public Defender	Element 3: Penal Code section 422 requires SPECIFIC intent.	The committee has consistently declined to use the term “specific

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	Superior Court of Los Angeles County	<p>Element 4: omits language from section 422 “on its face and under the circumstances in which it was made” and by using the word “consider” it minimizes the importance of the words themselves, as well as the surrounding circumstances. Replace element 4 with element 4 of CALJIC 9.94.</p> <p>Recommend that, to the extent this instruction asks that the name of the family member who was threatened be inserted in element 1, that the instruction allow instead for the user to insert the language “or member[s] of his or her immediate family” following the name of the complaining witness.</p>	<p>intent,” choosing instead to describe what must be specifically intended.</p> <p>This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for comment.</p> <p>The committee agrees with this comment and has inserted the proposed language.</p>
1806, Theft by Embezzlement	<p>Elaine Alexander, Executive Director, Appellate Defenders</p> <p>Los Angeles County Public Defender</p> <p>Superior Court of Los Angeles County</p>	<p>The law appears to require taking “undue” advantage of another. <i>People v. Stewart</i> (1976) 16 Cal.3d 133, 142; <i>People v. Talbot</i> (1934) 220 Cal. 3, 15; <i>People v. Swenson</i> (1954) 127 Cal.App.2d 658, 663. That word should be added to the sentence defining <i>fraudulently</i>.</p> <p>Disagree with the proposed change, prefer current version instead.</p> <p>Recommend that the instruction either provide language defining the “good faith belief” defense or reference a separate instruction concerning the defense since there is a reference to so instructing in the bench notes.</p>	<p>The committee agrees with this comment and has inserted the word “undue” into the definition.</p> <p>The committee carefully considered this comment but declines to follow it.</p> <p>The committee will refer this issue back to the committee for further research and drafting.</p>
2040, Unauthorized Use of Personal	Superior Court of Los Angeles County	Recommend revisions to definition of “person” per Penal Code section 530.55(a) as follows: add the parenthetical “[living or deceased]” after human being on page 135, line 41; strike the word “or” before the words “public entity”	The committee agrees with these comments and has made the suggested changes.

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Instruction	Commentator	Summary of Comments	Committee Response
Identifying Information		on page 135, line 43; and add the phrase “or any other legal entity” at the end of the sentence on line 43.	
2201, Speed Contest	Los Angeles County Public Defender	The instruction lacks discussion of concurrent, intervening or superseding causes, and the definition of substantial factor is unsupported by law.	The bench notes refer the user to CALCRIM 240, Causation.
2202, Exhibition of Speed	Los Angeles County Public Defender	Vehicle Code section 23109(e)(2) only applies to speed contests in violation of 23109(a) and not exhibitions of speed in violation of 23109(c). The new addition should be deleted.	The committee agrees with this comment and has made the appropriate deletion.
2370, 2375–2377, 2411, Marijuana—Compassionate Use Defense, Lawful Possession of Needle or Syringe	<p data-bbox="384 589 749 784">First District Appellate Project, California Appellate Project—Los Angeles, Central California Appellate Program, Sixth District Appellate Program</p> <p data-bbox="384 992 730 1052">Jose Varela, Assistant Public Defender, Marin County</p>	<p data-bbox="774 589 1449 914">Agree with new instruction on compassionate use, but would add comment to bench notes as follows: Under <u>Defenses – Instructional Duty</u> in the beginning of last sentence change: “If the defendant meets this burden” to “If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act.” See <i>People v. Breverman</i> (1998) 19 Cal.4th 142, 157, cf. CALCRIM 3470. Make corresponding change for CALCRIM 2411 also.</p> <p data-bbox="774 992 1449 1421">The new language on the compassionate use defense waters down the prosecution’s burden of proof and shifts the burden of proof to the defendant. It is also confusing and unclear. For the marijuana instructions, change to: “In order for the CUA to apply, the defendant must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with medical need) with a physician’s recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient’s current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was</p>	<p data-bbox="1491 589 1919 784">The committee agrees with this comment and has made the appropriate change in the marijuana instructions, but prefers to retain the language in the bench note of CALCRIM 2411.</p> <p data-bbox="1491 992 1887 1084">The committee discussed this comment and prefers to retain the current language.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
2377, Concentrated Cannabis	Christine Winte, Deputy District Attorney, Siskiyou County	<p>not authorized to possess marijuana or concentrated marijuana for medical purposes. If you have a reasonable doubt about whether the defendant’s possession or cultivation of marijuana was unlawful under the CUA, you must find the defendant not guilty.”</p> <p>For the hypodermic needle instruction, 2411: “The defendant must produce evidence tending to show that (his/her) possession of (needle[s]/ [or] syringe[s]) was lawful. The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If you have a reasonable doubt about whether the defendant’s possession of (needle[s]/ [or] syringe[s]) was lawful, you must find the defendant not guilty.”</p> <p>Health and Safety Code section 11362.77 states that only the dried female flowers can be used to calculate the amount that may be possessed by a qualified patient. Further, nothing in the enactments of the Compassionate Use Act contemplated a substance that has approximately a 7.95 to 1 conversion rate. Further, hash is normally made with “shake” (leaves and stems) not the bud of the plant. The act itself refers to marijuana and growing marijuana and not concentrated cannabis. To allow “medical marijuana” to apply to concentrated cannabis is a violation of the law.</p>	<p>Health and Safety Code section 11362.77(e) expressly states that the Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. Pursuant to 86 Ops.Cal.Atty.Gen. 180, 194 (2003), concentrated cannabis is included within the definition of marijuana as that term is used in the Compassionate Use Act of 1996.</p>
2411, Possession of Hypodermic Needle or Syringe	Los Angeles County Public Defender	<p>2411: Evidence Code section 115 allows a defendant to prove the elements of a given defense merely by raising a reasonable doubt as to their existence or non-existence, see <i>People v. Mower</i> (2002) 28 Cal.4th 457, 479. Therefore, the defense need not produce evidence, but rather has the burden of raising a reasonable doubt. Use the language of CALJIC 16.005 instead.</p>	<p>The committee devoted considerable</p>

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Instruction	Commentator	Summary of Comments	Committee Response
			comment.
3160–3163, Personal Infliction of Great Bodily Injury	First District Appellate Project, California Appellate Project – Los Angeles, Central California Appellate Program, Sixth District Appellate Program	<p>Change requirement no. 2 to read: “The defendant <i>directly</i> and <i>personally applied</i> physical force to</p> <p>Change no. 3A thus: The physical force the defendant <i>applied to</i> was <i>by itself sufficient to cause</i></p> <p>Change no. 3B to state: “The defendant’s actions must have contributed substantially to great bodily injury suffered by If the defendant’s role in either the physical attack or the infliction of great bodily injury was minor, trivial, or insubstantial, then his or her contribution was not sufficient, and you may not find that the People have proved this allegation.”</p> <p>These changes more closely track the language in <i>People v. Modiri</i> (2006) 39 Cal.4th 481.</p> <p>As to no. 3A and 3B, avoid the “could not have” language in the proposed revision. This is close to the <i>Modiri</i> language, but CALJIC 17.20 does not use such terms and this could encourage jurors to speculate about what happened.</p>	<p>This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for comment.</p> <p>The committee has considered these comments but prefers to retain the current language.</p> <p>The committee considered this suggestion but prefers the current language.</p>
3160	Hon. Rebecca S. Riley, Superior Court of Ventura County	Since 3B is an alternative instruction, (i.e., 3A is not given if 3B is given) leaving the language “the physical force that the defendant used on” is necessary to the meaning of the sentence.	The committee agrees with this comment and has retained the language in question.
3160	Superior Court of Los Angeles County	Delete Penal Code section 1192.7(c)(8) from referenced code sections.	This comment will be considered at the next full committee meeting because it addresses new material beyond the changes circulated for
3163			

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>The definition of cohabitants should be revised to refer to “two unrelated persons” to parallel the proposed revision to CALCRIM 840.</p>	<p>comment.</p> <p>The committee agrees with this comment and has made the suggested change.</p>
3402, Duress	<p>Los Angeles County Public Defender</p> <p>Superior Court of Los Angeles County</p>	<p>The <i>Neidinger</i> case was added to the bench notes along with a note to use the instruction “if the defendant has produced evidence tending to show that he or she acted under duress.” However that case held that a defendant need only raise a reasonable doubt whether the facts underlying the defense exist. Therefore the defense need not produce anything and the defense may be raised as long as any evidence, even that produced by the prosecution, shows evidence of the defense. The bench note should explain further that fear of great bodily harm can also raise the defense of duress. <i>People v. Otis</i> (1959) 174 Cal.App.2d 119, 124; <i>United States v. Bailey</i> (1980) 444 U.S. 394, 409.</p> <p>Replace the word “defendant” with “defense”, cf. comments to CALCRIM 2375 and 2411.</p>	<p>The committee has made appropriate changes to the bench notes.</p> <p>The committee has made this change.</p>
3453, Extension of Commitment	Los Angeles County Public Defender	<p>Reference to <i>People v. Williams</i> and <i>In re Howard N.</i> is inappropriate in insanity extension proceedings. In order for an instruction given pursuant to Penal Code section 1026.5 subd. (b)(1) to withstand constitutional scrutiny, it must include the requirement in <i>Kansas v. Crane</i> (2002) 534 U.S. 407, 413, regarding inability to control behavior. Additionally, CALCRIM section 3453 refers to insanity extension commitments whereas the <i>Williams</i> case interpreted commitments made pursuant to the SVPA.</p>	<p>The committee believes that the references to <i>Williams</i> and <i>In re Howard N.</i> appropriately provide a summary of the foundational law. The basic constitutional requirements laid out by both the U.S. and California Supreme Courts apply to any civil commitment. The differences among underlying statutes do not alter the constitutional requirements.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
	Superior Court of Los Angeles County	<p>Reliance on a case interpreting the SVPA in insanity extension proceedings is misplaced because individuals subject to insanity proceedings have been held not to be similarly situated for equal protection purposes. <i>People v. Hubbart</i> 88 Cal.App.4th 1202.</p> <p>Approve as revised, with caveat to review for changes needed in light of Proposition 83.</p>	<p>The committee notes that <i>People v. Hubbart</i> (2001) 88 Cal.App.4th 1202, 1220, 1224, found that “individuals subject to insanity proceedings” are not similarly situated to SVP defendants only on the question of whether they may get custody credits.</p> <p>The committee has added optional language about difficulty controlling behavior to the instruction along with an explanatory bench note.</p> <p>No response required.</p>
3454, Commitment as Sexually Violent Predator	Los Angeles County Public Defender Superior Court of Los Angeles County	<p>Subdivision H may or may not be adequate or applicable in a given case. Welfare and Institutions Code section 6600(a)(2)(H) provides: “A prior conviction for an offense described in subdivision (b) for which the person was committed to the Department of the Youth Authority pursuant to Section 1731.5.” Subdivision H should be modified to state: “Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5”. Furthermore, a corresponding bench note should be added setting forth Welfare and Institutions Code section 1731.5’s requirements as a prerequisite to the giving of subdivision (H).</p> <p>Approve as revised with caveat to review for changes needed in light of Proposition 83.</p>	<p>The committee agrees with this comment and has made the appropriate changes to the text of the instruction, although it prefers not to repeat the requirements of the referenced statute in the bench notes.</p> <p>No response required.</p>
3517, Lesser Included	Superior Court of Los Angeles County	A significant improvement over the previous versions of this instruction. Revive discussion in the current version	The committee agrees with this comment and has reinserted the

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Instruction	Commentator	Summary of Comments	Committee Response
Offenses		of the bench notes about the People’s possible election if the jury is deadlocked on the greater offense under <i>People v. Fields</i> (i.e., the District Attorney may move for a mistrial on the greater offense, or may request a verdict on the lesser included offense). It would be helpful to trial judges to continue to include it.	referenced paragraph.
3518, Lesser Included Offenses	Superior Court of Los Angeles County	The bench notes should emphasize that the non- <i>Stone</i> procedure is disfavored. Also in the last sentence in the third paragraph of the bench notes on page 237, we recommend the word “may” be replaced by “should (If the court chooses to follow the procedure suggested in <i>Stone</i> , the court SHOULD give CALCRIM No. 3517)”	The committee agrees with this comment and has reinserted appropriate language to the bench notes.
3577, Instructions to Alternate Upon Submission of Case to Jury	Hon. David Sotelo, Los Angeles County	This is typically read when the 12 soon-to-be-deliberating jurors are still in the jury box, so it should read: “The jury will soon begin deliberating . . .” rather than “The jury is now deliberating . . .”	The committee agrees to add this language as a bracketed alternative, since different judges instruct alternates at different times.

Pretrial Instructions

100. Trial Process (Before or After Voir Dire)~~(Before or During Voir Dire)~~

[Jury service is very important and I would like to welcome you and thank you for your service.] Before we begin, I am going to describe for you how the trial will be conducted, and explain what you and the lawyers and I will be doing. When I refer to “the People,” I mean the attorney[s] from the (district attorney’s office/city attorney’s office/office of the attorney general) who (is/are) trying this case on behalf of the People of the State of California. When I refer to defense counsel, I mean the attorney[s] who (is/are) representing the defendant[s], _____ <insert name[s] of defendant[s]>.

[The first step in this trial is jury selection.

During jury selection, the attorneys and I will ask you questions. These questions are not meant to embarrass you, but rather to determine whether you would be suitable to sit as a juror in this case.]

The trial will (then/now) proceed as follows: After jury selection, you will hear the People’s opening statement. The first step in the trial is the People’s opening statement. The People may present an opening statement. The defense is not required to present an opening statement, but if it chooses to do so, it may give it either after the People’s opening statement or
The defense may choose to give an opening statement then or at the beginning of the defense case. The purpose of an opening statement is to give you an overview of what the attorneys expect the evidence will show.

Next, the People will offer their evidence. Evidence usually includes witness testimony and exhibits. After the People present their evidence, the defense may also present evidence but is not required to do so. Because (he/she/they) (is/are) presumed innocent, the defendant[s] (does/do) not have to prove that (he/she/they) (is/are) not guilty.

After you have heard all the evidence and [before] the attorneys (give/have given) their final arguments, I will instruct you on the law that applies to the case.

After you have heard the arguments and instructions, you will go to the jury room to deliberate.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give an instruction outlining how the trial will proceed. This instruction has been provided for the convenience of the trial judge who may wish to explain the trial process to jurors. [See California Rules of Court, Rule 2.1035.](#)

[The court may give the optional bracketed language if using this instruction before jury selection begins.](#)

Pretrial Instructions

101. Cautionary Admonitions: Jury Conduct (Before or After Jury Is Selected)

I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial.

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. You must not talk about these things with the other jurors either, until the time comes for you to begin your deliberations.

As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not allow anything that happens outside of the courtroom to affect your decision [unless I tell you otherwise]. During the trial, do not read, listen to, or watch any news report or commentary about the case.

Do not do any research on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. Do not, investigate the facts or law, Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

Do not consider penalty or punishment in any way.

During the trial, do not speak to any party, witness, or lawyer involved in the trial. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

When the trial has ended and you have been released as jurors, you may discuss the case with anyone. But under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.

If you receive any information about this case from any source outside of the trial, even unintentionally, do not share that information with any other juror. If you do receive such information, or if anyone tries to influence you or any juror, you must immediately tell the bailiff.

Some words or phrases that may be used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in the instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in the instructions are to be applied using their ordinary, everyday meanings.

Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.) [See also California Rules of Court, Rule 2.1035.](#)

Do not give the sentence that begins “Do not let bias,” in the penalty phase of a capital trial.

If there will be a jury view, give the bracketed phrase “unless I tell you otherwise” in the fourth paragraph. (Pen. Code, § 1119.)

AUTHORITY

- Statutory Admonitions ▶ Pen. Code, § 1122.
- Avoid Discussing the Case ▶ *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].

- Avoid News Reports ▶ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge’s Conduct as Indication of Verdict ▶ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice ▶ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research ▶ *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court’s admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror

his or her view of the evidence in the case, the juror should report that conversation immediately to the court.
(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the second paragraph of this instruction.

Jury Misconduct

It is error to instruct the jury to immediately advise the court if a juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis. (*People v. Engelman* (2002) 28 Cal.4th 436, 449 [121 Cal.Rptr.2d 862, 49 P.3d 209].)

Although you may find it helpful to take notes Pretrial Instructions

102. Note-Taking

You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom. You may take your notes into the jury room during deliberations. **I do not mean to discourage you from taking notes, but H**ere are some points to consider if you take notes:

1. Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify;

AND

2. **The notes are for your own individual use**~~You may use your notes only to help you remember~~~~remind yourself of~~ what happened during the trial. **Please keep in mind that,**~~but remember,~~ your notes may be inaccurate or incomplete.

~~I do not mean to discourage you from taking notes. I believe you may find it helpful.~~

BENCH NOTES

Instructional Duty

~~The~~The court has a **sua sponte** duty to instruct the members of the jury that they may take notes. California Rules of Court, Rule 2.1031.~~re is no sua sponte duty to instruct on note taking; however, instruction on this topic has been recommended by the Supreme Court. (*People v. Morris* (1991) 53 Cal.3d 152, 214 [279 Cal.Rptr. 720, 807 P.2d 949], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d 394, 889 P.2d 588].)~~

AUTHORITY

- Resolving Jurors' Questions ▶ Pen. Code, § 1137.
- Jurors' Use of Notes ▶ California Rules of Court, Rule 2.1031
- ~~Jurors' Use of Notes ▶ *People v. Whitt* (1984) 36 Cal.3d 724, 746 [205 Cal.Rptr. 810, 685 P.2d 1161].~~

Secondary Sources

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 18.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.05[2] (Matthew Bender).

105. Witnesses

You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's **disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, [or] socioeconomic status** ~~gender, race, religion, or national origin~~, or _____ *<insert any other impermissible bias as appropriate>*. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- How well could the witness see, hear, or otherwise perceive the things about which the witness testified?
- How well was the witness able to remember and describe what happened?
- What was the witness's behavior while testifying?
- Did the witness understand the questions and answer them directly?
- Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?
- What was the witness's attitude about the case or about testifying?
- Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?
- How reasonable is the testimony when you consider all the other evidence in the case?

- [Did other evidence prove or disprove any fact about which the witness testified?]
- [Did the witness admit to being untruthful?]
- [What is the witness's character for truthfulness?]
- [Has the witness been convicted of a felony?]
- [Has the witness engaged in [other] conduct that reflects on his or her believability?]
- [Was the witness promised immunity or leniency in exchange for his or her testimony?]

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

[If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.]

[If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.]

[If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on

inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

The court may strike any of the enumerated impermissible bases for bias that are clearly inapplicable in a given case.

Give all of the bracketed factors that are relevant based on the evidence. (Evid. Code, § 780(e), (i), and (k).)

Give any of the final three bracketed paragraphs if relevant based on the evidence.

AUTHORITY

- Factors ▶ Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Proof of Character by Negative Evidence ▶ *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].
- Inconsistencies ▶ *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies ▶ *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21]; *People v. Reyes* (1987) 195 Cal.App.3d 957, 965 [240 Cal.Rptr. 752]; *People v. Johnson* (1986) 190 Cal.App.3d 187, 192–194 [237 Cal.Rptr. 479].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), § 642.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], [c], 85.03[2][b] (Matthew Bender).

200. Duties of Judge and Jury

Members of the jury, I will now instruct you on the law that applies to this case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.]

You must decide what the facts are. It is up to all of you, and you alone, ~~exclusively~~ to decide what happened, based only on the evidence that has been presented to you in this trial.

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

You must reach your verdict without any consideration of punishment.

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.] After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jurors are the exclusive judges of the facts and that they are entitled to a copy of the written instructions when

they deliberate. (Pen. Code, §§ 1093(f), 1137.) Although there is no sua sponte duty to instruct on the other topics described in this instruction, there is authority approving instruction on these topics.

In the first paragraph, select the appropriate bracketed alternative on written instructions. Penal Code section 1093(f) requires the court to give the jury a written copy of the instructions on request. The committee believes that the better practice is to always provide the jury with written instructions. If the court, in the absence of a jury request, elects not to provide jurors with written instructions, the court must modify the first paragraph to inform the jurors that they may request a written copy of the instructions.

Do not give the sentence that begins “Do not let bias,” in the penalty phase of a capital trial.

Do not give the bracketed sentence in the final paragraph if the court will be commenting on the evidence pursuant to Penal Code section 1127.

AUTHORITY

- Copies of Instructions ▶ Pen. Code, §§ 1093(f), 1137.
- Judge Determines Law ▶ Pen. Code, §§ 1124, 1126; *People v. Como* (2002) 95 Cal.App.4th 1088, 1091 [115 Cal.Rptr.2d 922]; see *People v. Williams* (2001) 25 Cal.4th 441, 455 [106 Cal.Rptr.2d 295, 21 P.3d 1209].
- Jury to Decide the Facts ▶ Pen. Code, § 1127.
- Attorney’s Comments Are Not Evidence ▶ *People v. Stuart* (1959) 168 Cal.App.2d 57, 60–61 [335 P.2d 189].
- Consider All Instructions Together ▶ *People v. Osband* (1996) 13 Cal.4th 622, 679 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602]; *People v. Shaw* (1965) 237 Cal.App.2d 606, 623 [47 Cal.Rptr. 96].
- Do Not Consider Punishment ▶ *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].
- Follow Applicable Instructions ▶ *People v. Palmer* (1946) 76 Cal.App.2d 679, 686–687 [173 P.2d 680].
- No Bias, Sympathy, or Prejudice ▶ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 643, 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.05[1], Ch. 83, *Evidence*, § 83.02, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1], [2][c], 85.03[1], 85.05[2], [4] (Matthew Bender).

RELATED ISSUES

Jury Misconduct

It is error to instruct the jury to immediately advise the court if a juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis. (*People v. Engelman* (2002) 28 Cal.4th 436, 449 [121 Cal.Rptr.2d 862, 49 P.3d 209].)

Posttrial Introductory

201. Do Not Investigate

Do not do any research on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. Do not, investigate the facts or law. Do not, conduct any experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.)

AUTHORITY

- No Independent Research ▶ Pen. Code, § 1122; *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[4][a][i] (Matthew Bender).

Posttrial Introductory

202. Note-Taking

You have been given notebooks and may have taken notes during the trial. Please do not remove your notes from the jury room. You may use your notes during deliberations. The notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete. ~~You may use your notes during deliberations only to remind yourself of what happened during the trial. But remember, your notes may be inaccurate or incomplete.~~ If there is a disagreement about the testimony [and stipulations] at trial ~~the testimony~~ what actually happened at trial, you may ask that the court reporter's record be read to you. ~~e court reporter to read back that~~ the relevant parts of the testimony to assist you. It is the record that must guide your deliberations, not your notes. ~~It is that~~ testimony that must guide your deliberations, not your notes.

Please do not remove your notes from the jury room.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the members of the jury that they may take notes. California Rules of Court, Rule 2.1031. ~~There is no sua sponte duty to instruct on note taking; however, instruction on this topic has been recommended by the Supreme Court. (*People v. Morris* (1991) 53 Cal.3d 152, 214 [279 Cal.Rptr. 720, 807 P.2d 949], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d 394, 889 P.2d 588].)~~

AUTHORITY

- Jurors' Use of Notes ▶ California Rules of Court, Rule 2.1031
- Jurors' Use of Notes ▶ *People v. Whitt* (1984) 36 Cal.3d 724, 746 [205 Cal.Rptr. 810, 685 P.2d 1161].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.05[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[2], [3], Ch. 87, *Death Penalty*, §§ 87.20, 87.24 (Matthew Bender).

222. Evidence

You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom [or during a jury view]. “Evidence” is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses’ answers are evidence. The attorneys’ questions are significant only if they helped you to understand the witnesses’ answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

~~**The court reporter has made a record of everything that was said during the trial. If you decide that it is necessary, you may ask that the court reporter’s notes be read to you. You must accept the court reporter’s notes as accurate.**~~

[During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts **as true**. Because there is no dispute about those facts you must **also** accept them as true.]

~~**The court reporter has made a record of everything that was said during the trial. If you decide that it is necessary, you may ask that the court reporter’s notes be read to you. You must accept the court reporter’s notes as accurate.**~~

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

If the parties stipulated to one or more facts, give the bracketed paragraph that begins with “During the trial, you were told.”

AUTHORITY

- Evidence Defined ▶ Evid. Code, § 140.
- Arguments Not Evidence ▶ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence ▶ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400].
- Stipulations ▶ *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].
- Striking Testimony ▶ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 636, 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

RELATED ISSUES

Non-Testifying Courtroom Conduct

There is authority for an instruction informing the jury to disregard defendant’s in-court, but non-testifying behavior. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90 [206 Cal.Rptr. 468] [defendant was disruptive in court; court instructed jurors they should not consider this behavior in deciding guilt or innocence].) However, if the defendant has put his or her character in issue or another basis for relevance exists, such an instruction should not be given. (*People v. Garcia, supra*, at p. 91, fn. 7; *People v. Foster* (1988) 201 Cal.App.3d 20, 25 [246 Cal.Rptr. 855].)

Posttrial Introductory

223. Direct and Circumstantial Evidence: Defined

Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may **logically and reasonably** conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction explaining direct and circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629].) The court must give this instruction if the court will be giving either CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence* or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*.

The court, at its discretion, may give this instruction in any case in which circumstantial evidence has been presented.

AUTHORITY

- Direct Evidence Defined ▶ Evid. Code, § 410.
- Logical and Reasonable Inference Defined ▶ Evid. Code, § 600(b).
- Difference Between Direct and Circumstantial Evidence ▶ *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [155 P. 477] [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [293 P.2d 495] [sua sponte duty to instruct].

Secondary Sources

- 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 3.
- 5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 652.
- 1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 117.
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.01[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

Posttrial Introductory

225. Circumstantial Evidence: Intent or Mental State

The People must prove not only that the defendant did the acts charged, but also that (he/she) acted with a particular (intent/ [and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/ [and/or] mental state) required.

A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/ [and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/ [and/or] mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish the element of a specific intent or a mental state. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1].)

Give this instruction when the defendant's intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence. If other elements of the offense also rest substantially or entirely on

circumstantial evidence, do not give this instruction. Give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*. (See *People v. Marshall* (1996) 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *People v. Hughes* (2002) 27 Cal.4th 287, 347 [116 Cal.Rptr.2d 401, 39 P.3d 432].)

If the court is also instructing on a strict-liability offense, the court may wish to modify this instruction to clarify the charges to which it applies.

AUTHORITY

- Instructional Requirements ▶ *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 481–482 [268 Cal.Rptr. 262] [when both specific intent and mental state are elements].
- Intent Manifested by Circumstances ▶ Pen. Code, § 21(a).
- Accept Reasonable Interpretation of Circumstantial Evidence That Points Against Specific Intent ▶ *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254 [302 P.2d 406], disapproved on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86].
- Circumstantial Evidence Must Be Entirely Consistent With Existence of Specific Intent ▶ *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254 [302 P.2d 406], disapproved on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86].
- Reject Unreasonable Interpretations ▶ *People v. Hines* (1997) 15 Cal.4th 997, 1049–1050 [64 Cal.Rptr.2d 594, 938 P.2d 388].

Secondary Sources

- 1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 3, 6.
- 5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 652.
- 1 Witkin, *California Evidence* (4th ed. 2000) Circumstantial Evidence, § 117.
- 4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

RELATED ISSUES

General or Specific Intent Explained

A crime is a general-intent offense when the statutory definition of the crime consists of only the description of a particular act, without reference to intent to do

a further act or achieve a future consequence. A crime is a specific-intent offense when the statutory definition refers to the defendant's intent to do some further act or achieve some additional consequence. (*People v. McDaniel* (1979) 24 Cal.3d 661, 669 [156 Cal.Rptr. 865, 597 P.2d 124]; *People v. Hood* (1969) 1 Cal.3d 444, 456–457 [82 Cal.Rptr. 618, 462 P.2d 370]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768]; see, e.g., *People v. Whitfield* (1994) 7 Cal.4th 437, 449–450 [27 Cal.Rptr.2d 858, 868 P.2d 272] [second degree murder based on implied malice is a specific-intent crime].)

Only One Possible Inference

The fact that elements of a charged offense include mental elements that must necessarily be proved by inferences drawn from circumstantial evidence does not alone require an instruction on the effect to be given to such evidence. (*People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629]; *People v. Wiley* (1976) 18 Cal.3d 162, 174–176 [133 Cal.Rptr. 135, 554 P.2d 881].) When the only inference to be drawn from circumstantial evidence points to the existence of a required specific intent or mental state, a circumstantial evidence instruction need not be given sua sponte, but should be given on request. (*People v. Gordon* (1982) 136 Cal.App.3d 519, 531 [186 Cal.Rptr. 373]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 793–794 [155 Cal.Rptr. 152].)

Direct Evidence, Extrajudicial Admission, or No Substantial Reliance

This instruction should not be given if direct evidence of the mental elements exists (*People v. Wiley* (1976) 18 Cal.3d 162, 175 [133 Cal.Rptr. 135, 554 P.2d 881]), if the only circumstantial evidence is an extrajudicial admission (*People v. Gould* (1960) 54 Cal.2d 621, 629 [7 Cal.Rptr. 273, 354 P.2d 865], overruled on other grounds in *People v. Cuevas* (1995) 12 Cal.4th 252, 271–272 [48 Cal.Rptr.2d 135, 906 P.2d 1290]), or if the prosecution does not substantially rely on circumstantial evidence (*People v. DeLeon* (1982) 138 Cal.App.3d 602, 607–608 [188 Cal.Rptr. 63]).

See the Related Issues section of CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*.

226. Witnesses

You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, [or] socioeconomic status ~~gender, race, religion, or national origin~~ [, or _____ <insert any other impermissible bias as appropriate>]. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- How well could the witness see, hear, or otherwise perceive the things about which the witness testified?
- How well was the witness able to remember and describe what happened?
- What was the witness's behavior while testifying?
- Did the witness understand the questions and answer them directly?
- Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?
- What was the witness's attitude about the case or about testifying?
- Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?
- How reasonable is the testimony when you consider all the other evidence in the case?

- **[Did other evidence prove or disprove any fact about which the witness testified?]**
- **[Did the witness admit to being untruthful?]**
- **[What is the witness’s character for truthfulness?]**
- **[Has the witness been convicted of a felony?]**
- **[Has the witness engaged in [other] conduct that reflects on his or her believability?]**
- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

[If the evidence establishes that a witness’s character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness’s character for truthfulness is good.]

[If you do not believe a witness’s testimony that he or she no longer remembers something, that testimony is inconsistent with the witness’s earlier statement on that subject.]

[If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness’s credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on

inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

The court may strike any of the enumerated impermissible bases for bias that are clearly inapplicable in a given case.

Give all of the bracketed factors that are relevant based on the evidence. (Evid. Code, § 780(e), (i), and (k).)

Give any of the final three bracketed paragraphs if relevant based on the evidence.

If the court instructs on a prior felony conviction or prior misconduct admitted pursuant to *People v. Wheeler* (1992) 4 Cal.4th 284 [14 Cal.Rptr.2d 418, 841 P.2d 938], the court should consider whether to give CALCRIM No. 316, *Additional Instructions on Witness Credibility—Other Conduct*. (See Bench Notes to that instruction.)

AUTHORITY

- Factors ▶ Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Inconsistencies ▶ *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies ▶ *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].
- Proof of Character by Negative Evidence ▶ *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), § 642.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][b], [2][b], [c], 85.03[2][b] (Matthew Bender).

Posttrial Introductory

250. Union of Act and Intent: General Intent

~~Every~~ ~~The~~ crime[s] [or other allegation[s]] charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent. ~~[except for the crime[s] charged in Count[s] ___].~~

~~For you to find a person~~ ~~In order to be~~ guilty of the crime[s] of _____ <insert name[s] of alleged offense[s] and count[s], e.g., battery, rape, as charged in Count 1> [or **to find** the allegation[s] of _____ <insert name[s] of enhancement[s]> **true**], **that** person must not only commit the prohibited act [or fail to do the required act], but must do so **with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act, however, it is not required that he or she intend to break the law. hointentionally or on purpose.** The act required is explained in the instructions for ~~that each~~ crime [or allegation]. ~~However, it is not required that he or she intend to break the law.~~

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and general criminal intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) However, this instruction **must not** be used if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense. In such cases, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses require only a general criminal intent by inserting the names of the offenses **and count numbers** where indicated in the second paragraph of the instruction. (*People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) **If all the charged crimes and allegations involve general intent, the court need not provide a list in the blank provided in this instruction.**

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt*, *supra*, 222 Cal.App.2d at pp. 586–587.)

If the defendant is also charged with a criminal negligence or strict liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

“A person who commits a prohibited act ‘through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence’ has not committed a crime.” (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86] [quoting Pen. Code, § 26].) Similarly, an honest and reasonable mistake of fact may negate general criminal intent. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].) If there is sufficient evidence of these or other defenses, such as unconsciousness, the court has a **sua sponte** duty to give the appropriate defense instructions. (See Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority ▶ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements ▶ *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement ▶ *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 1–5.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [2] (Matthew Bender).

RELATED ISSUES

Sex Registration and Knowledge of Legal Duty

The offense of failure to register as a sex offender requires proof that the defendant actually knew of his or her duty to register. (*People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].) For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is “acting with general criminal intent, even though he may not know that his act or conduct is unlawful.” (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) In such cases, the court should give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, instead of this instruction.

Posttrial Introductory

251. Union of Act and Intent: Specific Intent or Mental State

~~Every~~ **The** crime[s] [(and/or) other allegation[s]] charged in this case requires proof of the union, or joint operation, of act and wrongful intent. ~~[except for the crime[s] charged in Count[s] ___].~~

~~For you to find a person~~ **In order to be** guilty of the crime[s] of _____ <insert name[s] of alleged offense[s] and count[s], e.g., burglaryrape, as charged in Count 1> [or **to find the allegation[s] the allegation[s]** of _____ <insert name[s] of enhancement[s]> **true**], **that** person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the **specific** (intent/ [and/or] mental state) required are explained in the instruction for ~~that~~**every** crime [or allegation].

<Repeat next paragraph as needed>

[The specific (intent/ [and/or] mental state) required for the crime of _____ <insert name[s] of alleged offense[s] e.g., burglaryrape> is _____ <insert specific intent>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) This instruction **must** be given if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense.

Do not give this instruction if the case involves only general-intent offenses that do not require any specific mental state. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*.) If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses are specific-intent offenses by inserting the names of the offenses **and count numbers** where indicated in the second paragraph of the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118

[60 Cal.Rptr. 234, 429 P.2d 586].) The court may use the final optional paragraph if it deems it helpful, particularly in cases with multiple counts.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

This instruction does not apply to criminal negligence or strict liability. If the defendant is also charged with a criminal negligence or strict liability offense, the court should give the appropriate Union of Act and Intent instruction: CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see *Defenses and Insanity*, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority ▶ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Turner* (1971) 22 Cal.App.3d 174, 184 [99 Cal.Rptr. 186]; *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 1–6.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.03 (Matthew Bender).

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140,
Challenges to Crimes, § 140.02[1], [3] (Matthew Bender).

Posttrial Introductory

252. Union of Act and Intent: General and Specific Intent Together

~~The Every~~ crime[s] [(and/or) ~~or~~ other allegation[s]] charged in Count[s] ~~this~~ ~~ease-~~require[s] proof of the union, or joint operation, of act and wrongful intent. ~~[except for the crime[s] charged in Count[s] —];~~

The following crime[s] [and allegation[s]] require[s] general criminal intent: _____ *<insert name[s] of alleged offense[s] and enhancement[s] and count[s], e.g., batteryrape, as charged in Count 1>*. ~~For you to find a person guilty~~ ~~To be guilty~~ of (this/these) offense[s] ~~crime[s]~~ [or to find the allegation[s] true], ~~that and allegation[s]], a~~ person must not only commit the prohibited act [or fail to do the required act], but must do so with wrongful intent. intentionally or on purpose. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose, however, it is not required that he or she intend to break the law. It is not required, however, that the person intend to break the law. The act required is explained in the instruction for that each crime [or allegation].

The following crime[s] [and allegation[s]] require[s] a specific intent or mental state: _____ *<insert name[s] of alleged offense[s] and count[s], e.g., rapeburglary, as charged in Count 1>* ~~for the allegation[s] of~~ _____ *<insert name[s] of enhancement[s]>*, ~~For you to find a person~~ ~~To be guilty of~~ (this/these) offense[s] ~~crimes~~ [or to find the allegation[s] true], ~~that person (he/she) a person~~ must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime [or allegation].

<Repeat next paragraph as needed>

[The specific (intent/ [and/or] mental state) required for the crime of _____ *<insert name[s] of alleged offense[s] e.g., burglaryrape>* is _____ *<insert specific intent>*.]

~~The following crime[s] [and allegation[s]] require[s] a specific intent or mental state:~~ _____ *<insert name[s] of alleged offense[s] and enhancement[s]>*. ~~To be guilty of (this/these) offense[s], a person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific intent or mental state. The act and the intent or mental state required are explained in the instruction for each crime [or allegation].~~

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the joint union of act and intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) The court may give this instruction in cases involving both offenses requiring a specific intent or mental state and offenses that do not, rather than giving both CALCRIM No. 250 and CALCRIM No. 251.

Do not give this instruction if the case involves only offenses requiring a specific intent or mental state or involves only offenses that do not. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.)

The court should specify for the jury which offenses require general criminal intent and which require a specific intent or mental state by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If the crime requires a specific mental state, such as knowledge or malice, the court **must** insert the name of the offense in the third paragraph, explaining the mental state requirement, even if the crime is classified as a general intent offense.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

If the defendant is also charged with a criminal negligence or strict-liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these

instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority ▶ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements ▶ *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement ▶ *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1]–[3] (Matthew Bender).

RELATED ISSUES

See the Bench Notes and Related Issues sections of CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

Posttrial Introductory

253. Union of Act and Intent: Criminal Negligence

For you to find a person In order to be guilty of the crime[s] of _____ <insert name[s] of alleged offense[s]> [or to find the allegation[s] of _____ <insert name[s] of enhancement[s]> true], a person must do an act [or fail to do an act] with (criminal/gross) negligence. (Criminal/Gross) negligence is defined in the instructions on that crime.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on an offense for which criminal or gross negligence is an element. **Do not** give this instruction if only general or specific-intent offenses are presented to the jury. (*People v. Lara* (1996) 44 Cal.App.4th 102, 110 [51 Cal.Rptr.2d 402].) Although no case has held that the court has a sua sponte duty to give this instruction, the committee recommends that the instruction be given, if applicable, as a matter of caution.

The court must specify for the jury which offenses require criminal negligence by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

The court should select either “criminal” or “gross” based on the words used in the instruction on the elements of the underlying offense.

AUTHORITY

- Statutory Authority ▶ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Criminal or Gross Negligence Defined ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 20.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [4] (Matthew Bender).

Posttrial Introductory

254. Union of Act and Intent: Strict-Liability Crime

For you to find a person~~In order to be~~ guilty of the crime[s] of _____
<insert name[s] of alleged offense[s]> [or to find the allegation[s] of
_____ <insert name[s] of enhancement[s]> true], a person only needs to
do the prohibited act [or to fail to do the required act]. The People do not
need to prove any intent or other mental state.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on a strict-liability offense. The committee does not believe that the instruction is required. However, the instruction may be useful when the case also involves general-intent, specific-intent, or criminal negligence offenses. **Do not** give this instruction unless the court is completely certain that the offense is a strict-liability offense. For a discussion of the rarity of strict-liability offenses in modern criminal law, see *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590], and *People v. Simon* (1995) 9 Cal.4th 493, 519–522 [37 Cal.Rptr.2d 278, 886 P.2d 1271].

The court must specify for the jury which offenses are strict-liability offenses by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

AUTHORITY

- Strict-Liability Offenses Discussed ▶ *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590]; *People v. Simon* (1995) 9 Cal.4th 493, 519–522 [37 Cal.Rptr.2d 278, 886 P.2d 1271].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 17–19.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[5] (Matthew Bender).

Evidence

302. Evaluating Conflicting Evidence

If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of ~~the greater number of witnesses, or a~~any witness, without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on weighing contradictory evidence unless corroborating evidence is required. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884 [123 Cal.Rptr. 119, 538 P.2d 247].)

AUTHORITY

- Instructional Requirements ▶ *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884 [123 Cal.Rptr. 119, 538 P.2d 247].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 649.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

Aiding and Abetting, Inchoate, and Accessorial Crimes

402. Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)

The defendant is charged in Count[s] ___ with _____ <insert target offense> and in Counts[s] ___ with _____ <insert non-target offense>.

You must first decide whether the defendant is guilty of _____ <insert target offense>. If you find the defendant is guilty of this crime, you must then decide whether (he/she) is guilty of _____ <insert non-target offense>.

Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

To prove that the defendant is guilty of _____ <insert non-target offense>, the People must prove that:

1. The defendant is guilty of _____ <insert target offense>;
2. During the commission of~~During the commission of the~~ _____ <insert target offense> a coparticipant in that _____ <insert target offense> committed, a coparticipant committed the crime of _____ <insert non-target offense> **was committed;**

AND

3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of _____ <insert non-target offense> was a natural and probable consequence of the commission of the _____ <insert target offense>.

A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the _____ <insert non-target offense> was committed for a reason independent of the common plan to commit the _____ <insert target offense>, then the commission of _____ <insert non-target offense> was not a natural and probable consequence of _____ <insert target offense>.

To decide whether the crime of _____ <insert non-target offense> was committed, please refer to the separate instructions that I (will give/have given) you on that crime.

[The People allege that the defendant originally intended to aid and abet the commission of either _____ <insert target offense> or _____ <insert alternative target offense>. The defendant is guilty of _____ <insert non-target offense> if the People have proved that the defendant aided and abetted either _____ <insert target offense> or _____ <insert alternative target offense> and that _____ <insert non-target offense> was the natural and probable consequence of either _____ <insert target offense> or _____ <insert alternative target offense>. However, you do not need to agree on which of these two crimes the defendant aided and abetted.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on that theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges both target and non-target crimes. If only non-target crimes are charged, give CALCRIM No. 403.

AUTHORITY

- Aiding and Abetting Defined ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard ▶ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

COMMENTARY

In *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [58 Cal.Rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms “natural” and “probable,” nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define “natural and probable.”])

RELATED ISSUES

Lesser Included Offenses

- The court has a duty to instruct on lesser included offenses that could be the natural and probable consequence of the intended offense when the evidence raises a question whether the greater offense is a natural and probable consequence of the original, intended criminal act. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1588 [11 Cal.Rptr.2d 231] [aider and abettor may be found guilty of second degree murder under doctrine of natural and probable consequences although the principal was convicted of first degree murder].)

Specific Intent – Non-Target Crimes

Before an aider and abettor may be found guilty of a specific intent crime under the natural and probable consequences doctrine, the jury must first find that the perpetrator possessed the required specific intent. (*People v. Patterson* (1989) 209 Cal.App.3d 610, 614 [257 Cal.Rptr. 407] [trial court erroneously failed to instruct the jury that they must find that the perpetrator had the specific intent to kill necessary for attempted murder before they could find the defendant guilty as an aider and abettor under the "natural and probable" consequences doctrine], disagreeing with *People v. Hammond* (1986) 181 Cal.App.3d 463 [226 Cal.Rptr. 475] to the extent it held otherwise.) However, it is not necessary that the jury find that the aider and abettor had the specific intent; the jury must only determine that the specific intent crime was a natural and probable consequence of the original crime aided and abetted. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586–1587 [11 Cal.Rptr. 2d 231].)

Target and Non-Target Offense May Consist of Same Act

Although generally, non-target offenses charged under the natural and probable consequences doctrine will be different and typically more serious criminal acts than the target offense alleged, they may consist of the same act with differing mental states. (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463–1466 [61 Cal.Rptr.2d 680] [defendants were properly convicted of attempted murder as a natural and probable consequence of aiding and abetting the discharge of a firearm from a vehicle. Although both crimes consist of the same act, attempted murder requires a more culpable mental state].)

Target Offense Not Committed

The Supreme Court has left open the question whether a person may be liable under the natural and probable consequences doctrine for a non-target offense, if the target offense was not committed. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. 4 [58 Cal.Rptr.2d 827, 926 P.2d 1013].)

See generally, the related issues under CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

Aiding and Abetting, Inchoate, and Accessorial Crimes

403. Natural and Probable Consequences (Only Non-Target Offense Charged)

[Before you may decide whether the defendant is guilty of _____ <insert non-target offense>, you must decide whether (he/she) is guilty of _____ <insert target offense>.]

To prove that the defendant is guilty of _____ <insert non-target offense>, the People must prove that:

1. The defendant is guilty of _____ <insert target offense>;
2. During the commission of _____ <insert target offense> a coparticipant in that _____ <insert target offense> committed the crime of _____ <insert non-target offense> A perpetrator of _____ <insert target offense>, also committed the crime of _____ <insert non-target offense> was committed;

AND

3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the _____ <insert non-target offense> was a natural and probable consequence of the commission of the _____ <insert target offense>.

A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the _____ <insert non-target offense> was committed for a reason independent of the common plan to commit the _____ <insert target offense>, then the commission of _____ <insert non-target offense> was not a natural and probable consequence of _____ <insert target offense>.

To decide whether crime of _____ <insert non-target offense> was committed, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

[The People are alleging that the defendant originally intended to aid and abet either _____ <insert target offense> or _____ <insert alternative target offense>.

The defendant is guilty of _____ <insert non-target offense> if you decide that the defendant aided and abetted one of these crimes and that _____ <insert non-target offense> was the natural and probable result of one of these crimes. However, you do not need to agree about which of these two crimes the defendant aided and abetted.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Do not give the first bracketed paragraph in cases in which the prosecution is also pursuing a conspiracy theory.

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges only non-target crimes. If both target and non-target crimes are charged, give CALCRIM No. 402.

AUTHORITY

- Aiding and Abetting Defined ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard ▶ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- No Unanimity Required ▶ *People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013].
- Presence or Knowledge Insufficient ▶ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr.2d 827, 926 P.2d 1013].
- Withdrawal ▶ *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 1013]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

COMMENTARY

In *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [58 Cal.rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms “natural” and “probable,” nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman, supra*, 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow*

(2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define “natural and probable.”])

RELATED ISSUES

See the Related Issues section under CALCRIM No. 401, *Aiding and Abetting*, and CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*.

Homicide

521. Murder: Degrees (Pen. Code, § 189)

If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree.

<Select the appropriate section[s]. Give the final two paragraphs in every case.>

<Give if multiple theories alleged.>

[The defendant has been prosecuted for first degree murder under (two/___ <insert number>) theories: (1) _____ <insert first theory, e.g., “the murder was willful, deliberate, and premeditated”> [and] (2) _____ <insert second theory, e.g., “the murder was committed by lying in wait”> [_____ <insert additional theories>].

Each theory of first degree murder has different requirements, and I will instruct you on (both/all ___ <insert number>).

You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.]

<A. Deliberation and Premeditation>

[The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if (he/she) decided to kill before committing the act that caused death.

The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.]

<B. Torture>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:

1. (He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;
2. (He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;

3. The acts causing death involved a high degree of probability of death;

AND

3.4. The torture was a cause of death.]

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person *deliberates* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. (He/She) concealed (his/her) purpose from the person killed;
2. (He/She) waited and watched for an opportunity to act;

AND

3. Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.

The lying in wait does not need to continue for any particular period of time, but its duration must **be substantial enough to** show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is [also] any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <insert type of explosive from Health & Saf. Code, § 12000> is an *explosive*.]

[A *destructive device* is _____ <insert definition supported by evidence from Pen. Code, § 12301>.]

[_____ <insert type of destructive device from Pen. Code, § 12301> is a *destructive device*.]

<E. Weapon of Mass Destruction>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

[_____ <insert type of weapon from Pen. Code, § 11417(a)(1)> is a *weapon of mass destruction*.]

[_____ <insert type of agent from Pen. Code, § 11417(a)(2)> is a *chemical warfare agent*.]]

<F. Penetrating Ammunition>

[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]

<G. Discharge From Vehicle>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. (He/She) shot a firearm from a motor vehicle;
2. (He/She) intentionally shot at a person who was outside the vehicle;

AND

3. (He/She) intended to kill that person.

A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.

A *motor vehicle* includes (a/an) (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <insert other type of motor vehicle>).

<H. Poison>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.

[***Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.**]

[_____ <insert name of substance> **is a *poison*.**]

<GIVE FINAL TWO PARAGRAPHS IN EVERY CASE.>

All other murders are of the second degree.

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final two paragraphs in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with “The defendant has been prosecuted for first degree murder under.” If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of “deliberate” and “premeditated” if those terms have not already been defined for the jury.

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, “_____ is a weapon of mass destruction” or “is a chemical warfare agent,” only if the device used is listed in the code section noted in the instruction. For example, “Sarin is a chemical warfare agent.” However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, “the defendant used a chemical warfare agent, sarin,” or “the material used by the defendant, sarin, was a chemical warfare agent.” (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

AUTHORITY

- Types of Statutory First Degree Murder ▶ Pen. Code, § 189.
- Armor Piercing Ammunition Defined ▶ Pen. Code, § 12323(b).
- Destructive Device Defined ▶ Pen. Code, § 12301.

- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death ▶ *People v. Cook* (2006) 39 Cal.4th 566, 602.
- Explosive Defined ▶ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined ▶ Pen. Code, § 11417.
- Discharge From Vehicle ▶ *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements ▶ *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 582-585; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined ▶ *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined ▶ *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements ▶ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 102–162.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Murder ▶ Pen. Code, § 187.
- Voluntary Manslaughter ▶ Pen. Code, § 192(a).

- Involuntary Manslaughter ▶ Pen. Code, § 192(b).
- Attempted First Degree Murder ▶ Pen. Code, §§ 663, 189.
- Attempted Murder ▶ Pen. Code, §§ 663, 187.

RELATED ISSUES

Premeditation and Deliberation—Anderson Factors

Evidence in any combination from the following categories suggests premeditation and deliberation: (1) events before the murder that indicate planning; (2) motive, specifically evidence of a relationship between the victim and the defendant; and (3) method of the killing that is particular and exacting and evinces a preconceived design to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942].) Although these categories have been relied on to decide whether premeditation and deliberation are present, an instruction that suggests that each of these factors *must* be found in order to find deliberation and premeditation is not proper. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020–1021 [245 Cal.Rptr. 185, 750 P.2d 1342].) *Anderson* also noted that the brutality of the killing alone is not sufficient to support a finding that the killer acted with premeditation and deliberation. Thus, the infliction of multiple acts of violence on the victim without any other evidence indicating premeditation will not support a first degree murder conviction. (*People v. Anderson, supra*, 70 Cal.2d at pp. 24–25.) However, “[t]he *Anderson* guidelines are descriptive, not normative.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 [9 Cal.Rptr.2d 577, 831 P.2d 1159].) The holding did not alter the elements of murder or substantive law but was intended to provide a “framework to aid in appellate review.” (*Ibid.*)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, “leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation”]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim’s death. “The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation].” (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

Torture—Instruction on Voluntary Intoxication

“[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering.” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242 [278 Cal.Rptr. 640, 805 P.2d 899]; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899].)

Torture—Premeditated Intent to Inflict Pain

Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation

In *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481], the court approved this instruction regarding the length of time a person lies in wait: “[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.”

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

Homicide

524. Second Degree Murder: Peace Officer (Pen. Code, § 190(b),(c))

If you find the defendant guilty of second degree murder [as charged in Count ___], you must then decide whether the People have proved the additional allegation that (he/she) murdered a peace officer.

To prove this allegation the People must prove that:

1. _____ *<insert officer's name, excluding title>* was a peace officer lawfully performing (his/her) duties as a peace officer;

[AND]

2. When the defendant killed _____ *<insert officer's name, excluding title>*, the defendant knew, or reasonably should have known, that _____ *<insert officer's name, excluding title>* was a peace officer who was performing (his/her) duties(;/.)

<Give element 3 when defendant charged with Pen. Code, § 190(c)>

[AND]

3. The defendant (intended to kill the peace officer/ [or] intended to inflict great bodily injury on the peace officer/ [or] personally used a (deadly weapon/ [or] firearm) to kill the peace officer.)

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*great bodily injury*[/] *deadly weapon*[/] [and] *firearm*) (is/are) defined in another instruction to which you should refer.]

[Someone *personally uses* a (deadly weapon/ [or] firearm) if he or she intentionally does any of the following:

1. Displays the weapon in a menacing manner;
2. Hits someone with the weapon;

OR

3. Fires the weapon.]

[The People allege that the defendant _____ <insert all of the factors from element 3 when multiple factors are alleged>. **You may not find the defendant guilty unless you all agree that the People have proved at least one of these alleged facts and you all agree on which fact or facts were proved. You do not need to specify the fact or facts in your verdict.**]

[A person who is employed as a police officer by _____ <insert name of agency that employs police officer> **is a peace officer.**]

[A person employed by _____ <insert name of agency that employs peace officer, e.g., “the Department of Fish and Game”> **is a peace officer if** _____ <insert description of facts necessary to make employee a peace officer, e.g., “designated by the director of the agency as a peace officer”>.]

[The duties of (a/an) _____ <insert title of peace officer> **include** _____ <insert job duties>.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged under Penal Code section 190(b), give only elements 1 and 2. If the defendant is charged under Penal Code section 190(c), give all three elements, specifying the appropriate factors in element 3, and give the appropriate definitions, which follow in brackets. Give the bracketed unanimity instruction if the prosecution alleges more than one factor in element 3.

In order to be “engaged in the performance of his or her duties,” a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) “[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element.” (*Ibid.*) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

Give the relevant bracketed definitions unless the court has already given the definitions in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

“Peace officer,” as used in this statute, means “as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5.” (Pen. Code, § 190(b) & (c).)

The court may give the bracketed sentence that begins, “The duties of a _____ <insert title> include,” on request. The court may insert a description of the officer’s duties such as “the correct service of a facially valid

search warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

AUTHORITY

- Second Degree Murder of a Peace Officer ▶ Pen. Code, § 190(b) & (c).
- Personally Used Deadly Weapon ▶ Pen. Code, § 12022.
- Personally Used Firearm ▶ Pen. Code, § 12022.5.
- Personal Use ▶ Pen. Code, § 1203.06(b)(~~3~~2).

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 164.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.15[2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 87, *Death Penalty*, § 87.13[7] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.01[4][c] (Matthew Bender).

Homicide

**540A. Felony Murder: First Degree—Defendant Allegedly Committed
Fatal Act- (Pen. Code, § 189)**

The defendant is charged [in Count __] with murder, under a theory of felony murder.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. The defendant committed [or attempted to commit] _____
<insert felony or felonies from Pen. Code, § 189>;
2. The defendant intended to commit _____ <insert felony or
felonies from Pen. Code, § 189>;

AND

3. While committing [or attempting to commit] _____, <insert
felony or felonies from Pen. Code, § 189> the defendant did an act
that caused the death of another person.

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ <insert felony or felonies from Pen. Code, § 189>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES ARE GIVEN.>

[The defendant must have intended to commit the (felony/felonies) of _____ <insert felony or felonies from Pen. Code, § 189> before or at the time of the act causing the death.]

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with “The defendant must have intended to commit the felony.” For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with “It is not required that the person die immediately” on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with “It is not required that the person killed be” on request.

The Supreme Court has not decided whether the trial court has a *sua sponte* duty to instruct on the meaning of “one continuous transaction.” (See *People v. Cavitt*

(2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of “one continuous transaction,” the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

Drive-By Shooting

The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony-murder rule. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837].) A finding of a specific intent to kill is required in order to find first degree murder under this clause. (*Ibid.*)

If the prosecutor is proceeding under both malice and felony-murder theories, also give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v.*

Superior Court (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant.*)

AUTHORITY

- Felony Murder: First Degree ▶ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Logical Nexus Between Felony and Killing ▶ *People v. Dominguez* (2006) 39 Cal.4th 1141; *People v. Cavitt* (2004) 33 Cal.4th 187, 197-206.

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 134–147.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 87, *Death Penalty*, § 87.13[7] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- ~~Second Degree Murder ▶ Pen. Code, § 187.~~
- ~~Voluntary Manslaughter ▶ Pen. Code, § 192(a).~~
- ~~Involuntary Manslaughter ▶ Pen. Code, § 192(b).~~

RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder

If a felony, such as robbery, is committed merely to facilitate an intentional murder, then the felony-murder rule does not apply. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99] [robbery committed to facilitate murder did not satisfy felony-murder special circumstance].) If the defense requests a special instruction on this point, see CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony*, *Pen. Code*, § 190.2(a)(17).

No Duty to Instruct on Lesser Included Offenses of Uncharged Predicate Felony

“Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine.” (*People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769] [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [122 Cal.Rptr.2d 545] [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary

Auto burglary may form the basis for a first degree felony-murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [150 Cal.Rptr. 515] [noting the problems of applying the felony-murder rule to a nondangerous daytime auto burglary].)

Duress

“[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony.” (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [122 Cal.Rptr.2d 587, 50 P.3d 368] [dictum]; see also CALCRIM No. 3402, *Duress or Threats*.)

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony murder. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 752].)

Merger: Ireland Rule

In *People v. Ireland* the court held that assault could not form the basis of a charge for second degree felony murder because the assaultive conduct “merges” with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–540 [75 Cal.Rptr. 188, 450 P.2d 580] [merger based on assault with a deadly weapon].) Although merger is typically an issue in second degree felony murder, in *People v. Garrison* (1989)

47 Cal.3d 746, 778 [254 Cal.Rptr. 257, 765 P.2d 419], the court held that first degree felony murder cannot be based on a burglary where the intent on entry is to commit an assault. (See also *People v. Baker* (1999) 74 Cal.App.4th 243, 251 [87 Cal.Rptr.2d 803] [conspiracy to commit assault may not be basis for first degree felony murder]; for further discussion, see the Related Issues section of CALCRIM No. 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act.*)

Homicide

**540B. Felony Murder: First Degree—Coparticipant Allegedly
Committed Fatal Act (Pen. Code, § 189)**

<Give the following introductory sentence when not giving Instruction 540A.>
[The defendant is charged [in Count ___] with murder, under a theory of
felony murder.]

The defendant may [also] be guilty of murder, under a theory of felony
murder, even if another person did the act that resulted in the death. I will
call the other person the *perpetrator*.

To prove that the defendant is guilty of first degree murder under this theory,
the People must prove that:

1. The defendant (committed [or attempted to commit][,]/ [or] aided
and abetted[,]/ [or] was a member of a conspiracy to commit)
_____ *<insert felony or felonies from Pen. Code, § 189>*;
2. The defendant (intended to commit[,]/ [or] intended to aid and abet
the perpetrator in committing[,]/ [or] intended that one or more of
the members of the conspiracy commit) _____ *<insert felony
or felonies from Pen. Code, § 189>*;
3. If the defendant did not personally commit [or attempt to commit]
_____ *<insert felony or felonies from Pen. Code, § 189>*, then a
perpetrator, (whom the defendant was aiding and abetting/ [or]
with whom the defendant conspired), personally committed [or
attempted to commit] _____ *<insert felony or felonies from Pen.
Code, § 189>*;

[AND]

4. While committing [or attempting to commit] _____, *<insert
felony or felonies from Pen. Code, § 189>* the perpetrator did an act
that caused the death of another person(;/.)

*<Give element 5 if the court concludes it must instruct on causal
relationship between felony and death; see Bench Notes.>*

[AND]

5. There was a logical connection between the act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 189>* [or attempted _____ *<insert felony or felonies from Pen. Code, § 189>*]. The connection between the fatal act and the _____ *<insert felony or felonies from Pen. Code, § 189>* [or attempted _____ *<insert felony or felonies from Pen. Code, § 189>*] must involve more than just their occurrence at the same time and place.]

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>*, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* before or at the time of the act causing the death.]

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if"

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

Bracketed element 5 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rptr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one

continuous transaction.” (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) Give bracketed element 5 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 5. (See discussion of conspiracy liability in the Related Issues section below.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with “The defendant must have (intended to commit.” For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with “It is not required that the person die immediately” on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with “It is not required that the person killed be” on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of “one continuous transaction.” (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of “one continuous transaction,” the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

Related Instructions

CALCRIM No. 400 et seq., *Aiding and Abetting: General Principles*.

CALCRIM No. 415 et seq., *Conspiracy*.

AUTHORITY

- Felony Murder: First Degree ▶ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].

- Continuous Transaction Requirement ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Logical Connection Required for Liability of Nonkiller ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▶ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing ▶ *People v. Dominguez* (2006) 39 Cal.4th 1141; *People v. Cavitt* (2004) 33 Cal.4th 187, 197-206.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 80, 87; Crimes Against the Person, §§ 134–147, 156.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3][b], Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- ~~Second Degree Murder ▶ Pen. Code, § 187.~~
- ~~Voluntary Manslaughter ▶ Pen. Code, § 192(a).~~
- ~~Involuntary Manslaughter ▶ Pen. Code, § 192(b).~~

RELATED ISSUES

Conspiracy Liability—Natural and Probable Consequences

In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder

based on aiding and abetting the underlying felony. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 [285 Cal.Rptr. 523].) The court has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy.

In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, “[f]or purposes of complicity in a cofelon’s homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations].” In the court’s two most recent opinions on felony-murder complicity, the court refers to the liability of “cofelons” or “accomplices” without reference to whether liability is based on directly committing the offense, aiding and abetting the offense, or conspiring to commit the offense. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197–205 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].) On the other hand, in both of these cases, the defendants were present at the scene of the felony and directly committed the felonious acts. (*People v. Cavitt, supra*, 33 Cal.4th at p. 194; *People v. Billa, supra*, 31 Cal.4th at p. 1067.) Thus, the court has not had occasion recently to address a situation in which the defendant was convicted of felony murder based solely on a theory of coconspirator liability.

The requirement for a logical nexus between the felony and the act causing the death, articulated in *People v. Cavitt, supra*, 33 Cal.4th at p. 193, may be sufficient to hold a conspiring defendant liable for the resulting death under the felony-murder rule. However, *Cavitt* did not clearly answer this question. Nor has any case explicitly held that the natural and probable consequences doctrine does not apply in the context of felony murder based on conspiracy.

Thus, if the trial court is faced with a factual situation in which the defendant’s liability is premised solely on being a member of a conspiracy in which another coparticipant killed an individual, the committee recommends that the court do the following: (1) give bracketed element 6 requiring a logical nexus between the felony and the act causing death; (2) request briefing and review the current law on conspiracy liability and felony murder; and (3) at the court’s discretion, add as element 7, “The act causing the death was a natural and probable consequence of the plan to commit _____ <insert felony or felonies from Pen. Code, § 189>.”

|
See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*.

Homicide

**540C. Felony Murder: First Degree—Other Acts Allegedly Caused
Death- (Pen. Code, § 189)**

The defendant is charged [in Count __] with murder, under a theory of felony murder.

The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____ *<insert felony or felonies from Pen. Code, § 189>*;
2. The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____ *<insert felony or felonies from Pen. Code, § 189>*;

<Give element 3 if defendant did not personally commit or attempt felony.>

- [3. A perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>*;]

(3/4). The commission [or attempted commission] of the _____ *<insert felony or felonies from Pen. Code, § 189>* was a substantial factor in causing the death of another person;

(4/5). The act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 189>* [or attempted _____ *<insert felony or felonies from Pen. Code, § 189>*] were part of one continuous transaction;

AND

(5/6). There was a logical connection between the act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 189>*.

The connection between the fatal act and the _____ <insert felony or felonies from Pen. Code, § 189> must involve more than just their occurrence at the same time and place.

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ <insert felony or felonies from Pen. Code, § 189>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ <insert felony or felonies from Pen. Code, § 189> before or at the time of the act causing the death.]

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; see generally, *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with “An act causes death if.” If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with “There may be more than one cause of death.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [11 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution’s theory is that the defendant committed or attempted to commit the underlying felony, then select “committed [or attempted to commit]” in element 1 and “intended to commit” in element 2. In addition, in the paragraph that begins with “To decide whether,” select “the defendant” in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If the prosecution’s theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with “The defendant may be guilty of murder.” In addition, in the paragraph that begins with “To decide whether,” select “the perpetrator” in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying

felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state “the perpetrator committed,” rather than “the defendant,” in the instructions on the underlying felony.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with “The defendant must have (intended to commit.” For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with “It is not required that the person die immediately” on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with “It is not required that the person killed be” on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of “one continuous transaction.” (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of “one continuous transaction,” the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

See the Bench Notes to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act* for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

AUTHORITY

- Felony Murder: First Degree ▶ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Logical Connection Required for Liability of Nonkiller ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▶ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim ▶ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].
- Logical Nexus Between Felony and Killing ▶ *People v. Dominguez* (2006) 39 Cal.4th 1141; *People v. Cavitt* (2004) 33 Cal.4th 187, 197-206.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.04, 140.10[3][b], Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- ~~Second Degree Murder ▶ Pen. Code, § 187.~~
- ~~Voluntary Manslaughter ▶ Pen. Code, § 192(a).~~
- ~~Involuntary Manslaughter ▶ Pen. Code, § 192(b).~~

RELATED ISSUES

Accidental Death of Accomplice During Commission of Arson

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)

See the Related Issues section to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act* and CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.

Homicide

590. Gross Vehicular Manslaughter While Intoxicated (Pen. Code, § 191.5(a))

The defendant is charged [in Count __] with gross vehicular manslaughter while intoxicated [in violation of Penal Code section 191.5(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21/~~operated a vessel under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/operated a vessel while having a blood alcohol level of 0.08 or higher~~);
2. While ~~(driving that vehicle/operating that vessel)~~ under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug], the defendant also committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);
3. The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence;

AND

4. The defendant's grossly negligent conduct caused the death of another person.

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ <insert misdemeanor[s] /infraction[s]>.

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant committed _____ <insert misdemeanor[s]/infraction[s]>.]

[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: _____ <insert act[s] alleged>.]

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21/~~operated a vessel under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/operated a vessel while having a blood alcohol level of 0.08 or higher~~).

Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily injury;

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

The combination of ~~(driving a vehicle/operating a vessel)~~ while under the influence of (an alcoholic beverage/ [and/or] a drug) and violating a ~~(traffic/navigation)~~ law is not enough by itself to establish gross negligence. In evaluating whether the defendant acted with gross negligence, consider the level of the defendant's intoxication, if any; the way the defendant ~~(drove/operated the vessel)~~; and any other relevant aspects of the defendant's conduct.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] otherwise lawful act[s] that might cause death): _____ <insert alleged predicate acts when multiple acts alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]

[The People have the burden of proving beyond a reasonable doubt that the defendant committed gross vehicular manslaughter while intoxicated. If the People have not met this burden, you must find the defendant not guilty of that crime. You must consider whether the defendant is guilty of the lesser crime[s] of _____ <insert lesser offense[s]>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of

the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 1, instruct on the particular “under the influence” offense charged. In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the driving under the influence offense and the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with “A person facing a sudden and unexpected emergency.”

If the defendant is charged with one or more prior conviction (see Pen. Code, § 191.5(d)), the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial. (See Bench Notes to CALCRIM No.

3100.)

AUTHORITY

- Gross Vehicular Manslaughter While Intoxicated ▶ Pen. Code, § 191.5(a).
- Unlawful Act Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act ▶ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of the Predicate Unlawful Act ▶ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481[76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587[249 Cal.Rptr. 906].
- Gross Negligence ▶ *People v. Penny*, (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Gross Negligence—Overall Circumstances ▶ *People v. Bennett* (1992) 54 Cal.3d 1032, 1039 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine ▶ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 238–245.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.04, Ch. 142, *Crimes Against the Person*, § 142.02[2][c], [4], Ch. 145, *Narcotics and Alcohol Offenses*, §§ 145.02[4][c], 145.03[1][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Gross Negligence Without Intoxication ▶ Pen. Code, § 192(c)(1); *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].
- Vehicular Manslaughter With Ordinary Negligence While Intoxicated ▶ Pen. Code, § 192(c)(3); *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Vehicular Manslaughter With Ordinary Negligence Without Intoxication ▶ Pen. Code, § 192(c)(2); *People v. Rodgers* (1949) 94 Cal.App.2d 166, 166 [210 P.2d 71].
- Injury to Someone While Driving Under the Influence of Alcohol or Drugs ▶ Veh. Code, § 23153; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].

Gross vehicular manslaughter while intoxicated is *not* a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 992 [103 Cal.Rptr.2d 698, 16 P.3d 118].)

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

The Vehicle Code driving-under-the-influence offense of the first element cannot do double duty as the predicate unlawful act for the second element. (*People v. Soledad* (1987) 190 Cal.App.3d 74, 81 [235 Cal.Rptr. 208].) “[T]he trial court erroneously omitted the ‘unlawful act’ element of vehicular manslaughter when instructing in . . . [the elements] by referring to Vehicle Code section 23152 rather than another ‘unlawful act’ as required by the statute.” (*Id.* at p. 82.)

Predicate Act Need Not Be Inherently Dangerous

“[T]he offense which constitutes the ‘unlawful act’ need not be an inherently dangerous misdemeanor or infraction. Rather, to be an ‘unlawful act’ within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.” (*People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 191.5.) “[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable

caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

Homicide

602. Attempted Murder: Peace Officer, Firefighter, ~~or~~ Custodial Officer, or Custody Assistant (Pen. Code, §§ 21a, 664(e))

If you find the defendant guilty of attempted murder [under Count ___], you must then decide whether the People have proved the additional allegation that (he/she) attempted to murder a (peace officer/firefighter/custodial officer).

To prove this allegation, the People must prove that:

1. _____ <insert officer's name, excluding title> was a (peace officer/firefighter/custodial officer/custody assistant/nonsworn uniformed employee of a sheriff's department) lawfully performing (his/her) duties as a (peace officer/firefighter/custodial officer/custody assistant/nonsworn uniformed employee of a sheriff's department);

AND

2. When the defendant attempted the murder, the defendant knew, or reasonably should have known, that _____ <insert officer's name, excluding title> was a (peace officer/firefighter/custodial officer/custody assistant/nonsworn uniformed employee of a sheriff's department) who was performing (his/her) duties.

[A person who is employed as a police officer by _____ <insert name of agency that employs police officer> is a *peace officer*.]

[A person employed by _____ <insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"> is a *peace officer* if _____ <insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">.]

[The duties of (a/an) _____ <insert title of peace officer, firefighter, ~~or~~ custodial officer, custody assistant or nonsworn uniformed employee of a sheriff's department> include _____ <insert job duties>.]

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

[A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [[A/An] (county jail/city jail/_____ <insert other detention facility>) is a local detention facility.] [A custodial officer is not a peace officer.]]

<If the custodial officer is employed by a law enforcement agency of San Diego County, Fresno County, Kern County, Stanislaus County, Riverside County, Santa Clara County, or a county having a population of 425,000 or less, give the following sentence in place of the definition above.>

[A person designated as (a/an) (correctional officer/jailer/_____ <insert similar title>) employed by the county of _____ <insert name of county designated by Penal Code section 831.5(a)> is a custodial officer.]

[A custody assistant is a person who is a full-time, non-peace officer employee of the county sheriff's department who assists peace officer personnel in maintaining order and security in a custody detention, court detention, or station jail facility of the sheriff's department.]

[For the purpose of this instruction, a nonsworn uniformed employee of a sheriff's department is someone whose job includes the care or control of inmates in a detention facility. [A prison, jail, camp, or other correctional facility used for the confinement of adults or both adults and minors/_____ <insert other applicable definition from Penal Code section 289.6(c)>is a detention facility for the purpose of this definition.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, Lawful Performance: Custodial Officer.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In order to be “engaged in the performance of his or her duties,” a peace officer or custodial officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) “[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element.” (*Ibid.*) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance of a peace officer and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. If lawful performance of a custodial officer is an issue, give the bracketed paragraph on lawful performance of a custodial officer and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

Penal Code section 664(e) refers to the definition of peace officer used in Penal Code section 190.2(a)(7), which defines “peace officer” as “defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12.”

Penal Code section 664(e) refers to the definition of firefighter used in Penal Code section 190.2(a)(9), which defines “firefighter” “as defined in Section 245.1.”

The court may give the bracketed sentence that begins, “The duties of (a/an) _____ <insert title> include,” on request. The court may insert a description of the officer’s duties such as “the correct service of a facially valid search . . . warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

In the bracketed definition of “local detention facility,” do not insert the name of a specific detention facility. Instead, insert a description of the type of detention facility at issue in the case. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869] [jury must determine if alleged victim is a peace officer]; see Penal Code section 6031.4 [defining local detention facility].)

AUTHORITY

- Attempted Murder on a Peace Officer or Firefighter ▶ Pen. Code, § 664(e).
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Firefighter Defined ▶ Pen. Code, § 245.1.
- Custody Assistant Defined ▶ Pen. Code, § 831.7.
- Nonsworn Uniformed Employee of Sheriff’s Department Defined ▶ Pen. Code, § 664(e).
- Custodial Officer as Referenced in Pen. Code, § 664, Defined ▶ Pen. Code, §§ 831(a) and 831.5(a).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 241.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person*, § 142.01[3][e] (Matthew Bender).

Homicide

763. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating (Pen. Code, § 190.3)

In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.

An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.

A mitigating circumstance or factor is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

Under the law, you must consider, weigh, and be guided by specific factors, where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

The factors are:

- (a) The circumstances of the crime[s] that the defendant was convicted of in this case and any special circumstances that were found true.
- (b) Whether or not the defendant has engaged in violent criminal activity other than the crime[s] of which the defendant was convicted in this case. *Violent criminal activity* involves the unlawful use or attempted use of force or violence or the direct or implied threat to use force or violence. [The other violent criminal activity alleged in this case will be described in these instructions.]
- (c) Whether or not the defendant has been convicted of any prior felony~~Any felony of which the defendant has conviction been convicted~~ other than the

crime[s] of which the defendant was convicted in this case or the absence of any prior felony conviction.

- (d) Whether the defendant was under the influence of extreme mental or emotional disturbance when (he/she) committed the crime[s] of which (he/she) was convicted in this case.
- (e) Whether the victim participated in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct in committing the crime[s] of which (he/she) was convicted in this case.
- (g) Whether at the time of the murder the defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether, at the time of the offense, the defendant's capacity to appreciate the criminality of (his/her) conduct or to follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication.
- (i) The defendant's age at the time of the crime[s] of which (he/she) was convicted in this case.
- (j) Whether the defendant was an accomplice to the murder and (his/her) participation in the murder was relatively minor.
- (k) Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. ~~In reaching your decision, you may consider~~ These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above.

Do not consider the absence of a mitigating factor as an aggravating factor.

[You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the death penalty.]

[Even if a fact is both a “special circumstance” and also a “circumstance of the crime,” you may consider that fact only once as an aggravating factor in your weighing process. Do not double-count that fact simply because it is both a “special circumstance” and a “circumstance of the crime.”]

[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant’s family influence your decision.

[However, you may consider evidence about the impact the defendant’s execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant’s background or character.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Although not required, “[i]t is . . . the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record.” (*People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111. S.Ct. 1023, 112 L.Ed.2d 1105]; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Melton* (1988) 44 Cal.3d 713, 770 [244 Cal.Rptr. 867, 750 P.2d 741].) The jury must be instructed to consider only those factors that are “applicable.” (*Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023.)

When the court will be instructing the jury on prior violent criminal activity in aggravation, give the bracketed sentence that begins with “The other violent criminal activity alleged in this case.” (See *People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d 1166].) The court also has a **sua sponte** duty to give CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes* in addition to this instruction.

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When the court will be instructing the jury on prior felony convictions, the court also has a **sua sponte** duty to give CALCRIM No. 765, *Death Penalty: Conviction for Other Felony Crimes* in addition to this instruction.

On request, the court must instruct the jury not to double-count any “circumstances of the crime” that are also “special circumstances.” (*People v. Melton, supra*, 44 Cal.3d at p. 768.) When requested, give the bracketed paragraph that begins with “Even if a fact is both a ‘special circumstance’ and also a ‘circumstance of the crime’.”

On request, give the bracketed sentence that begins with “You may not let sympathy for the defendant’s family.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 456 [79 Cal.Rptr.2d 408, 966 P.2d 422].) On request, give the bracketed sentence that begins with “However, you may consider evidence about the impact the defendant’s execution.” (*Ibid.*)

AUTHORITY

- Death Penalty Statute ▶ Pen. Code, § 190.3.
- Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy ▶ *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].
- Should Instruct on All Factors ▶ *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Must Instruct to Consider Only “Applicable Factors” ▶ *Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023; *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Mitigating Factor Must Be Supported by Evidence ▶ *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277 [113 S.Ct. 1222, 122 L.Ed.2d 620].
- Aggravating and Mitigating Defined ▶ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].

- On Request Must Instruct to Consider Only Statutory Aggravating Factors
 ▶ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].
- Mitigating Factors Are Examples ▶ *People v. Melton* (1988) 44 Cal.3d 713, 760 [244 Cal.Rptr. 867, 750 P.2d 741]; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].
- Must Instruct to Not Double-Count ▶ *People v. Melton* (1988) 44 Cal.3d 713, 768 [244 Cal.Rptr. 867, 750 P.2d 741].

Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, §§ 462, 466–467, 475, 480, 483–484, 493–497.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 87, *Death Penalty*, §§ 87.23, 87.24 (Matthew Bender).

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].) “The aggravating or mitigating nature of the factors is self-evident within the context of each case.” (*Ibid.*) However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*Ibid.*; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].) In *People v. Hillhouse*, the Supreme Court stated, “we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors.” The committee has rephrased this for clarity and included in the text of this instruction, “You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509, fn. 6 [117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].);

Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (*People v. Musselwhite* (1998) 17

Cal.4th 1216, 1269 [74 Cal.Rptr.2d 212, 954 P.2d 475].) In *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1269, decided prior to *Hillhouse*, the Supreme Court held that the trial court properly instructed the jury that “*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . .” (italics in original).

Assaultive Crimes and Battery

**840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent
Resulting in Traumatic Condition (Pen. Code, § 273.5(a))**

The defendant is charged [in Count __] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child) that resulted in a traumatic condition in violation of Penal Code section 273.5(a).

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully [and unlawfully] inflicted a physical injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child);

[AND]

2. The injury inflicted by the defendant resulted in a traumatic condition.

<Give element 3 when instructing on self-defense or defense of another>

[AND]

3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

A *traumatic condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

[The term *cohabitants* means two unrelated ~~adults~~ persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each person for significant periods.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under law to be the natural father. _____ <insert name of presumed father> is presumed under law to be the natural father of _____ <insert name of child>.]

[A traumatic condition is the *result of an injury* if:

1. The traumatic condition was the natural and probable consequence of the injury;
2. The injury was a direct and substantial factor in causing the condition;

AND

3. The condition would not have happened without the injury.

A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590-591 [35 Cal.Rptr.

401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Give the bracketed paragraph that begins, “A traumatic condition is the *result of* an injury if”

If there is sufficient evidence that an alleged victim’s injuries were caused by an accident, the court has a **sua sponte** duty to instruct on accident. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 [88 Cal.Rptr.2d 111].) Give CALCRIM No. 3404, *Accident*.

Give the bracketed language “[and unlawfully]” in element 1 if there is evidence that the defendant acted in self-defense.

Give the third bracketed sentence that begins “A person may cohabit simultaneously with two or more people,” on request if there is evidence that the defendant cohabited with two or more people. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].)

Give on request the bracketed paragraph that begins “A person is considered to be the (mother/father)” if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [39 Cal.Rptr.2d 479] [parentage can be established without resort to any presumption].)

If the defendant is charged with an enhancement for a prior conviction for a similar offense within seven years and has not stipulated to the prior conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*. If the court has granted a bifurcated trial, see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements ▶ Pen. Code, § 273.5(a).
- Traumatic Condition Defined ▶ Pen. Code, § 273.5(c); *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Cohabitant Defined ▶ *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force ▶ *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].

- Duty to Define Traumatic Condition ▶ *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- General Intent Crime ▶ See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra, *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation ▶ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 63, 64.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.13[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment on Spouse ▶ Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47 Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting “traumatic condition”].
- Misdemeanor Battery ▶ Pen. Code, §§ 242, 243(a); see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Battery Against Spouse, Cohabitant, or Fellow Parent ▶ Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Simple Assault ▶ Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

RELATED ISSUES

Continuous Course of Conduct

Penal Code section 273.5 is aimed at a continuous course of conduct. The prosecutor is not required to choose a particular act and the jury is not required to unanimously agree on the same act or acts before a guilty verdict can be returned. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224–225 [206 Cal.Rptr. 516].)

Multiple Acts of Abuse

A defendant can be charged with multiple violations of Penal Code section 273.5 when each battery satisfies the elements of section 273.5. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1140 [18 Cal.Rptr.2d 274].)

Prospective Parents of Unborn Children

Penal Code section 273.5(a) does not apply to a man who inflicts an injury upon a woman who is pregnant with his unborn child. “A pregnant woman is not a ‘mother’ and a fetus is not a ‘child’ as those terms are used in that section.” (*People v. Ward* (1998) 62 Cal.App.4th 122, 126, 129 [72 Cal.Rptr.2d 531].)

Termination of Parental Rights

Penal Code section 273.5 “applies to a man who batters the mother of his child even after parental rights to that child have been terminated.” (*People v. Mora* (1996) 51 Cal.App.4th 1349, 1356 [59 Cal.Rptr.2d 801].)

Assaultive Crimes and Battery

**875. Assault With Deadly Weapon or Force Likely
to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)–(3) & (b))**

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) [in violation of Penal Code section 245].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with (a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and

1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

[AND]

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon/with a firearm/with a semiautomatic firearm/with a machine gun/with an assault weapon/with a .50 BMG rifle) to a person(;/.)

<Give element 5 when instructing on self-defense or defense of another>

[AND]

5. The defendant did not act (in self-defense/ [or] in defense of someone else.)]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[A *semiautomatic firearm* extracts a fired cartridge and chambers a fresh cartridge withoperates by using the energy of the explosive in a fixed

cartridge to extract a fired cartridge and chamber a fresh cartridge with each single pull of the trigger.]

[A *machine gun* is any weapon that (shoots/is designed to shoot/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.]

[An *assault weapon* includes _____ <insert names of appropriate designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1>.]

[A *.50 BMG rifle* is a center fire rifle that can fire a *.50 BMG cartridge* [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. The overall length is 5.54 inches from the base of the cartridge to the tip of the bullet;
2. The bullet diameter for the cartridge is from .510 to, and including, .511 inch;

AND

3. The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]

[The term[s] (*great bodily injury*[,]/ *deadly weapon*[,]/ *firearm*[,]/ *machine gun*[,]/ *assault weapon*[,]/ [and] *.50 BMG rifle*) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give element 1A if it is alleged the assault was committed with a deadly weapon, firearm, semiautomatic firearm, machine gun, an assault weapon, or .50 BMG

rifle. Give 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(a).)

Give the bracketed definition of “application or force and apply force” on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Assault Weapon Defined ▶ Pen. Code, §§ 12276, 12276.1.
- Semiautomatic Firearm Defined ▶ Pen. Code, § 12126(e).
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Machine Gun Defined ▶ Pen. Code, § 12200.
- .50 BMG Rifle Defined ▶ Pen. Code, § 12278.
- Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 40–47.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.

A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 [117 Cal.Rptr. 595]; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221 [99 Cal.Rptr.2d 458].)

RELATED ISSUES

Semiautomatic Firearm Need Not be Operable

Assault with a semiautomatic weapon does not require proof that the gun was operable as a semiautomatic at the time of the assault. A person may commit an assault under Penal Code section 245(b) by using the gun as a club or bludgeon, regardless of whether he or she could also have fired it in a semiautomatic manner at that moment. (*People v. Miceli* (2002) 104 Cal.App.4th 256 [127 Cal.Rptr.2d 888].)

Assaultive Crimes and Battery

**970. Shooting Firearm or BB Device in Grossly Negligent Manner
(Pen. Code, § 246.3)**

The defendant is charged [in Count ___] with shooting a (firearm/BB Device)
in a grossly negligent manner [in violation of Penal Code section 246.3].

To prove that the defendant is guilty of this crime, the People must prove that:

- 1. The defendant intentionally shot a (firearm/BB device);**
- 2. The defendant did the shooting with gross negligence;**

[AND]

- 3. The shooting could have resulted in the injury or death of a person(;/.)**

<Give element 4 when instructing on self-defense or defense of another>

[AND]

- 4. The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:

- 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury.**

AND

- 2. A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[A *BB device* is any instrument that expels a projectile, such as a BB or a pellet, through the force of air pressure, gas pressure, or spring action.]

[The term[s] (*great bodily injury*/ [and] *firearm*) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

AUTHORITY

- Elements ▶ Pen. Code, § 246.3.
- Discharge Must be Intentional ▶ *People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155]; *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538 [16 Cal.Rptr.2d 656].
- Firearm Defined ▶ Pen. Code, § 12001(b).
- BB Device Defined ▶ Pen. Code, § 246.3(c).
- Willful Defined ▶ Pen. Code, § 7(1).

- Gross Negligence Defined ▶ *People v. Alonzo* (1993) 13 Cal.App.4th 535, 540 [16 Cal.Rptr.2d 656]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926].
- Actual Belief Weapon Not Loaded Negates Mental State ▶ *People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440 [35 Cal.Rptr.2d 155].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 48.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.01[1][i] (Matthew Bender).

LESSER INCLUDED OFFENSES

Unlawful possession by a minor of a firearm capable of being concealed on the person (see Pen. Code, § 12101(a)) is not a necessarily included offense of unlawfully discharging a firearm with gross negligence. (*In re Giovanni M.* (2000) 81 Cal.App.4th 1061, 1066 [97 Cal.Rptr.2d 319].)

RELATED ISSUES

Second Degree Felony-Murder

Grossly negligent discharged of a firearm is an inherently dangerous felony and may serve as the predicate offense to second degree felony-murder. (*People v. Robertson* (2004) 34 Cal.4th 156, 173 [17 Cal.Rptr.3d 604, 95 P.3d 872] [merger doctrine does not apply]; *People v. Clem* (2000) 78 Cal.App.4th 346, 351 [92 Cal.Rptr.2d 727]; see CALCRIM Nos. 541A–541C, *Felony Murder: Second Degree*.)

Actual Belief Weapon Not Loaded Negates Mental State

“A defendant who believed that the firearm he or she discharged was unloaded . . . would not be guilty of a violation of section 246.3.” (*People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872] [citing *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440 [35 Cal.Rptr.2d 155]].)

Sex Offenses

1123. Aggravated Sexual Assault of Child Under 14 Years (Pen. Code, § 269(a))

The defendant is charged [in Count __] with aggravated sexual assault of a child who was under the age of 14 years and at least ~~seven~~**10** years younger than the defendant [in violation of Penal Code section 269(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed _____ *<insert sex offense specified in Pen. Code, § 269(a)(1)–(5)>* on another person;

AND

2. When the defendant acted, the other person was under the age of 14 years and was at least ~~seven~~**10** years younger than the defendant.

To decide whether the defendant committed _____ *<insert sex offense specified in Pen. Code, § 269(a)(1)–(5)>*, please refer to the separate instructions that I (will give/have given) you on that crime.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1 and in the sentence following element 2, insert the sex offense specified in Penal Code section 269(a)(1)–(5) that is charged. The sex offenses specified in section 269(a)(1)–(5) and their applicable instructions are:

1. Rape (Pen. Code, § 261(a)(2); see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*).

2. Rape or sexual penetration in concert (Pen. Code, § 264.1; see CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, and CALCRIM No.1046, *Sexual Penetration in Concert*).
3. Sodomy (Pen. Code, § 286(c)(2); see CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*).
4. Oral copulation (Pen. Code, § 288a(c)(2); see CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*).
5. Sexual penetration (Pen. Code, § 289(a); see CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*).

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements ▶ Pen. Code, § 269(a).

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 54.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[2][a], [c], [7][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Assault ▶ Pen. Code, § 240.
- Underlying Sex Offense ▶ Pen. Code, §§ 261(a)(2) [rape], 264.1 [rape or sexual penetration in concert], 286(c)(2) [sodomy], 288a(c)(2) [oral copulation], 289(a) [sexual penetration].

Sex Offenses

1154. Prostitution: Soliciting Another (Pen. Code, § 647(b))

The defendant is charged [in Count __] with soliciting another person to engage in an act of prostitution [in violation of Penal Code section 647(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant requested [or _____ <insert other synonyms for “solicit,” as appropriate>] that another person engage in an act of prostitution;

[AND]

2. The defendant intended to engage in an act of prostitution with the other person(;/.)

<Give element 3 when instructing that person solicited must receive message; see Bench Notes.>

[AND]

3. The other person received the communication containing the request.]

A person *engages in an act of prostitution* if he or she has sexual intercourse or does a lewd act with someone else in exchange for money [or other compensation]. A *lewd act* means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person’s body for the purpose of sexual arousal or gratification. Under the law, when a prostitute and a customer engage in sexual intercourse or lewd acts, both of them are engaged in an act of prostitution.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94

Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. (*Ibid.*) If there is an issue over whether the intended person actually received the communication, give bracketed element 3.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements ▶ Pen. Code, § 647(b).
- Prostitution Defined ▶ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195] [lewd act requires touching between prostitute and customer].
- Lewd Conduct Defined ▶ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Solicitation Requires Specific Intent ▶ *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134]; *People v. Love* (1980) 111 Cal.App.3d Supp. 1, 13 [168 Cal.Rptr. 591]; *People v. Dell* (1991) 232 Cal.App.3d 248, 264 [283 Cal.Rptr. 361].
- Solicitation Defined ▶ *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication ▶ *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- Solicitation Applies to Either Prostitute or Customer ▶ *Leffel v. Municipal Court* (1976) 54 Cal.App.3d 569, 575 [126 Cal.Rptr. 773].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 61–63.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.11[1] (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 441, *Solicitation: Elements*.

Sex Offenses

1180. Incest ~~With a Minor~~ (Pen. Code, § 285)

The defendant is charged [in Count ___] with incest [in violation of Penal Code section 285].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant had sexual intercourse with another person ~~minor~~;
2. When the defendant did so, (he/she) was at least 14 years old;

AND

- 2.3. The defendant and the other person ~~minor~~ are related to each other as (parent and child/[great-]grandparent and [great-]grandchild/[half] brother and [half] sister/uncle and niece/aunt and nephew).

Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]

A minor is a person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

This instruction focuses on incestuous sexual intercourse with a minor, which is the most likely form of incest to be charged. Incest is also committed by intercourse between adult relatives within the specified degree of consanguinity, or by an incestuous marriage. (See Pen. Code, § 285.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements ▶ Pen. Code, § 285.
- Incestuous Marriages ▶ Fam. Code, § 2200.
- Sexual Intercourse Defined ▶ See Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585 [250 Cal.Rptr. 635, 758 P.2d 1165]].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 138–142.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Incest ▶ Pen. Code, §§ 664, 285.

RELATED ISSUES

Accomplice Instructions

A minor is a victim of, not at accomplice to, incest. Accomplice instructions are not appropriate in a trial for incest involving a minor. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see *People v. Stoll* (1927) 84 Cal.App. 99, 101–102 [257 P. 583].) An exception may exist when two minors engage in consensual sexual intercourse, and thus both are victims of the other's crime. (*People v. Tobias, supra*, 327 Cal.4th at p. 334; see *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364–1365 [73 Cal.Rptr.2d 331] [minor perpetrator under Pen. Code, § 261.5].) An adult woman who voluntarily engages in the incestuous act is

an accomplice, whose testimony must be corroborated. (See *People v. Stratton* (1904) 141 Cal. 604, 609 [75 P. 166].)

Half-Blood Relationship

Family Code section 2200 prohibits sexual relations between brothers and sisters of half blood, but not between uncles and nieces of half blood. (*People v. Baker* (1968) 69 Cal.2d 44, 50 [69 Cal.Rptr. 595, 442 P.2d 675] [construing former version of § 2200].) However, sexual intercourse between persons the law deems to be related is proscribed. A trial court may properly instruct on the conclusive presumption of legitimacy (see Fam. Code, § 7540) if a defendant uncle asserts that the victim's mother is actually his half sister. The presumption requires the jury to find that if the defendant's mother and her potent husband were living together when the defendant was conceived, the husband was the defendant's father, and thus the defendant was a full brother of the victim's mother. (*People v. Russell* (1971) 22 Cal.App.3d 330, 335 [99 Cal.Rptr. 277].)

Lack of Knowledge as Defense

No reported cases have held that lack of knowledge of the prohibited relationship is a defense to incest. (But see *People v. Patterson* (1894) 102 Cal. 239, 242–243 [36 P. 436] [dictum that party without knowledge of relationship would not be guilty]; see also *People v. Vogel* (1956) 46 Cal.2d 798, 801, 805 [299 P.2d 850] [good faith belief is defense to bigamy].)

Kidnapping

1203. Kidnapping: For Robbery, Rape, or Other Sex Offenses (Pen. Code, § 209(b))

The defendant is charged [in Count __] with kidnapping for the purpose of (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration) [in violation of Penal Code section 209(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____ <insert other offense specified in statute>_____);
2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear ;
3. Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;
4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____ <insert other offense specified in statute>);

[AND]

5. The other person did not consent to the movement(;/.)

<Give element 6 if instructing on reasonable belief in consent>

[AND]

6. The defendant did not actually and reasonably believe that the other person consented to the movement.]

[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[As used here, *substantial distance* means more than a slight or trivial distance. The movement must have substantially increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____ *<insert other offense specified in statute>*). In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.]

[To be guilty of kidnapping for the purpose of (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration), the defendant does not actually have to commit the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____ *<insert other offense specified in statute>*).

To decide whether the defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____ *<insert other offense specified in statute>*), please refer to the separate instructions that I (will give/have given) you on that crime.

<Defense: Good Faith Belief in Consent>

[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>

[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.]

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In addition, the court has a **sua sponte** duty to instruct on the elements of the alleged underlying crime.

Give the bracketed definition of “consent” on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that begins with “Consent may be withdrawn.” (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The defendant’s reasonable and actual belief in the victim’s consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].)

Related Instructions

Kidnapping a child for the purpose of committing a lewd or lascivious act is a separate crime under Penal Code section 207(b). See CALCRIM No. 1200, *Kidnapping: For Child Molestation*.

AUTHORITY

- Elements ▶ Pen. Code, § 209(b); *People v. Rayford* (1994) 9 Cal.4th 1, 12–14, 22 [36 Cal.Rptr.2d 317, 884 P.2d 1369] [following modified two-prong *Daniels* test for movement necessary for aggravated kidnapping]; *People v.*

Daniels (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 168 [112 Cal.Rptr.2d 826].

- Robbery Defined ▶ Pen. Code, § 211.
- Rape Defined ▶ Pen. Code, § 261.
- Other Sex Offenses Defined ▶ Pen. Code, §§ 262 [spousal rape], 286 [sodomy], 288a [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking ▶ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery ▶ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim ▶ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear ▶ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 257–265, 274, 275.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.14 (Matthew Bender).

COMMENTARY

The instruction states that the movement must “substantially” increase the risk of harm to the victim beyond that necessarily included in the underlying robbery, rape, or sex offense. In *People v. Martinez* (1999) 20 Cal.4th 225 [83 Cal.Rptr.2d 533, 973 P.2d 512], the Court observed that “[u]nlike our decisional authority,

[section 209(b)(2)] does not require that the movement ‘substantially’ increase the risk of harm to the victim.” (*Id.* at p. 232, fn. 4 [dictum, discussing 1997 amendment to section 209(b)(2)].) One appellate court has followed the *Martinez* dictum in holding that kidnapping for carjacking does not require that the physical movement of the victim *substantially* increase the risk of harm. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415 [124 Cal.Rptr.2d 92].) Nevertheless, a recent Supreme Court case repeats the “substantial” increase in harm element without discussing the *Martinez* footnote. (See *People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493].) Until this issued is clarified, the committee decided to retain the word “substantial.”

LESSER INCLUDED OFFENSES

- Kidnapping ▶ Pen. Code, § 207; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Jackson* (1998) 66 Cal.App.4th 182, 189 [77 Cal.Rptr.2d 564].
- Attempted Kidnapping ▶ Pen. Code, §§ 664, 207.
- False Imprisonment ▶ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171 [112 Cal.Rptr.2d 826].

RELATED ISSUES

Psychological Harm

Psychological harm may be sufficient to support conviction for aggravated kidnapping under Penal Code section 209(b). An increased risk of harm is not limited to a risk of bodily harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493] [substantial movement of robbery victim that posed substantial increase in risk of psychological trauma beyond that expected from stationary robbery].)

Criminal Threats and Hate Crimes

1300. Criminal Threat (Pen. Code, § 422)

The defendant is charged [in Count ___] with having made a criminal threat **[in violation of Penal Code section 422]**.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____ <insert name of complaining witness or member[s] of complaining witness's immediate family>;
2. The defendant made the threat to _____ <insert name of complaining witness> (orally/in writing/by electronic communication device);
3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____ <insert name of complaining witness>];
4. The threat was so clear, immediate, unconditional, and specific that it communicated to _____ <insert name of complaining witness> a serious intention and the immediate prospect that the threat would be carried out;
5. The threat actually caused _____ <insert name of complaining witness> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

6. _____'s <insert name of complaining witness> fear was reasonable under the circumstances.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory.

[An immediate ability to carry out the threat is not required.]

[An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

Give the bracketed definition of “electronic communication” on request. (Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining “immediate family” should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

AUTHORITY

- Elements ▶ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances ▶ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threat Not Required to Be Unconditional ▶ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- Conditional Threat May Be True Threat, Depending on Context ▶ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].
- Immediate Ability to Carry Out Threat Not Required ▶ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear ▶ *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024 [109 Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].
- Verbal Statement, Not Mere Conduct, Is Required ▶ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 22.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[1] (Matthew Bender).

COMMENTARY

This instruction uses the current nomenclature “criminal threat,” as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called “terrorist threat”]. (See also Stats. 2000, ch. 1001, § 4.)

LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ▶ See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

In *In re George T.* (2004) 33 Cal.4th 620, 628–629 [16 Cal.Rptr.3d 61, 93 P.3d 1007], a minor gave two classmates a poem containing language that referenced school shootings. The court held that “the text of the poem, understood in light of the surrounding circumstances, was not ‘as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.’ ” (*Id.* at p. 638.)

Related Statutes

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening

witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4 [102 Cal.Rptr.2d 269]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539 [70 Cal.Rptr.2d 878].)

Whether Threat Actually Received

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

1400. Active Participation in Criminal Street Gang (Pen. Code, § 186.22(a))

The defendant is charged [in Count __] with participating in a criminal street gang [in violation of Penal Code section 186.22(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant actively participated in a criminal street gang;
2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

AND

3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:

a. directly and actively committing a felony offense;

OR

b. aiding and abetting a felony offense.;

Active participation means involvement with a criminal street gang in a way that is more than passive or in name only.

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

<If criminal street gang has already been defined>

[A *criminal street gang* is defined in another instruction to which you should refer.]

<If criminal street gang has not already been defined in another instruction>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. That has a common name or common identifying sign or symbol;
2. That has, as one or more of its primary activities, the commission of _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;

AND

3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>

1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)

_____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ <insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>

AND

[at least one of the following crimes:] _____ <insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>;

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

4. The crimes were committed on separate occasions or were personally committed by two or more persons.]

The People need not prove that every perpetrator involved in the pattern of criminal gang activity, if any, was a member of the alleged criminal street gang at the time when such activity was taking place.

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

Felonious criminal conduct means committing or attempting to commit [any of] the following crime[s]: _____ <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted>.

To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

To prove that the defendant aided and abetted ~~willfully assisted, furthered, or promoted~~ felonious criminal conduct by a member of the gang, a crime, the People must prove that:

1. A member of the gang committed the crime;

2. The defendant knew that the gang member intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

4. The defendant's words or conduct did in fact aid and abet the commission of the crime.

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;

AND

2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].)

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of “criminal street gang,” “pattern of criminal gang activity,” or “felonious criminal conduct.”

On request, give the bracketed paragraph that begins with “The People do not need to prove that the defendant devoted all or a substantial part of” (See Pen. Code, § 186.22(i).)

On request, give the bracketed paragraph that begins with “If you find the defendant guilty of a crime in this case.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with “If you conclude that defendant was present.” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

This instruction should be used when a defendant is charged with a violation of Penal Code section 186.22(a) as a substantive offense. If the defendant is charged with an enhancement under 186.22(b), use CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*.

For additional instructions relating to liability as an aider and abettor, see the Aiding and Abetting series (CALCRIM No. 400 et seq.).

AUTHORITY

- Elements ▶ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].

- Willful Defined ▶ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined ▶ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03 (Matthew Bender).

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran, supra*, 97 Cal.App.4th at 1458 [original italics].)

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

The predicate offenses that establish a pattern of criminal gang activity are not lesser included offenses of active participation in a criminal street gang. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944–945 [34 Cal.Rptr.3d 40].)

RELATED ISSUES

Conspiracy

Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182 and CALCRIM No. 415, *Conspiracy*.)

Labor Organizations or Mutual Aid Activities

The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

Related Gang Crimes

Soliciting or recruiting others to participate in a criminal street gang, or threatening someone to coerce them to join or prevent them from leaving a gang, are separate crimes. (Pen. Code, § 186.26.) It is also a crime to supply a firearm to someone who commits a specified felony while participating in a criminal street gang. (Pen. Code, § 186.28.)

Unanimity

The “continuous-course-of-conduct exception” applies to the “pattern of criminal gang activity” element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758].)

(Revised August 2006)

Criminal Street Gangs

1402. Gang-Related Firearm Enhancement (Pen. Code, § 12022.53(e))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>] and you find that the defendant committed (that/those) crime[s] for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals (personally used/personally and intentionally discharged) a firearm during that crime [and caused (great bodily injury/ [or] death)]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

[1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the _____ <insert appropriate crime listed in Penal Code section 12022.53(a) crime(.;/)>

[AND]

[2. That person intended to discharge the firearm(.;/)]

[AND]

3. That person's act caused (great bodily injury to/ [or] the death of) another person [who was not an accomplice to the crime].]

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

[A principal *personally uses* a firearm if he or she intentionally does any of the following:

1. Displays the firearm in a menacing manner.
2. Hits someone with the firearm.

OR

3. Fires the firearm].

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. A person is subject to prosecution if he or she committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant used the firearm “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In order for the defendant to receive an enhancement under Penal Code section 12022.53(e), the jury must find both that the defendant committed a felony for the benefit of a street gang and that a principal used or intentionally discharged a firearm in the offense. Thus, the court **must give** CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*, with this instruction and the jury must find both allegations have been proved before the enhancement may be applied.

In this instruction, the court **must** select the appropriate options based on whether the prosecution alleges that the principal used the firearm, intentionally discharged the firearm, or intentionally discharged the firearm causing great bodily injury or death. The court should review CALCRIM Nos. 3146, 3148, and 3149 for guidance. Give the bracketed definition of “personally used” only if the prosecution specifically alleges that the principal “personally used” the firearm. Do not give the bracketed definition of “personally used” if the prosecution alleges intentional discharge or intentional discharge causing great bodily injury or death.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with “An act causes” If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with “There may be more than one cause” (*Id.* at pp. 335–338.)

The court should give the bracketed definition of “firearm” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the principal used the weapon “during the commission of” the offense, the court may give CALCRIM No. 3261, *During*

Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If, in the elements, the court gives the bracketed phrase “who was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

AUTHORITY

- Enhancement ▶ Pen. Code, § 12022.53(e).
- Vicarious Liability Under Subdivision (e) ▶ *People v. Garcia* (2002) 28 Cal.4th 1166, 1171 [124 Cal.Rptr.2d 464, 52 P.3d 648]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12 [104 Cal.Rptr.2d 247].
- Principal Defined ▶ Pen. Code, § 31.
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Personally Uses ▶ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(23).
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Proximate Cause ▶ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, § 322.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03[4] (Matthew Bender).

RELATED ISSUES

Principal Need Not Be Convicted

It is not necessary that the principal who actually used or discharged the firearm be convicted. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176 [124 Cal.Rptr.2d 464, 52 P.3d 648].)

Defendant Need Not Know Principal Armed

For an enhancement charged under Penal Code section 12022.53(e) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal intended to use or discharge a firearm. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 14–15 [104 Cal.Rptr.2d 247].)

See the Related Issues sections of CALCRIM Nos. 3146–3149.

Theft and Extortion

1806. Theft by Embezzlement (Pen. Code, §§ 484, 503)

The defendant is charged [in Count ____] with [grand/petty] theft by embezzlement [in violation of Penal Code section 503].

To prove that the defendant is guilty of this crime, the People must prove that:

1. An owner [or the owner's agent] entrusted (his/her) property to the defendant;
2. The owner [or owner's agent] did so because (he/she) trusted the defendant;
3. The defendant fraudulently (converted/used) that property for (his/her) own benefit;

AND

4. When the defendant (converted/used) the property, (he/she) intended -(to deprive the owner of (it/its use). temporarily/permanently/-[or] permanently/-[or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property)-.

A person acts fraudulently when he or she takes undue advantage of another person or causes a loss to that person by breaching ~~his~~ a duty, trust or confidence

[A good faith belief in acting with authorization to use the property is a defense.]

[An intent to deprive the owner of property, even temporarily, is enough.]

[Intent to restore the property to its owner is not a defense.]

[An agent is someone to whom the owner has given complete or partial authority and control over the owner's property.]

[For petty theft, the property taken can be of any value, no matter how slight.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the evidence supports it, the court has a **sua sponte** duty to instruct that a good faith belief in acting with authorization to use the property is a defense. *People v. Stewart* (1976) 16 Cal.3d 133, 140.

Related Instructions

If the defendant is charged with grand theft, give CALCRIM No. 1801 *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

AUTHORITY

- Elements ▶ Pen. Code, §§ 484, 503–515; In re Basinger (1988) 45 Cal.3d 1348, 1363 [756 P.2d 833, 842-842, 249 Cal.Rptr. 110,118] People v. Wooten (1996) 44 Cal.App.4th 1834, 1845 [52 Cal.Rptr.2d 765]; People v. Kronemyer (1987) 189 Cal.App.3d 314, 361 [234 Cal.Rptr. 442, 473].
- Fraud Defined ▶ People v. Talbot (1934) 220 Cal.3d 3, 15; People v. Stein (1979) 94 Cal.App.3d 235, 241 [156 Cal.Rptr. 299, **303].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Petty Theft ▶ Pen. Code, § 486.
- Attempted Theft ▶ Pen. Code, §§ 664, 484.

RELATED ISSUES

Alter Ego Defense

A partner can be guilty of embezzling from his own partnership. “[T]hough [the Penal Code] requir[es] that the property be ‘of another’ for larceny, [it] does not require that the property be ‘of another’ for embezzlement. . . . It is both illogical and unreasonable to hold that a partner cannot steal from his partners merely because he has an undivided interest in the partnership property. Fundamentally, stealing that portion of the partners’ shares which does not belong to the thief is no different from stealing the property of any other person.” (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 464, 468 [106 Cal.Rptr. 519]; see Pen. Code, § 484.)

Fiduciary Relationships

Courts have held that creditor/debtor and employer/employee relationships are not presumed to be fiduciary relationships in the absence of other evidence of trust or confidence. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1846 [52 Cal.Rptr.2d 765] [creditor/debtor]; *People v. Threestar* (1985) 167 Cal.App.3d 747, 759 [213 Cal.Rptr. 510] [employer/employee].)

1 Criminal Writings and Fraud
2

3 **2040. Unauthorized Use of Personal Identifying Information (Pen.**
4 **Code, § 530.5(a)**
5

6 **The defendant is charged [in Count __] with the unauthorized use of someone**
7 **else’s personal identifying information [in violation of Penal Code section**
8 **530.5(a).**
9

10 **To prove that the defendant is guilty of this crime, the People must prove**
11 **that:**

- 12
- 13 **1. The defendant willfully obtained someone else’s personal**
14 **identifying information;**
 - 15
 - 16 **2. The defendant willfully used that information for an unlawful**
17 **purpose;**

18 **AND**
19

- 20
- 21 **3. The defendant used the information without the consent of the**
22 **person whose identifying information (he/she) was using.**
23

24 ***Personal identifying information* includes a person’sthe (name [;]/ [and]**
25 **address[;]/ [and] telephone number[;]/ [and] health insurance identification**
26 **number[;]/ [and] taxpayer identification number[;]/ [and] school**
27 **identification number[;]/ [and] state or federal driver’s license number or**
28 **identification number[;]/ [and] social security number[;]/ [and] place of**
29 **employment[;]/ [and] employee identification number[;]/ [and] mother’s**
30 **maiden name[;]/ [and] demand deposit account number[;]/ [and] savings**
31 **account number[;]/ [and] checking account number[;]/ [and] PIN (personal**
32 **identification number) or password[;]/ [and] alien registration number[;]/**
33 **[and] government passport number[;]/ [and] date of birth[;]/ [and] unique**
34 **biometric data such as fingerprints, facial-scan identifiers, voice print, retina**
35 **or iris image, or other unique physical representation[;]/ [and] unique**
36 **electronic data such as identification number, address, or routing code,**
37 **telecommunication identifying information or access device[;]/ [and]**
38 **information contained in a birth or death certificate[;]/ and credit card**
39 **number) -of an individual person or an equivalent form of identification.**
40

41 **[As used here, the term “person” means a human being, whether living or**
42 **dead, or a firm, association, organization, partnership, business trust,**

43 company, corporation, limited liability company, ~~or~~ public entity or any other
44 legal entity.]

45
46 Someone commits an act *willfully* when he or she does it willingly or on
47 purpose.

48
49 An *unlawful purpose* includes unlawfully (obtaining/ [or] attempting to
50 obtain) (credit[,]/ [or] goods[,]/ [or] services[,]/ [or] medical information) in
51 the name of the other person.

BENCH NOTES

Instructional Duty

56
57 The court has a **sua sponte** duty to give this instruction defining the elements of
58 the crime.

59
60 In the definition of personal identifying information, give the relevant items based
61 on the evidence presented.

AUTHORITY

- 62
- 63
- 64
- 65
- 66 • Elements ▶ Pen. Code, § 530.5(a).
- 67 • Personal Identifying Information Defined ▶ Pen. Code, § 530.5(b).
- 68 • Person Defined ▶ Pen. Code, § 530.5(g).

Secondary Sources

69
70
71
72 2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against
73 Property, § 209.

74
75 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143,
76 *Crimes Against Property*, § 143.01[1], [4][h] (Matthew Bender).

Vehicle Offenses

2201. Speed Contest (Veh. Code, § 23109(c), (e)(2), (f)(1)–(3))

The defendant is charged [in Count __] with engaging in a speed contest [in violation of Vehicle Code section 23109].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a motor vehicle on a highway;

[AND]

2. While so driving, the defendant willfully engaged in a speed contest(./;)

[AND]

3. The speed contest was a substantial factor in causing someone other than the defendant to suffer [serious] bodily injury.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A person *engages in a speed contest* when he or she uses a motor vehicle to race against another vehicle, a clock, or other timing device. [A *speed contest* does not include an event in which the participants measure the time required to cover a set route of more than 20 miles but where the vehicle does not exceed the speed limits.]

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A *motor vehicle* includes a (passenger vehicle/motorcycle/bus/school bus/commercial vehicle/truck tractor/ _____ <insert other type of motor vehicle>).]

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle*/ [and] *highway*) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court must define the terms “motor vehicle” and “highway.” Give the bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the defendant is charged with aiding and abetting a speed contest under Vehicle Code section 23109(b), give CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*. This instruction also must be given, but the court should modify the first sentence and change “defendant” to “perpetrator” throughout the instruction.

Give the appropriate bracketed language of element 3 if the defendant is charged with causing an injury, as well as CALCRIM No. 240, *Causation*.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

AUTHORITY

- Elements ▶ Veh. Code, § 23109(c), (e)(2), (f)(1) – (3).23109(a).
- Willfully Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Motor Vehicle Defined ▶ Veh. Code, § 415.
- Highway Defined ▶ Veh. Code, § 360.
- Speed Contest ▶ *In re Harvill* (1959) 168 Cal.App.2d 490, 492–493 [335 P.2d 1016] [discussing prior version of statute].
- Serious Bodily Injury Defined ▶ Pen. Code, § 243(f)(4).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 254.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

Vehicle Offenses

2202. Exhibition of Speed (Veh. Code, § 23109(c))

The defendant is charged [in Count __] with engaging in an exhibition of speed [in violation of Vehicle Code section 23109].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a motor vehicle on a highway;

AND

2. While so driving, the defendant willfully engaged in an exhibition of speed.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A person *engages in an exhibition of speed* when he or she accelerates or drives at a rate of speed that is dangerous and unsafe in order to show off or make an impression on someone else.

[The People must prove that the defendant intended to show off or impress someone but are not required to prove that the defendant intended to show off to or impress any particular person.]

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <insert other type of motor vehicle>).]

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle*/ [and] *highway*) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court must define the terms “motor vehicle” and- “highway.” Give the bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the defendant is charged with aiding and abetting an exhibition of speed, give CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*. This instruction also must be given, but the court should modify the first sentence and change “defendant” to “perpetrator” throughout the instruction.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

AUTHORITY

- Elements ▶ Veh. Code, § 23109(c), (e)(2), (f)(1) – (3).
- Willfully Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Motor Vehicle Defined ▶ Veh. Code, § 415.
- Highway Defined ▶ Veh. Code, § 360.
- Serious Bodily Injury Defined ▶ Pen. Code, § 243(f)(4).
- Exhibition of Speed Defined ▶ *People v. Grier* (1964) 226 Cal.App.2d 360, 364 [38 Cal.Rptr. 11]; *In re Harvill* (1959) 168 Cal.App.2d 490, 492–493 [335 P.2d 1016] [discussing prior version of statute]; see also *Tischhoff v. Wolfchief* (1971) 16 Cal.App.3d 703, 707 [94 Cal.Rptr. 299] [term did not require definition in civil case].
- Screeching Tires ▶ *In re F. E.* (1977) 67 Cal.App.3d 222, 225 [136 Cal.Rptr. 547]; *People v. Grier* (1964) 226 Cal.App.2d 360, 363 [38 Cal.Rptr. 11].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, § 254.

6 Millman, *Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145*, Narcotics and Alcohol Offenses, § 145.02[1][c] (*Matthew Bender*).

2370. Planting, etc., Marijuana (Health & Saf. Code, § 11358)

The defendant is charged [in Count ___] with [unlawfully] (planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) marijuana, a controlled substance **[in violation of Health and Safety Code section 11358].**

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) one or more marijuana plants;

AND

2. The defendant knew that the substance (he/she) (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) was marijuana.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

<Defense: Compassionate Use>

[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.]

~~[Possession or cultivation of marijuana is not unlawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to~~

~~possess or cultivate marijuana for personal medical purposes[, or as the primary caregiver of a patient with a medical need,] when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this charge.~~

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11358. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act ~~If the defendant meets this burden~~, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1. If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give

the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11358.
- Harvesting ▶ *People v. Villa* (1983) 144 Cal.App.3d 386, 390 [192 Cal.Rptr. 674].
- Aider and Abettor Liability ▶ *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 70, 111.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [b], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▶ Health & Saf. Code, § 11357.

RELATED ISSUES

Aider and Abettor Liability of Landowner

In *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580], the court held that a landowner could be convicted of aiding and abetting cultivation of marijuana based on his or her knowledge of the activity and failure to prevent it. “If [the landowner] knew of the existence of the illegal activity, her failure to take steps to stop it would aid and abet the commission of the crime. This conclusion is based upon the control that she had over her property.” (*Ibid.*)

(New January 2006)

2371–2374. Reserved for Future Use

Controlled Substances

2375. Simple Possession of Marijuana: Misdemeanor (Health & Saf. Code, § 11357(c))

The defendant is charged [in Count ____] with possessing more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11357(c)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was marijuana;

AND

5. The marijuana possessed by the defendant weighed more than 28.5 grams.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

<Defense: Compassionate Use>

[Possession of marijuana is ~~not unlawful~~ if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have the evidence raises a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.]

~~[Possession of marijuana is not unlawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]~~

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third

sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act~~If the defendant meets this burden~~, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)

AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11357(c), ~~11018~~; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- “Marijuana” Defined ▶ Health & Saf. Code, § 11018.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820-821.
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§64–92.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [b], [d], [3][a], [a.1] (Matthew Bender).

Controlled Substances

**2376. Simple Possession of Marijuana on School Grounds:
Misdemeanor (Health & Saf. Code, § 11357(d))**

The defendant is charged [in Count ____] with possessing marijuana, a controlled substance, on the grounds of a school [in violation of Health and Safety Code section 11357(d)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was marijuana;
5. The marijuana was in a usable amount but not more than 28.5 grams in weight;
6. The defendant was at least 18 years old;

AND

7. The defendant possessed the marijuana on the grounds of or inside a school providing instruction in any grade from kindergarten through 12, when the school was open for classes or school-related programs.

A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the

seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Compassionate Use>

[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defendant must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.]

~~[Possession of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]~~

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) However, there are no cases on whether the defense applies to the charge of possession on school grounds. In general, the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act~~If the defendant meets this burden~~, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions if the court concludes that the defense applies to possession on school grounds.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. *People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)

AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11357(d), ~~11018~~; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- “Marijuana” Defined ▶ Health & Saf. Code, § 11018.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820-821.
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§64–92.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[d], [3][a], [a.1] (Matthew Bender).

Controlled Substances

2377. Simple Possession of Concentrated Cannabis (Health & Saf. Code, § 11357(a))

The defendant is charged [in Count ____] with possessing concentrated cannabis, a controlled substance [in violation of Health and Safety Code section 11357(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] possessed ~~a controlled substance~~ concentrated cannabis;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as concentrated cannabis ~~a controlled substance~~;
4. The controlled substance was concentrated cannabis;

AND

5. The concentrated cannabis ~~controlled substance~~ was in a usable amount.

A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

Concentrated cannabis means the separated resin, whether crude or purified, from the cannabis plant.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy ~~a controlled substance~~ concentrated cannabis does not, by itself, mean that a person has control over that substance.]

<Defense: Compassionate Use>

[Possession of concentrated cannabis is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defendant must produce evidence tending to show that (his/her) possession or cultivation of concentrated cannabis was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of concentrated cannabis possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of concentrated cannabis was unlawful under the Compassionate Use Act, you must find the defendant not guilty.]

~~[Possession of concentrated cannabis is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana or concentrated cannabis for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana or concentrated cannabis possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana or concentrated cannabis for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]~~

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana or concentrated cannabis.]]

BENCH NOTES

Instructional Duty

The court has a *sua sponte* duty to give this instruction defining the elements of the crime.

Defenses—Instructional Duty

“Concentrated cannabis or hashish is included within the meaning of ‘marijuana’ as the term is used in the Compassionate Use Act of 1996.” (86 Ops.Cal.Atty.Gen.)

180, 194 (2003)) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) [If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act](#)~~If the defendant meets this burden~~, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)

AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11357(a), ~~11006.5~~; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- [“Concentrated Cannabis” Defined](#) ▶ Health & Saf. Code, § 11006.5.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460; [People v. Frazier \(2005\) 128 Cal.App.4th 807, 820-821.](#)
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[d], [3][a], [a.1] (Matthew Bender).

Controlled Substances

2411. Possession of Hypodermic Needle or Syringe (Bus. & Prof. Code, § 4140)

The defendant is charged [in Count __] with possessing [a] hypodermic (needle[s]/ [or] syringe[s]) [in violation of Business and Professions Code section 4140].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] possessed [a] hypodermic (needle[s]/ [or] syringe[s]);
2. The defendant knew of (its/their) presence;

AND

3. The defendant knew that the object[s] (was/were) [a] hypodermic (needle[s]/ [or] syringe[s]).

[Two or more persons may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

<Defense: Authorized Possession for Personal Use>

[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

1. (He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use;

[AND]

2. (He/She) obtained (it/them) from an authorized source(;/.)

[AND]

3. (He/She) possessed no more than 10 (needles/ [or] syringes).]

The defendant must produce evidence tending to show that (his/her) possession of (needle[s]/ [or] syringe[s]) was lawful. If you have that evidence raises a reasonable doubt about whether the defendant's possession of (needle[s]/ [or] syringe[s]) a syringe was unlawful, you must find the defendant not guilty.

~~The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not met this burden, you must find the defendant not guilty of this crime.~~

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Defenses—Instructional Duty

Business and Professions Code section 4140 allows for the lawful possession of a hypodermic needle or hypodermic syringe when “acquired in accordance with this article.” (*People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession affirmative defense].) The defendant need only raise a reasonable doubt about whether his or her possession of these items was lawful . (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *ibid.* at pp. 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word “unlawfully” in element 1 and the bracketed paragraph on that defense. See also *People v. Frazier* (2005) 128 Cal.App.4th 807, 820-821.

In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 121285.) The purpose of this project is to evaluate “the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C.” (Health & Saf. Code, § 121285(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) If there is sufficient evidence that the defendant acquired the hypodermic needle or syringe in accordance with this project, the court has a **sua sponte** duty to instruct on the defense. Give the bracketed word “unlawfully” in element 1 and the bracketed paragraph on the defense of authorized possession.

AUTHORITY

- Elements ▶ Bus. & Prof. Code, § 4140.
- Authorized Possession Defense ▶ *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17]; *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Disease Prevention Demonstration Project ▶ Health & Saf. Code, § 121285; Bus. & Prof. Code, § 4145(a)(2).

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.04[2][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.02; Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [b] (Matthew Bender).

2542. Carrying Firearm: Active Participant in Criminal Street Gang
(Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C))

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ___], you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang.

To prove this allegation, the People must prove that:

1. When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;
2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

AND

3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:

a. Directly and actively committing a felony offense;

OR

b. aiding and abetting a felony offense.

Active participation means involvement with a criminal street gang in a way that is more than passive or in name only.

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. That has a common name or common identifying sign or symbol;
2. That has, as one or more of its primary activities, the commission of _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;

AND

3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)

<Give 1A if the crime or crimes are in Pen. Code, § [186.22\(e\)\(1\)–\(25\), \(31\)–\(33\)](#)>

1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)

_____ <insert one or more crimes listed in Pen. Code, § [186.22\(e\)\(1\)–\(25\), \(31\)–\(33\)](#)>;

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ <insert one or more crimes from Pen. Code, § [186.22\(e\)\(1\)–\(25\), \(31\)–\(33\)](#)>

AND

[at least one of the following crimes:] _____ <insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>;

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

4. The crimes were committed on separate occasions or were personally committed by two or more persons.

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

Felonious criminal conduct means committing or attempting to commit [any of] the following crime[s]: _____ <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted>.

To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, willfully assisted, furthered, or promoted a crime, the People must prove that:

1. A member of the gang committed the crime;
2. The defendant knew that the gang member intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

- 4. The defendant's words or conduct did in fact aid and abet the commission of the crime.**

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

- 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

- 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176] [Pen. Code, § 12031(a)(2)(C) incorporates entire substantive gang offense defined in section 186.22(a)]; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(3) or 12031(a)(2)(C) and the defendant does not stipulate to being an active gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra*, 67 Cal.App.4th at p. 135.)

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section [186.22\(e\)\(1\)–\(25\), \(31\)–\(33\)](#) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra*, 26 Cal.4th 316, 323–324.)

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section [186.22\(e\)\(1\)–\(25\), \(31\)–\(33\)](#). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section [186.22\(e\)\(1\)–\(25\), \(31\)–\(33\)](#). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of “criminal street gang,” “pattern of criminal gang activity,” or “felonious criminal conduct.”

On request, give the bracketed paragraph that begins with “The People do not need to prove that the defendant devoted all or a substantial part of” (See Pen. Code, § 186.22(i).)

On request, give the bracketed paragraph that begins with “If you find the defendant guilty of a crime in this case.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with “If you conclude that defendant was present.” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*.

For additional instructions relating to liability as an aider and abettor, see series 400, Aiding and Abetting.

AUTHORITY

- Factors ▶ Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C).
- Elements of Gang Factor ▶ Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▶ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28, 154, 185.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, §§ 144.01[1][d], 144.03[2] (Matthew Bender).

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

[The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.... ¶... [The gang expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night

in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

(Ibid. [emphasis in original].)

See also the Commentary and Related Issues sections of the Bench Notes for CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

(Revised August 2006)

Crimes Against the Government

2656. Resisting Peace Officer, Public Officer, or EMT (Pen. Code, § 148(a))

The defendant is charged [in Count __] with (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) in the performance or attempted performance of (his/her) duties [in violation of Penal Code section 148(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <insert name, excluding title> was (a/an) (peace officer/public officer/emergency medical technician) lawfully performing or attempting to perform (his/her) duties as a (peace officer/public officer/emergency medical technician);
2. The defendant willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ <insert name, excluding title> in the performance or attempted performance of those duties;

AND

3. When the defendant acted, (he/she) knew, or reasonably should have known, that _____ <insert name, excluding title> was (a/an) (peace officer/public officer/emergency medical technician) performing or attempting to perform (his/her) duties.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A person who is employed as a police officer by _____ <insert name of agency that employs police officer> is a *peace officer*.]

[A person employed by _____ <insert name of agency that employs peace officer, e.g., “the Department of Fish and Game”> is a *peace officer* if _____ <insert description of facts necessary to make employee a peace officer, e.g., “designated by the director of the agency as a peace officer”>.]

[An officer or employee of _____ <insert name of state or local government agency that employs public officer> is a *public officer*.]

[An *emergency medical technician* is someone who holds a valid certificate as an emergency medical technician.]

[The duties of (a/an) _____ <insert title of peace officer, public officer, or emergency medical technician> include _____ <insert job duties>.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

[[The People allege that the defendant (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ <insert name, excluding title> by doing the following: _____ <insert description of acts when multiple acts alleged>.] You **mayust** not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the allegedse acts of (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) who was lawfully performing his or her duties, and you all agree on which act (he/she) committed.]

[If a person intentionally goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) the officer if all the other requirements are met.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court may use the optional bracketed language in the penultimate paragraph to insert a description of the multiple acts alleged if appropriate.

“[I]f a defendant is charged with violating section 148 and the arrest is found to be unlawful, a defendant cannot be convicted of that section.” (*People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].) An unlawful arrest includes both an arrest made without legal grounds and an arrest made with excessive force. (*Id.* at p. 167.) “[D]isputed facts bearing on the issue of legal cause must be

submitted to the jury considering an engaged-in-duty element.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct that the defendant is not guilty of the offense charged if the arrest was unlawful. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].)

If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. When giving the portion of CALCRIM No. 2670 on the “use of force,” the court **must** either delete the following sentence or specify that this sentence does not apply to a charge of violating Penal Code section 148: “If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer’s use of reasonable force.” (*People v. White, supra*, 101 Cal.App.3d at pp. 168–169 [court must clarify that Pen. Code, § 834a does not apply to charge under section 148].)

If the prosecution alleges multiple, distinct acts of resistance, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].) Give [CALCRIM No. 3500, Unanimity, if needed](#). ~~the bracketed paragraph that begins with “The People allege that the defendant.”~~

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

The court may give the bracketed sentence that begins with “The duties of a _____ <insert title . . . > include” on request. The court may insert a description of the alleged victim’s duties such as “the correct service of a facially valid search warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

If the facts indicate passive resistance to arrest, give the bracketed sentence that begins with “If a person goes limp.” (*In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].)

AUTHORITY

- Elements ▶ Pen. Code, § 148(a); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- General-Intent Crime ▶ *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- Knowledge Required ▶ *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207].
- Multiple Violations Permissible If Multiple Officers ▶ Pen. Code, § 148(e).
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Emergency Medical Technician Defined ▶ Health & Saf. Code, §§ 1797.80–1797.84.
- Delaying Officer From Performing Duties ▶ *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].
- Verbal Resistance or Obstruction ▶ *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Passive Resistance to Arrest ▶ *In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].
- Unanimity ▶ *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–19.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.06[3][b] (Matthew Bender).

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

Tax Crimes

2801. Willful Failure to File Tax Return (Rev. & Tax. Code, § 19706)

The defendant is charged [in Count ___] with intentionally failing to (file a tax return with/ [or] supply information to) the Franchise Tax Board [in violation of Revenue and Taxation Code section 19706].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was required to (file a tax return with/ [or] supply information to) the Franchise Tax Board;
2. The defendant did not (file the tax return/ [or] supply the information) by the time required;
3. The defendant voluntarily chose not to (file the tax return/ [or] supply the information), with the intent to violate a legal duty known to (him/her);

AND

4. When the defendant made that choice, (he/she) intended to unlawfully evade paying a tax.

[If the People prove beyond a reasonable doubt that the Franchise Tax Board issued a certificate stating that (a return had not been filed/ [or] information had not been supplied) as required by law, you may but are not required to conclude that (the return was not filed/ [or] the information was not supplied).]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report ~~a substantial amount of~~ income/ [or] owed ~~a substantial amount in~~ [additional] taxes).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19706.) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

The bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" explains a rebuttable presumption created by statute. (See Rev. & Tax. Code, § 19703; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instruction has been written as a permissive inference. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." (*Ibid.*)

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" if there is evidence that the return was filed or the information was supplied.

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) ~~Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra*, 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "[It] is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576,~~

~~585, cert. den. (1957) 353 U.S. 912 [77 S.Ct. 661, 1 L.Ed.2d 665].) “Whether the tax evaded was ‘substantial’ is, therefore, a jury question” (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that “substantial” is generally not defined for the jury].)~~

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements ▶ Rev. & Tax. Code, § 19706.
- Willful Requires Volitional Violation of Known Legal Duty ▶ *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563]; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.
- Evade a Tax Defined ▶ See *United States v. Bishop* (1973) 412 U.S. 346, 360, fn. 8 [93 S.Ct. 2008, 36 L.Ed.2d 241]; *Distinctive Theatres of Columbus v. Looker* (S.D. Ohio 1958) 165 F.Supp. 410, 411.
- Certificate of Franchise Tax Board ▶ Rev. & Tax. Code, § 19703.
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▶ *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Need Not Prove Exact Amount ▶ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct 1233, 87 L.Ed. 1546].
- [Amount of Unpaid Taxes Need Not Be Substantial ▶ *People v. Mojica* \(2006\) 139 Cal.App.4th 1197, 1204; *United States v. Holland* \(1989\) 880 F.2d 1091, 1095-1096.](#)
- Need Not Prove From Illegal Activity ▶ *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158 [203 Cal.Rptr. 196].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Failure to File Tax Return ▶ Rev. & Tax. Code, § 19701; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1182–1183 [203 Cal.Rptr. 196].

Tax Crimes

2812. Willfully Filing False Tax Return: Intent to Evade Tax (Rev. & Tax. Code, § 19706)

The defendant is charged [in Count __] with (supplying (false/ [or] fraudulent) information/ [or] (making[,]/ [or] verifying [,]/ [or] signing[,]/ [or] rendering) [a] (false/ [or] fraudulent) (tax return[s]/ [or] statement[s])) to the Franchise Tax Board with intent to evade a tax [in violation of Revenue and Taxation Code section 19706].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (supplied information/ [or] (made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered) [a] (tax return[s]/ [or] statement[s] provided) to the Franchise Tax Board;
2. The (information[,]/ [or] tax return[,]/ [or] statement) was (false/ [or] fraudulent);

<Alternative 3A—information>

- [3. When the defendant supplied the information, (he/she) knew that it was (false/ [or] fraudulent);]

<Alternative 3B—tax return or statement>

- [3. When the defendant (made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered) the (tax return/ [or] statement), (he/she) knew that it contained (false/ [or] fraudulent) information;]

4. When the defendant acted, (he/she) did so voluntarily, with intent to violate a legal duty known to (him/her);

AND

5. When the defendant acted, (he/she) intended to unlawfully evade paying a tax.

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report ~~a substantial amount of~~ income/ [or] owed ~~a substantial amount in~~ [additional] taxes.)]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Two statutes prohibit willfully making a false return. (Rev. & Tax. Code, §§ 19705(a)(1), 19706.) Section 19705(a)(1) requires verification under penalty of perjury whereas section 19706 requires an intent to evade. (*People v. Hagen* (1998) 19 Cal.4th 652, 659 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give this instruction if the defendant is charged with a violation of section 19706. If the defendant is charged with a violation of section 19705(a)(1), give CALCRIM No. 2811, *Willfully Filing False Tax Return: Statement Made Under Penalty of Perjury*.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19706.) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) ~~Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra*, 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852-853.) "[It] is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Numan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912 [77 S.Ct. 661, 1 L.Ed.2d 665].) "Whether the tax evaded was 'substantial' is, therefore, a jury question" (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)~~

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements ▶ Rev. & Tax. Code, § 19706.
- Evade a Tax Defined ▶ See *United States v. Bishop* (1973) 412 U.S. 346, 360, fn. 8 [93 S.Ct. 2008, 36 L.Ed.2d 941]; *Distinctive Theatres of Columbus v. Looker* (S.D. Ohio 1958) 165 F.Supp. 410, 411.
- Willful Requires Volitional Violation of Known Legal Duty ▶ *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563]; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.
- Need Not Prove Exact Amount ▶ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct. 1233, 87 L.Ed. 1546].
- Need Not Prove From Illegal Activity ▶ *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158 [203 Cal.Rptr. 196].
- [Amount of Unpaid Taxes Need Not Be Substantial ▶ *People v. Mojica* \(2006\) 139 Cal.App.4th 1197, 1204; *United States v. Holland* \(1989\) 880 F.2d 1091, 1095-1096.](#)

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Filing False Tax Return ▶ Rev. & Tax. Code, § 19701; *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563].

Vandalism

2900. Vandalism (Pen. Code, § 594)

The defendant is charged [in Count ___] with vandalism [in violation of Penal Code section 594].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant maliciously (defaced with graffiti or with other inscribed material[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property;

[AND]

2. The defendant (did not own the property/owned the property with someone else)(;/.)

<See Bench Notes regarding when to give element 3.>

[AND]

3. The amount of damage caused by the vandalism was ~~(\$400 or more~~less than \$400).

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

Graffiti or other inscribed material includes an unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a felony for causing \$400 or more in damage and the court is *not* instructing on the misdemeanor offense, give element 3. ~~selecting the “\$400 or more” language.~~ If the court *is* instructing on both the felony and the

misdemeanor offenses, ~~do not give element 3 but do~~ give CALCRIM No. 2901, *Vandalism: Amount of Damage*, with this instruction. (Pen. Code, § 594(b)(1).) The court should also give CALCRIM No. 2901 if the defendant is charged with causing more than \$10,000 in damage under Penal Code section 594(b)(1).

~~If the defendant is charged with only a misdemeanor, give element 3 with the “less than \$400” language.~~

In element 2, give the alternative language “owned the property with someone else” if there is evidence that the property was owned by the defendant jointly with someone else. (*People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722] [Pen. Code, § 594 includes damage by spouse to spousal community property].)

AUTHORITY

- Elements ▶ Pen. Code, § 594.
- Malicious Defined ▶ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Damage to Jointly Owned Property ▶ *People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Property, §§ 243–245.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 143, *Crimes Against Property*, § 143.11[2], Ch. 144, *Crimes Against Order*, § 144.03[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

This offense is a misdemeanor unless the amount of damage is \$400 or more. (Pen. Code, § 594(b)(1) & (2)(A).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. When instructing on both the felony and misdemeanor, the court must provide the jury with a verdict form on which the jury will indicate if the amount of damage has or has not been proved

to be \$400 or more. If the jury finds that the damage has not been proved to be \$400 or more, then the offense should be set at a misdemeanor.

RELATED ISSUES

Lack of Permission Not an Element

The property owner's lack of permission is not an element of vandalism. (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1014 [34 Cal.Rptr.2d 864].)

Damage Need Not Be Permanent

To "deface" under Penal Code section 594 does not require that the defacement be permanent. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 944 [102 Cal.Rptr.2d 511] [writing on a glass window with a marker pen was defacement under the statute].)

Enhancements and Sentencing Factors

3131. Personally Armed With Firearm (Pen. Code, §§ 1203.06(b)(3), 12022(c), 12022.3(b))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a firearm during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

A person is *armed* with a firearm when that person:

1. Carries a firearm [or has a firearm available] for use in either offense or defense;

AND

2. Knows that he or she is carrying the firearm [or has it available] for use.

<If there is an issue in the case over whether the defendant was armed with the firearm “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court should give the bracketed definition of “firearm” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of “armed,” the court may give the bracketed phrase “or has a firearm available” on request if the evidence shows that the firearm was at the scene of the alleged crime and “available to the defendant to use in furtherance of the underlying felony.” (*People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed “during the commission of” the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If the defendant is charged with being ineligible for probation under Penal Code section 1203.06 for being armed during the commission of the offense and having been convicted of a specified prior crime, the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, with this instruction unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial.

AUTHORITY

- Enhancement ▶ Pen. Code, §§ 1203.06(~~ab~~)(23), 12022(c), 12022.3(b).
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Armed ▶ *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38

Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].

- Personally Armed ▶ *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208 [11 Cal.Rptr.2d 645].
- Must Be Personally Armed for Enhancement Under Penal Code Section 12022.3 ▶ *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- Defendant Not Present When Drugs and Weapon Found ▶ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391].
- Firearm Need Not Be Operable ▶ *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded ▶ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 320, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.31 (Matthew Bender).

RELATED ISSUES

Defendant Not Present When Drugs and Weapon Found

In *People v. Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391], the defendant was convicted of possession of a controlled substance and an enhancement for being armed during that offense despite the fact that he was not present when the police located the illegal drugs and firearm. The Court held that there was sufficient evidence to support the arming enhancement, stating:

[W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found

in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer: (1) that the defendant knew of the firearm's presence; (2) that its presence together with the drugs was not accidental or coincidental; and (3) that, at some point during the period of illegal drug possession, the defendant had the firearm close at hand and thus available for immediate use to aid in the drug offense. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was "armed with a firearm in the commission" of a felony within the meaning of section 12022.

(Ibid.)

The *Bland* case did not state that the jury should be specifically instructed in these inferences, and it appears that no special instruction was given in *Bland*. If the prosecution requests a special instruction on this issue, the court may consider using the following language:

If the People have proved that a firearm was found close to the _____
<insert type of controlled substance allegedly possessed> in a place where the defendant was frequently present, you may but are not required to conclude that:

1. The defendant knew the firearm was present;
2. It was not accidental or coincidental that the firearm was present together with the drugs;

AND

3. During at least part of the time that the defendant allegedly possessed the illegal drug, (he/she) had the firearm close at hand and available for immediate use to aid in the drug offense.

If you find beyond a reasonable doubt that the evidence supports these conclusions, you may but are not required to conclude that the defendant was personally armed with a firearm during the commission [or attempted commission] of the _____ <insert name of alleged offense> [or the lesser crime of _____ <insert name of alleged lesser offense>].

Multiple Defendants—Single Weapon

Two or more defendants may be personally armed with a single weapon at the same time. (*People v. Smith* (1992) 9 Cal.App.4th 196, 205 [11 Cal.Rptr.2d 645].) It is for the jury to decide if the firearm was readily available to both defendants for use in offense or defense. (*Ibid.*)

For enhancements charged under Penal Code section 12022.3, see also the Related Issues section of CALCRIM No. 3130, *Personally Armed With Deadly Weapon*.

Definition of “during the commission of”

See CALCRIM No. 3261.

Enhancements and Sentencing Factors

3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(4), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A deadly [or dangerous] weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Someone *personally uses* a deadly [or dangerous] weapon if he or she intentionally does [any of] the following:

[1.] Displays the weapon in a menacing manner(./;)

[OR]

[2. Hits someone with the weapon(./;)]

[OR]

(3/2). Fires the weapon.]

<If there is an issue in the case over whether the defendant used the weapon “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give all of the bracketed “or dangerous” phrases if the enhancement charged uses both the words “deadly” and “dangerous” to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word “deadly.” (Pen. Code, § 12022.3.)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

In the definition of “personally uses,” the court may give the bracketed item 3 if the case involves an object that may be “fired.”

If the case involves an issue of whether the defendant used the weapon “during the commission of” the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements ▶ Pen. Code, §§ 667.61(e)(4), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.
- Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].

- Objects With Innocent Uses ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Personally Uses ▶ *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(32).
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▶ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 40.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 320, 324–332.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.30, 91.81[1][d] (Matthew Bender).

RELATED ISSUES

No Duty to Instruct on “Lesser Included Enhancements”

“[A] trial court’s sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on ‘lesser included enhancements.’ ” (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

Weapon Displayed Before Felony Committed

Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was “at least . . . an aid in completing an essential element of the subsequent crimes. . . .”

(*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705].)

Weapon Used Did Not Cause Death

In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. (*Ibid.*) The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be “a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime.” (*Ibid.*) [ellipsis and brackets omitted] Here, the court found that “[t]he knife was instrumental to the consummation of the murder and was used to advantage.” (*Ibid.*)

“One Strike” Law and Use Enhancement

Where the defendant’s use of a weapon has been used as a basis for applying the “one strike” law for sex offenses, the defendant may not also receive a separate enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

Assault and Use of Deadly Weapon Enhancement

“A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b).” (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

Robbery and Use of Deadly Weapon Enhancement

A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

Enhancements and Sentencing Factors

3146. Personally Used Firearm (Pen. Code, §§ 667.5(c)(8), 667.61(e)(4), 1203.06, 1192.7(c)(8), 12022.3, 12022.5, 12022.53(b))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a firearm during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

Someone *personally uses* a firearm if he or she intentionally does any of the following:

1. Displays the weapon in a menacing manner;
2. Hits someone with the weapon;

OR

3. Fires the weapon.

<If there is an issue in the case over whether the defendant used the firearm “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court should give the bracketed definition of “firearm” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon “during the commission of” the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements ▶ Pen. Code, §§ 667.5(c)(8), 667.61(e)(4), 1203.06, 1192.7(c)(8), 12022.3, 12022.5, 12022.53(b).
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Firearm Need Not Be Operable ▶ *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201]; see also Pen. Code, § 12022.53(b).
- Firearm Need Not Be Loaded ▶ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887]; see also Pen. Code, § 12022.53(b).
- Personally Uses ▶ *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(32).
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▶ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 321–332.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.30, 91.81[1][d] (Matthew Bender).

RELATED ISSUES

Assault With Firearm

An enhancement under Penal Code section 12022.5 may be applied to a conviction for assault with a firearm. (Pen. Code, § 12022.5(d).) The enhancements provided by Penal Code section 12022.53 may be applied to assault with a firearm on a peace officer, but to no other charge of assault. (Pen. Code, § 12022.53(a).)

Multiple Victims—Penal Code Section 12022.5

A defendant may receive multiple use enhancements under Penal Code section 12022.5 if convicted of multiple charges based on multiple victims even if the crimes occurred in a single “transaction” or “occurrence.” (*In re Tameka C.* (2000) 22 Cal.4th 190, 195–198 [91 Cal.Rptr.2d 730, 990 P.2d 603].) Thus, where the defendant was convicted of two counts of assault based on firing a single shot at one person, injuring a second, unintended victim, the defendant properly received two use enhancements. (*Id.* at p. 200.)

See the Related Issues section of CALCRIM No. 3145, *Personally Used Deadly Weapon*.

Enhancements and Sentencing Factors

**3147. Personally Used Firearm: Assault Weapon, Machine Gun, or .50
BMG Rifle (Pen. Code, § 12022.5(b))**

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used (an assault weapon/a machine gun/a .50 BMG rifle) during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[(A/An) _____ <insert type of weapon from Pen. Code, § 12276 or description from § 12276.1> is an assault weapon.]

[A *machine gun* is any weapon that (shoots[,] [or] is designed to shoot[,] [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.] [(A/An) _____ <insert name of weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machine gun> is [also] a *machine gun*.]

[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. The overall length is 5.54 inches from the base to the tip of the bullet;
2. The bullet diameter for the cartridge is from .510 to, and including, .511 inch;

AND

3. The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]

[The term (*assault weapon/machine gun/.50 BMG rifle*) is defined in another instruction.]

[(An assault weapon/A machine gun/A .50 BMG rifle) does not need to be in working order if it was designed to shoot and appears capable of shooting.] [(An assault weapon/A machine gun/A .50 BMG rifle) does not need to be loaded.]

Someone *personally uses* (an assault weapon/a machine gun/a .50 BMG rifle) if he or she [knows or reasonably should know that the weapon has characteristics that make it (an assault weapon/a machine gun/a .50 BMG rifle) and] intentionally does any of the following:

1. Displays the (assault weapon/machine gun/.50 BMG rifle) in a menacing manner;
2. Hits someone with the (assault weapon/machine gun/.50 BMG rifle);

OR

3. Fires the (assault weapon/machine gun/.50 BMG rifle).

<If there is an issue in the case over whether the defendant used the weapon “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The Supreme Court has held that for the crime of possession of an assault weapon, the prosecution must prove that the defendant knew or reasonably should have known that the weapon possessed the characteristics of an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].) It is unclear if this holding applies to an enhancement for using an assault weapon. In the definition of “personally uses,” the court may give the bracketed phrase that begins “knows or reasonably should know” at its discretion.

The court should give the bracketed definition of “assault weapon” or “machine gun” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon “during the commission of” the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement ▶ Pen. Code, § 12022.5(b).
- Assault Weapon Defined ▶ Pen. Code, §§ 12276, 12276.1.
- Machine Gun Defined ▶ Pen. Code, § 12200.
- .50 BMG Rifle Defined ▶ Pen. Code, § 12278.
- Knowledge Required for Assault Weapon Possession ▶ *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Firearm Need Not Be Operable ▶ *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201]; see also Pen. Code, § 12022.53(b).
- Firearm Need Not Be Loaded ▶ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887]; see also Pen. Code, § 12022.53(b).
- Personally Uses ▶ *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(23).
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▶ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 321–332.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.30[1] (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3145, *Personally Used Deadly Weapon*, and CALCRIM No. 3146, *Personally Used Firearm*.

Enhancements and Sentencing Factors

3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 1192.7(c)(8), 12022.7, 12022.8)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ <insert name of injured person> during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <insert name of injured person> was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

[Committing the crime of _____ <insert sexual offense charged> is not by itself the infliction of great bodily injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ <insert name of injured person> and you cannot decide which person caused which injury, you may, ~~but are not required to,~~ conclude that the defendant personally inflicted great bodily injury on _____ <insert name of injured person> if the People have proved that:

1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;

[AND]

3.3A. The amount or type of physical force the defendant used on _____ <insert name of injured person> was enough that it alone

could have caused _____ <insert name of injured person> to suffer great bodily injury ~~or~~ (;/.)]

[OR]

3B. The physical force that the defendant used on _____ <insert name of injured person> was sufficient in combination with the force used by the others to cause _____ <insert name of injured person> to suffer great bodily injury.

<Give this explanation when giving element 3B>

[The defendant must have applied substantial force to _____ <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].) However, there is currently a split in the Court of Appeal over whether a “group beating” instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating], REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The court should review these decisions and any current law before giving the bracketed instruction on group beatings.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements ▶ Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 1192.7(c)(8), 12022.7, 12022.8.

- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury ▶ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▶ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▶ [*People v. Modiri* \(2006\) 39 Cal.4th 481, 500–501](#); [*People v. Corona* \(1989\) 213 Cal.App.3d 589, 594 \[261 Cal.Rptr. 765\]](#); [*People v. Banuleos* \(2003\) 106 Cal.App.4th 1332, 1336–1338 \[131 Cal.Rptr.2d 639\]](#) [~~instruction on group beating approved~~]; [*People v. Modiri* \(2003\) 112 Cal.App.4th 123, 136–137 \[4 Cal.Rptr.3d 836\]](#) [~~reversed for erroneous instruction on group beating~~], REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

RELATED ISSUES

Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with “the intent to inflict such injury.” (Stats. 1995, ch. 341, § 1;

see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

Instructions on Aiding and Abetting

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant’s gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. (*Ibid.*) The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [255 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

Enhancement May be Applied Once Per Victim

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

Enhancements and Sentencing Factors

3161. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed (Pen. Code, § 12022.7(b))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant inflicted great bodily injury that caused _____ <insert name of injured person> to become (comatose/ [or] permanently paralyzed). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. The defendant personally inflicted great bodily injury on _____ <insert name of injured person> during the commission [or attempted commission] of the crime;

[AND]

2. The defendant's acts caused _____ <insert name of injured person> to (become comatose due to brain injury/ [or] suffer permanent paralysis)(./;)

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND]

3. _____ <insert name of injured person> was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

[**Paralysis** is a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.]

<Group Assault>

[If you conclude that more than one person assaulted _____ <insert name of injured person> and you cannot decide which person caused which injury, you may, **but are not required to,** conclude that the defendant

personally inflicted great bodily injury on _____ <insert name of injured person> if the People have proved that:

1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;

[AND]

3A. The amount or type of physical force the defendant used on _____ <insert name of injured person> was enough that it alone could have caused _____ <insert name of injured person> to suffer great bodily injury(;/.)]

[OR]

3B. The physical force that the defendant used on _____ <insert name of injured person> was sufficient in combination with the force used by the others to cause _____ <insert name of injured person> to suffer great bodily injury.

<Give this explanation when giving element 3B>

3. **The defendant must have applied substantial force to _____ <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.**

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].) ~~However, there is currently a split in the Court of Appeal over whether a “group beating” instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.~~

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement ▶ Pen. Code, § 12022.7(b).
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury ▶ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Group Beating Instruction ▶ [*People v. Modiri* \(2006\) 39 Cal.4th 481, 500-501](#); [*People v. Corona* \(1989\) 213 Cal.App.3d 589, 594 \[261 Cal.Rptr. 765\]](#); [*People v. Banuleos* \(2003\) 106 Cal.App.4th 1332, 1336–1338 \[131 Cal.Rptr.2d 639\] \[instruction on group beating approved\]](#); [*People v. Modiri* \(2003\) 112 Cal.App.4th 123, 136–137 \[4 Cal.Rptr.3d 836\] \[reversed for erroneous instruction on group beating\]](#) REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

RELATED ISSUES

Coma Need Not Be Permanent

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378 [94 Cal.Rptr. 2d 814], the court held that an enhancement under Penal Code section 12022.7(b) was proper where the victim was maintained in a medically induced coma for two months following brain surgery necessitated by the assault.

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

Enhancements and Sentencing Factors

3162. Great Bodily Injury: Age of Victim (Pen. Code, § 12022.7(c) & (d))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant inflicted great bodily injury on someone who was (under the age of 5 years/70 years of age or older). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. The defendant personally inflicted great bodily injury on _____ <insert name of injured person> during the commission [or attempted commission] of the crime;

[AND]

2. At that time, _____ <insert name of injured person> was (under the age of 5 years/70 years of age or older)(./;)

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND]

3. _____ <insert name of injured person> was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

[Committing the crime of _____ <insert sexual offense charged> is not by itself the infliction of great bodily injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ <insert name of injured person> and you cannot decide which person caused which injury, you may, **but are not required to,** conclude that the defendant

personally inflicted great bodily injury on _____ <insert name of injured person> if the People have proved that:

1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;

[AND]

3A. The amount or type of physical force the defendant used on _____ <insert name of injured person> was enough that it alone could have caused _____ <insert name of injured person> to suffer great bodily injury(;/.)]

[OR]

3B. The physical force that the defendant used on _____ <insert name of injured person> was sufficient in combination with the force used by the others to cause _____ <insert name of injured person> to suffer great bodily injury.

<Give this explanation when giving element 3B>

3. The defendant must have applied substantial force to _____ <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.

3. [A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].) ~~However, there is currently a split in the Court of Appeal over whether a “group beating” instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.~~

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements ▶ Pen. Code, § 12022.7(c) & (d).
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury ▶ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▶ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▶ ~~[People v. Modiri \(2006\) 39 Cal.4th 481, 500-501](#)~~. ~~[People v. Corona \(1989\) 213 Cal.App.3d 589, 594 \[261 Cal.Rptr. 765\]](#)~~; ~~[People v. Banuleos \(2003\) 106 Cal.App.4th 1332, 1336-1338 \[131 Cal.Rptr.2d 639\] \[instruction on group beating approved\]](#)~~; ~~[People v. Modiri \(2003\) 112 Cal.App.4th 123, 136-137 \[4 Cal.Rptr.3d 836\] \[reversed for erroneous instruction on group beating\]](#)~~ REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

Enhancements and Sentencing Factors

3163. Great Bodily Injury: Domestic Violence (Pen. Code, § 12022.7(e))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant inflicted great bodily injury on _____ <insert name of injured person> during the commission [or attempted commission] of that crime, under circumstances involving domestic violence. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <insert name of injured person> was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Domestic violence means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person with whom the defendant is having or has had a dating relationship[,]/ [or] person who was or is engaged to the defendant).

Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]

[The term *cohabitants* means two unrelated ~~persons~~adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]

[Committing the crime of _____ *<insert sexual offense charged>* is not by itself the infliction of great bodily injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* and you cannot decide which person caused which injury, you may, **but are not required to**, conclude that the defendant personally inflicted great bodily injury on _____ *<insert name of injured person>* if the People have proved that:

1. Two or more people, acting at the same time, assaulted _____ *<insert name of injured person>* and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ *<insert name of injured person>* during the group assault;

[AND]

3A. The amount or type of physical force the defendant used on _____ *<insert name of injured person>* was enough that it alone could have caused _____ *<insert name of injured person>* to suffer great bodily injury **(;/.)**

[OR]

3B. The physical force that the defendant used on _____ *<insert name of injured person>* was sufficient in combination with the force used by the others to cause _____ *<insert name of injured person>* to suffer great bodily injury.

<Give this explanation when giving element 3B>

3. **The defendant must have applied substantial force to _____ *<insert name of injured person>*. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.**

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

[The person who was injured does not have to be a person with whom the defendant had a relationship.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault. (~~*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].~~) However, there is currently a split in the Court of Appeal over whether a “group beating” instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836]

~~[reversed for erroneous instruction on group beating] REVIEW GRANTED AND
DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending
before the Supreme Court. The trial court should review these decisions and any
current law before giving the bracketed instruction on group beatings.~~

The jury must determine whether an injury constitutes “great bodily injury.”
(*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d
1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903]
[reversible error to instruct that a bone fracture is a significant or substantial
injury].)

If the case involves an issue of whether the defendant inflicted the injury “during
the commission of” the offense, the court may give CALCRIM No. 3261, *During
Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25
Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996)
13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor*
(1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement ▶ Pen. Code, § 12022.7(e).
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Escobar*
(1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Dating Relationship Defined ▶ Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury ▶ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3
Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183
Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603,
627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required ▶ *People v. Carter* (1998) 60 Cal.App.4th 752,
755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▶ *People v.
Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▶ ~~*People v. Modiri* (2006) 39 Cal.4th 481, 500-
501. *People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765];
People v. Banuleos (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d
639] [instruction on group beating approved]; *People v. Modiri* (2003) 112
Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous
instruction on group beating] REVIEW GRANTED AND DEPUBLISHED
December 23, 2003, S120238.~~

- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

RELATED ISSUES

Person Who Suffers Injury Need Not Be “Victim” of Domestic Abuse

Penal Code section 12022.7(e) does not require that the injury be inflicted on the “victim” of the domestic violence. (*People v. Truong* (2001) 90 Cal.App.4th 887, 899 [108 Cal.Rptr.2d 904].) Thus, the enhancement may be applied where “an angry husband physically abuses his wife and, as part of the same incident, inflicts great bodily injury upon the man with whom she is having an affair.” (*Id.* at p. 900.)

See also the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

3402. Duress or Threats

The defendant is not guilty of _____ <insert crime[s]> if (he/she) acted under duress. The defendant acted under duress if, because of threat or menace, (he/she) believed that (his/her/ [or] someone else's) life would be in immediate danger if (he/she) refused a demand or request to commit the crime[s]. The demand or request may have been express or implied.

The defendant's belief that (his/her/ [or] someone else's) life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed.

A threat of future harm is not sufficient; the danger to life must have been immediate.

[The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of _____ <insert crime[s]>.]

[This defense does not apply to the crime of _____ <insert charge[s] of murder; see Bench Notes>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on this defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally]; *People v. Seden* (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913], overruled by *Breverman*, *supra*, on a different point; see also *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–567 [211 Cal.Rptr. 579][no sua sponte duty because evidence did not support complete duress].) [Fear of great bodily harm can also raise the defense of duress. \(See *People v. Otis* \(1959\) 174 Cal.App.2d 119, 124; *United States v. Bailey* \(1980\) 444 U.S. 394, 409.](#)

Use this instruction if there is ~~defendant has produced~~ evidence tending to show that the defendant ~~or she~~ acted under duress. *People v. Neidinger* (2006) 40 Cal.4th 67, 76.

As provided by statute, duress is not a defense to crimes punishable by death. (Pen. Code, § 26(6); *People v. Anderson* (2002) 28 Cal.4th 767, 780 [122 Cal.Rptr.2d 587, 50 P.3d 368] [duress is not a defense to any form of murder].) If such a crime is charged, the court should instruct, using the last bracketed paragraph, that the defense is not applicable to that count. However, “duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony.” (*Id.* at p. 784.) If the defendant is charged with felony-murder, the court should instruct that the defense of duress does apply to the underlying felony.

Related Instructions

The defense of duress applies when the threat of danger is immediate and accompanied by a demand, either direct or implied, to commit the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 899–901 [255 Cal.Rptr. 120]; *People v. Steele* (1988) 206 Cal.App.3d 703, 706 [253 Cal.Rptr. 773].) If the threat is of future harm or there is no implicit or explicit demand that the defendant commit the crime, the evidence may support instructing on the defense of necessity. (See CALCRIM No. 3403, *Necessity*.)

AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 26(6).
- Burden of Proof ▶ *People v. Graham* (1976) 57 Cal.App.3d 238, 240 [129 Cal.Rptr. 31].
- Difference Between Necessity and Duress ▶ *People v. Heath* (1989) 207 Cal.App.3d 892, 897–902 [255 Cal.Rptr. 120].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, §§ 53–54.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.05[1] (Matthew Bender).

RELATED ISSUES

Necessity Distinguished

Although evidence may raise both necessity and duress defenses, there is an important distinction between the two concepts. With necessity, the threatened harm is in the immediate future, thereby permitting a defendant to balance alternative courses of conduct. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009–1013 [138 Cal.Rptr. 515].) Necessity does not negate any element of the crime, but rather represents a public policy decision not to punish a defendant despite proof of the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 [255 Cal.Rptr. 120].) The duress defense, on the other hand, does negate an element of the crime. The defendant does not have the time to form the criminal intent because of the immediacy of the threatened harm. (*Ibid.*)

Duress Cannot Reduce Murder to Manslaughter

Duress cannot reduce murder to manslaughter. (*People v. Anderson* (2002) 28 Cal.4th 767, 783–785 [122 Cal.Rptr.2d 587, 50 P.3d 368] [only the Legislature can recognize killing under duress as new form of manslaughter].)

Mental State or Intent

Evidence of duress may be relevant to determining whether the defendant acted with the required mental state, even if insufficient to constitute a complete defense. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99–100 [17 Cal.Rptr.3d 710, 96 P.3d 30] [noting that court properly instructed that duress may be considered on the question of whether the defendant acted with the proper mental state].)

Great Bodily Harm

Penal Code section 26(6) discusses life-endangering threats and several older cases have outlined the defense of duress in the literal language of the statute. However, some cases have concluded that fear of great bodily harm is sufficient to raise this defense. (Compare *People v. Hart* (1950) 98 Cal.App.2d 514, 516 [220 P.2d 595] and *People v. Lindstrom* (1932) 128 Cal.App. 111, 116 [16 P.2d 1003] with *People v. Otis* (1959) 174 Cal.App.2d 119, 124 [344 P.2d 342]; see also 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 59 [discussing this split]; but see *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–567 [211 Cal.Rptr. 579] [court rejects defense of duress because evidence showed defendant feared only a beating].) It is clear, however, that threats of great bodily harm are sufficient in the context of necessity. (*People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831 [118 Cal.Rptr. 110]; *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 27 [197 Cal.Rptr. 264].)

Third Person Threatened

In *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 21–25 [197 Cal.Rptr. 264], the court held that the defenses of necessity and duress may be based on threats of

harm to a third party. Although *Pena* is regarded as a necessity case, its discussion of this point was based on out-of-state and secondary authority involving the defense of duress. (See *People v. Heath* (1989) 207 Cal.App.3d 892, 898 [255 Cal.Rptr. 120] [acknowledging that though *Pena* uses the terms necessity and duress interchangeably, it is really concerned with the defense of necessity].) No other California cases discuss threats made to a third party and duress. (See also 1 Witkin and Epstein, *California Criminal Law* (3d ed. 2000) Defenses, § 60 [discussing *Pena* on this point].)

Defenses and Insanity

3453. Extension of Commitment (Pen. Code, § 1026.5(b)(1))

_____ <insert name of respondent> has been committed to a mental health facility. You must decide whether (he/she) currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder . That is the only purpose of this proceeding. You are not being asked to decide _____ <insert name of respondent>'s mental condition at any other time or whether (he/she) is guilty of any crime.

To prove that _____ <insert name of respondent> -currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder, the People must prove beyond a reasonable doubt that:

1. (He/She) suffers from a mental disease, defect, or disorder;

[AND]

2. As a result of (his/her) mental disease, defect, or disorder , (he/she) now:

- a. pPoses a substantial danger of physical harm to others(;/.)

[AND]

- b. Has serious difficulty in controlling (his/her) dangerous behavior.]

[Control of a mental condition through medication is a defense to a petition to extend commitment. To establish this defense, _____ <insert name of respondent> must prove by a preponderance of the evidence that:

1. (He/She) no longer poses a substantial danger of physical harm to others because (he/she) is now taking medicine that controls (his/her) mental condition;

AND

2. (He/She) will continue to take that medicine in an unsupervised environment.

Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for extending commitment.

Give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, and CALCRIM No. 3550, *Pre-Deliberation Instructions*, as well as any other relevant posttrial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

A constitutional requirement for an involuntary civil commitment is that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (*Kansas v. Crane* (2002) 534 U.S. 40, 412-413; *In re Howard N.* (2005) 35 Cal.4th 117, 128.) This requirement applies to an extension of a commitment after a finding of not guilty by reason of insanity. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159-1165; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878; *People v. Galindo* (2006) 142 Cal.App.4th 531.)

If the evidence raises a reasonable doubt about the serious impairment of the ability to control behavior, the court must instruct on that requirement using the optional bracketed element 2b. (See *In re Howard N.* (2005) 35 Cal. 4th 117, 137-138 [Youth Authority extended detention under Welf. & Inst. Code, section 1800 reversed for failure to instruct on impaired ability to control behavior]; cf. *People v. Williams* (2003) 31 Cal.4th 757, 774-777 [jury instructed in the language of the SVPA would necessarily understand this requirement, and no further instruction is needed]).

AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 1026.5(b)(1).
- Unanimous Verdict, Burden of Proof ▶ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Affirmative Defense of Medication ▶ *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600–1602 [266 Cal.Rptr. 724].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 693.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial*, § 86.10[7] (Matthew Bender).

RELATED ISSUES

Extension of Commitment

The test for extending a person’s commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused “was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense.” (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].) In contrast, the standard for recommitment under Penal Code section 1026.5(b) is whether a defendant, “by reason of a mental disease, defect, or disorder [,] represents a substantial danger of physical harm to others.” (*People v. Superior Court, supra*, 233 Cal.App.3d at pp. 489–4900 ; see *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr. 2d 247].)

Defenses and Insanity

3454. Commitment as Sexually Violent Predator (Welf. & Inst. Code, §§ 6600, 6600.1)

The petition alleges that _____ *<insert name of respondent>* is a sexually violent predator.

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. (He/She) has been convicted of committing sexually violent offenses against ~~two~~ one or more victims;
2. (He/She) has a diagnosed mental disorder;

[AND]

3. As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)

<Give element 4 when ~~instructing on confinement in a secure facility~~ evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community.>

[AND]

- 4 It is necessary to keep (him/her) in custody in a secure facility, to ensure the health and safety of others.]

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community.

The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

_____ <insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)> (is/are) [a] *sexually violent offense[s]* when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person.

[_____ <insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)> (is/are) also [a] *sexually violent offense[s]* when the offense[s] (is/are) committed on a child under 14 years old. ~~and the offense[s] involve[s] substantial sexual conduct. Substantial sexual conduct means oral copulation, or masturbation of either the victim or the offender, or penetration of the vagina or rectum of either the victim or the offender with the penis of the other or with any foreign object.~~]

As used here, a *conviction* for committing a sexually violent offense is one of the following:

<Give the appropriate bracketed description[s] below.>

<A. *Conviction With Fixed Sentence*>

[A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]

<B. *Conviction With Indeterminate Sentence*>

[A conviction for an offense that I have just described to you that ~~was committed before July 1, 1977, and~~ resulted in an indeterminate sentence.]

<C. Conviction in Another Jurisdiction>

[A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]

<D. Conviction Under Previous Statute>

[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

<E. Conviction With Probation>

[A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]

<F. Acquittal Based on Insanity Defense>

[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>

[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

<H. Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5 >
[A prior conviction for one of the offenses that I have just described to you for which the respondent was committed to the Department of Youth Authority pursuant to Welfare and Institutions Code section 1731.5.]

You may not conclude that _____ <insert name of respondent> is a sexually violent predator based solely on (his/her) alleged prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.

In order to prove that _____ <insert name of respondent> is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a sexually violent predator.

If ~~sufficient~~ evidence is presented ~~about to raise a reasonable doubt as to~~ amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [4 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to anyone of the SVP requirements. (*People v. Calderon, supra*, 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 220, *Reasonable Doubt*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant posttrial instructions. These instructions may need to be modified.

Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776–777 [3 Cal.Rptr 684, 74 P.3d 779] (interpreting Welfare and Institutions Code section 6600, the same statute at issue here).

But see *In re Howard N.* (2005) 35 Cal. 4th 117, 137-138, which found in a commitment proceeding under a different code section, i.e., Welfare and Institutions Code section 1800, that when evidence of inability to control behavior was insufficient, the absence of a specific “control” instruction was not harmless beyond a reasonable doubt. Moreover, *In re Howard N.* discusses *Williams* extensively without suggesting that it intended to overrule *Williams*. *Williams* therefore appears to be good law in proceedings under section 6600.

AUTHORITY

- Elements and Definitions ▶ Welf. & Inst. Code, §§ 6600, 6600.1.
- Unanimous Verdict, Burden of Proof ▶ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].

- Likely Defined ▶ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined ▶ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility ▶ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined ▶ Pen. Code, § 1170.
- Impairment of Control ▶ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment ▶ *People v. Cooley* (2002) 29 Cal.4th 228, 256.
- [Need for Treatment and Need for Custody not the Same ▶ *People v. Ghillotti* \(2002\) 27 Cal.4th 888, 927.](#)

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 193.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole*, § 104.06 (Matthew Bender).

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings

Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064 [123 Cal.Rptr.2d 253].)

Masturbation Does Not Require Skin-to-Skin Contact

Substantial sexual conduct with a child under 14 years old includes masturbation where the touching of the minor’s genitals is accomplished through his or her clothing. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 [20 Cal.Rptr.3d 801]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [6 Cal.Rptr.3d 389].) “[T]he trial court properly instructed the jury when it told the jury that ‘[t]o constitute masturbation, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.’ ” (*People v. Lopez, supra*, 123 Cal.App.4th at p. 1312.)

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

Self-defense is a defense to _____ <insert list of pertinent crimes charged>. The defendant is not guilty of (that/those crime[s]) _____ <insert crime(s) charged> if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <insert name of third party>) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];
2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <insert name of victim> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <insert name of victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ <insert crime(s) charged>.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case [citation].” (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra*, 19 Cal.4th at p. 156 [77 Cal.Rptr.2d 870].) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another.*)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another.*
CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another,
Property.

CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects:
Offered by the Defense.*

AUTHORITY

- Instructional Requirements ▶ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▶ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518].
- Burden of Proof ▶ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ▶ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]).

- No Duty to Retreat ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, §§ 73.11, 73.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 124, *Jurisdiction and Disposition Hearings*, § 124.04 (Matthew Bender).

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

Ex-Felon in Possession of Weapon

“[W]hen [an ex-felon] is in imminent peril of great bodily harm or . . . reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate [Penal Code] section 12021. . . . [T]he use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available.” (*People v. King* (1978) 22 Cal.3d 12, 24, 26 [148 Cal.Rptr. 409, 582 P.2d 1000] [error to refuse instructions on self-defense and defense of others]; see also CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self-Defense*.)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. “The common law does not take account of a person’s mental capacity when determining

whether he has acted as the reasonable person would have acted. The law holds ‘the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.’ (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)” (*Ibid.*; see also Rest.2d Torts, § 283B.)

See also the Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

Posttrial Concluding

3516. Multiple Counts: Alternative Charges for One Event – Dual Conviction Prohibited

~~<Alternative A – no lesser included offense>~~

[The defendant is charged in Count __ with _____ <insert name of alleged offense, e.g., theft> and in Count __ with _____ <insert name of alleged offense, e.g., receiving stolen property>. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]

~~<Alternative B – lesser included offense[s] to one count>~~

~~[Alternative charges are alleged in this case. The defendant is charged in Count __ with _____ <insert name of most serious charged offense, e.g., robbery>. _____ <insert name[s] of lesser included offense[s], e.g., grand theft> (is/are) [a] lesser included offense[s] to that charge. The defendant is also charged in Count __ with _____ <insert name of other charged offense, e.g., receiving stolen property>. If you find the defendant guilty of _____ <insert name of most serious charged offense> or of the lesser offense[s] of _____ <insert name[s] of lesser included offense[s]>, you must find (him/her) not guilty of _____ <insert name of other charged offense>. Similarly, if you find the defendant guilty of _____ <insert name of other charged offense>, you must find (him/her) not guilty of _____ <insert name of most serious charged offense> and not guilty of the lesser offense[s] of _____ <insert name[s] of lesser included offense[s]>.]~~

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction where the defendant is charged in the alternative with multiple counts for a single event. (See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].) ~~When one offense is necessarily included in another, the defendant cannot be convicted of both. (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48].) This is to be distinguished from the question of whether the defendant may be punished for two separate charges arising out of a single event. (*Ibid.*)~~

This instruction applies only to those cases in which the defendant may be legally convicted of only one of the alternative charges. [See dual conviction list in Related Issues section below.](#)

If the defendant is charged with multiple counts for separate offenses, give CALCRIM No. 3515, *Multiple Counts: Separate Offenses*.

If the case involves separately charged greater and lesser offenses, the court should give CALCRIM No. 3519a ~~lesser included offense, the court should give either CALCRIM No. 3517, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without Stone Instruction (Non-Homicide)*, or CALCRIM No. 3518, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With Stone Instruction (Non-Homicide)*. (See *People v. Fields* (1996) 13 Cal.4th 289, 308–311 [52 Cal.Rptr.2d 282, 914 P.2d 832].) ~~Do not give this instruction unless the case also involves alternative charges. In such cases, the court should give alternative B.~~~~

Because the law is unclear in this area, the court must decide whether to give this instruction if the defendant is charged with specific sexual offenses and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss.

AUTHORITY

- Prohibition Against Dual Conviction ▶ *People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48]; *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Instructional Requirements ▶ See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 644.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

RELATED ISSUES

Dual Conviction May Not Be Based on Necessarily Included Offenses

“[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.” (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48] [emphasis in original, citations and internal quotation marks omitted]; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [16 Cal.Rptr.3d 902, 94 P.3d 1098].) “In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether all the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense.” (*People v. Montoya, supra*, 33 Cal.4th at p. 1034 [internal quotation marks and citation omitted].)

Some courts have also applied the “accusatory pleading” test to determine whether one offense is necessarily included in another. (See *People v. Malfavon* (2002) 102 Cal.App.4th 727, 742 [125 Cal.Rptr.2d 618] [court must compare “the facts actually alleged in the accusatory pleading” to determine if one offense is necessarily included in the other].) In *People v. Montoya, supra*, 33 Cal.4th at p. 1034, however, the Supreme Court observed that the “accusatory pleading” test is generally used “to determine whether to instruct a jury on an uncharged lesser offense.” The Court further noted that “[s]ome Court of Appeal decisions have concluded that the accusatory pleading test . . . does not apply to considerations of whether multiple convictions are proper.” (*Id.* at p. 1036 [internal quotation marks and citation omitted].) The Court declined to decide this issue. (*Ibid.*) Justice Chin, in a concurring opinion, expressed the opinion that the “accusatory pleading” test should not be used to determine whether one offense is necessarily included in another. (*Id.* at p. 1039.)

Dual Conviction—Examples of Offense Where Prohibited or Permitted

The courts have held that dual conviction is *prohibited* for the following offenses:

- Robbery and theft ▶ *People v. Ortega* (1998) 19 Cal.4th 686, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Robbery and receiving stolen property ▶ *People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587 [267 Cal.Rptr. 66].
- Theft and receiving stolen property ▶ *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].

- Battery and assault ▶ See *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Forgery and check fraud ▶ *People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66].
- Forgery and credit card fraud ▶ *People v. Cobb* (1971) 15 Cal.App.3d 1, 4 [93 Cal.Rptr. 152].

The courts have held that dual conviction is *permitted* for the following offenses (although dual punishment is not):

- Burglary and theft ▶ *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [27 Cal.Rptr.2d 839].
- Burglary and receiving stolen property ▶ *People v. Allen* (1999) 21 Cal.4th 846, 866 [89 Cal.Rptr.2d 279, 984 P.2d 486].
- Carjacking and grand theft ▶ *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and robbery ▶ *People v. Ortega* (1998) 19 Cal.4th 686, 700 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and unlawful taking of a vehicle ▶ *People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].
- Murder and gross vehicular manslaughter while intoxicated ▶ *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118].
- Murder and child abuse resulting in death ▶ *People v. Malfavon* (2002) 102 Cal.App.4th 727, 743 [125 Cal.Rptr.2d 618].

Joy Riding and Receiving Stolen Property

A defendant cannot be convicted of both joy riding (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), unless the record clearly demonstrates that the joy riding conviction is based exclusively on the theory that the defendant drove the car, temporarily depriving the owner of possession, not on the theory that the defendant stole the car. (*People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 758–759 [129 Cal.Rptr. 306, 548 P.2d 706]; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252 [273 Cal.Rptr. 212].)

Accessory and Principal

In *People v. Prado* (1977) 67 Cal.App.3d 267, 273 [136 Cal.Rptr. 521], and *People v. Francis* (1982) 129 Cal.App.3d 241, 248 [180 Cal.Rptr. 873], the courts

held that the defendant could not be convicted as both a principal and as an accessory after the fact for the same offense. However, later opinions have criticized these cases, concluding, “there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime.” (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324 [19 Cal.Rptr.2d 423]; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816 [25 Cal.Rptr.2d 676]; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536, fn. 6 [26 Cal.Rptr.2d 323].)

3517. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you which charges are affected by this instruction:]

[_____ <insert crime> is a lesser crime of _____ <insert crime> [charged in Count ____].]

[_____ <insert crime> is a lesser crime of _____ <insert crime> [charged in Count ____].]

[_____ <insert crime> is a lesser crime of _____ <insert crime> [charged in Count ____].]

It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

<Give the following paragraphs if the jury has separate guilty and not guilty forms for both greater and lesser offenses pursuant to Stone v. Superior Court >

[[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive verdict forms of guilty and not guilty for the greater crime and also verdict forms of guilty and not guilty for the lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

- 1. If all of you agree the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form [for that count].**

2. If all of you cannot agree whether the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, inform me only that you cannot reach an agreement~~of your disagreement~~ and do not complete or sign any verdict form [for that count].
3. If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime and you also agree that the People have proved beyond a reasonable doubt that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the lesser crime.
4. If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the lesser crime.
5. If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me only~~about~~ that you cannot reach an agreement about~~your disagreement on~~ the lesser crime.

<Give the following paragraphs if the jury has a combined verdict form for both greater and lesser offenses >

[[For (the/any) charge with a lesser crime,] (Y/y)ou will receive a form for indicating your verdict on both the greater crime and the lesser crime. The greater crime is listed first. When you have reached a verdict, have the foreperson complete the form, sign, and date it. Follow these directions before writing anything on the form.

1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime as charged, (write “guilty” in the blank/circle the word “guilty”/check the box for “guilty”) for that crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime.
2. If all of you cannot agree whether the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime as

charged, inform me **only that you cannot reach an agreement of your disagreement** and do not write anything on the verdict form.

3. If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime and you also agree that the People have proved beyond a reasonable doubt that (he/she) is guilty of the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for the greater crime and (write “guilty” in the blank/circle the word “guilty”/check the box for “guilty”) for the lesser crime. You must not (write/circle/check) anything for the lesser crime unless you have (written/circled/checked) “not guilty” for the greater crime.
4. If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of either the greater or the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for both the greater crime and the lesser crime.
5. If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for the greater crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime, and inform me **only that you cannot reach an agreement** about **your disagreement on** that crime.

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense:>

[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<insert crime>, which is a lesser crime of _____<insert crime>.]

BENCH NOTES

Instructional Duty

If lesser included crimes are not charged separately and the jury receives only one not guilty verdict form for each count, the court should use CALCRIM 3518 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519.

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a **sua sponte** duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this “as a judicially declared rule of criminal procedure.” (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. (*Ibid.*) If the court chooses not to follow the procedure suggested in *Stone*, the court may give CALCRIM No. 3518 in place of this instruction.

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Procedure for Completion of Verdict Forms: With Stone Instruction*, or CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v.*

Fields, supra, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (Ibid.) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (Ibid.; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (People v. Fields, supra, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

The court may not control the sequence in which the jury considers the offenses. (People v. Kurtzman, supra, 46 Cal.3d at p. 330.)

AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▶ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ▶ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ▶ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d].
- Conviction of Lesser Precludes Retrial on Greater ▶ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ▶ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ▶ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct “on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Acquittal of Greater Does Not Bar Retrial of Lesser

Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

Lesser Included Offenses Barred by Statute of Limitations

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. (*Ibid.*)

3518. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Is Given Only One Not Guilty Verdict Form for Each Count. (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you which charges are affected by this instruction:]

[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____].]
[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____].]
[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____].]

It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive three verdict forms – one for guilty of the greater crime, one for guilty of only the lesser crime, and one for not guilty of either the greater or lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

1. If all of you agree the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form [for that count].
2. If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime and also agree the People have proved beyond a reasonable doubt that (he/she) is guilty of the lesser crime, complete and sign the verdict form for guilty of the lesser crime. Do not complete or sign any other verdict forms [for that count].

3. **If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty.**
4. **If all of you cannot agree whether the People have proved beyond a reasonable doubt that the defendant is guilty of a charged or lesser crime, inform me only that you cannot reach agreement [as to that count] and do not complete or sign any verdict form [for that count].**

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense:>

[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<insert crime>, which is a lesser crime of _____<insert crime>.]

BENCH NOTES

Instructional Duty

If lesser crimes are not charged separately and the jury receives separate not guilty and guilty verdict forms for each count, the court should use CALCRIM 3517 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519.

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a sua sponte duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

| The procedure outlined in this instruction is disfavored. In *Stone v. Superior Court*, *supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the

jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this “as a judicially declared rule of criminal procedure.” (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. (*Ibid.*) If the court chooses to follow the procedure suggested in *Stone*, the court **mayshould** give CALCRIM No. 3517 in place of this instruction.

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Procedure for Completion of Verdict Forms: With Stone Instruction*, or CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra*, 46 Cal.3d at p. 330.)

AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▶ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ▶ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ▶ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d].
- Conviction of Lesser Precludes Retrial on Greater ▶ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].

- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ▶ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ▶ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct “on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Acquittal of Greater Does Not Bar Retrial of Lesser

Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

Lesser Included Offenses Barred by Statute of Limitations

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense

that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. (*Ibid.*)

3519 . Deliberations and Completion of Verdict Forms: Lesser Offenses – For Use When Lesser Included Offenses and Greater Crimes Are Separately Charged (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

Now I will explain to you which charges are affected by this instruction:

[_____ <insert crime>, as charged in Count ____, is a lesser crime to _____ <insert crime> [as charged in Count ____].]

[_____ <insert crime>, as charged in Count ____, is a lesser crime to _____ <insert crime> [as charged in Count ____].]

[_____ <insert crime>, as charged in Count ____, is a lesser crime to _____ <insert crime> [as charged in Count ____].]

It is up to you to decide the order in which you consider each greater and lesser crime and the relevant evidence, but I can accept a verdict of guilty of the lesser crime only if you have found the defendant not guilty of the greater crime.

[You will receive verdict forms of guilty and not guilty for [each/the] greater crime and lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

- 1. If all of you agree the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any verdict form for the [corresponding] lesser crime.**
- 2. If all of you cannot agree whether the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, inform me of your disagreement and do not complete or sign any verdict form for that crime or the [corresponding] lesser crime.**
- 3. If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime and also agree**

the People have proved beyond a reasonable doubt that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the [corresponding] lesser crime. Do not complete or sign any other verdict forms [for those charges].

4. If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the [corresponding] lesser crime.
5. If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me about your disagreement on the lesser crime.]

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense:>

[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<insert crime>, which is a lesser crime of _____<insert crime>.]

BENCH NOTES

Instructional Duty

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a sua sponte duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense]).

Whenever greater and lesser included crimes are separately charged the court must use this instruction instead of CALCRIM 3517 or 3518.

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Procedure for Completion of Verdict Forms: With Stone Instruction*, or CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

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AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▶ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ▶ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ▶ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d].
- Conviction of Lesser Precludes Retrial on Greater ▶ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ▶ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].

- Must Permit Partial Verdict of Acquittal on Greater ▶ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

Duty to Instruct on Lesser

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Lesser Included Offenses Barred by Statute of Limitations

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Smith (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. (*Ibid.*)

3520–3529. Reserved for Future Use

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./ If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not do any research on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. Do not investigate the facts or law.

Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

In your deliberations, do not consider penalty or punishment in any way.

Do not reveal to me or anyone else how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it.

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict form[s] and notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [130 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with "These exhibits will be sent into the jury room." If not, give the bracketed phrase that begins with "You may examine whatever exhibits you think."

Give the bracketed sentence that begins with "Do not take anything I said or did during the trial" unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

AUTHORITY

- Exhibits ▶ Pen. Code, § 1137.
- Questions ▶ Pen. Code, § 1138.
- Verdict Forms ▶ Pen. Code, § 1140.
- Unanimous Verdict ▶ Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742].
- Duty to Deliberate ▶ *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Judge’s Conduct as Indication of Verdict ▶ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- Keep an Open Mind ▶ *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), §§ 643-644.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court’s admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror

his or her view of the evidence in the case, the juror should report that conversation immediately to the court.
(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the fourth paragraph of this instruction.

(*New January 2006*)

3551–3574. Reserved for Future Use

Posttrial Concluding

3577. Instructions to Alternate on Submission of Case to Jury

_____ ~~<insert name[s] or number[s] of alternate juror[s]>~~, **To the alternate juror[s]:** The jury **will soon begin** ~~is now~~ deliberating, but you are still [an] alternate juror[s] and are bound by my earlier instructions about your conduct.

Do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends[, and not even with each other]. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use at its discretion.