

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

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Advisory Committee on Criminal Jury Instructions  
Hon. Sandra L. Margulies, Chair  
Robin Seeley, Attorney, 415-865-7710,  
robin.seeley@jud.ca.gov

DATE: July 13, 2006

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 first set of revisions and additions to the Judicial Council Criminal Jury Instructions (CALCRIM) that were first published in 2005.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective August 25, 2006:

1. Approve for publication under rule 855(d) of the California Rules of Court the new and revised criminal jury instructions prepared by the advisory committee. On Judicial Council approval, the instructions will be officially published in the new edition of CALCRIM; and
2. Approve the insertion of code section references in the titles and introductory paragraphs of every CALCRIM instruction that charges a statutory offense.

The table of contents for the proposed revisions and additions to the jury instructions is attached at pages 5—7. 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 are readily understood

by the average juror. In August 2005, the council approved publication of approximately 700 criminal jury instructions. The Advisory Committee on Criminal Jury Instructions is charged with maintaining and updating the instructions.

The advisory committee drafted and edited the revisions and additions in this proposal, then circulated them for public comment. 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. 106, 220, 225, 251, 359, 415, 416, 521, 563, 602, 736, 763, 801, 823, 852, 853, 945, 1030, 1112, 1162, 1170, 1300, 1303, 1304, 1305, 1400, 1401, 1750, 1804, 1904, 1905, 2101, 2111, 2180, 2181, 2302, 2303, 2400, 2500, 2542, 2560, 2562, 2655, 2701, 2800, 2810, 2826, 2962, 2963, 2964, 2982, 3115, 3116, 3117, 3261, 3454, 3517, and 3518. Of these, 3 are newly drafted and 55 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. 106, *Jurors Asking Questions*, was revised because an advisory committee member commented that the statement: “Do not feel slighted or disappointed if your question is not asked” would fit better in the logical flow of the instruction if it were the third sentence instead of the fourth.

CALCRIM No. 763, *Death Penalty: Factors to Consider – Not Identified as Aggravating or Mitigating*, was revised in response to concerns that inserting the name of the murder victim in the designated blanks was cumbersome and confusing in cases with multiple murder victims. The advisory committee replaced the blanks with the words “the crime[s] of which (he/she) was convicted in this case” in response to this concern. The new language is not only easier to use with multiple victims, it is also more accurate because it includes other crimes that may not necessarily be murders.

CALCRIM No. 2962, *Selling or Furnishing Alcoholic Beverage to Person Under 21*; CALCRIM No. 2963, *Permitting Person Under 21 to Consume Alcoholic Beverage*; and CALCRIM No. 2964, *Purchasing Alcoholic Beverage for Person Under 21: Resulting in Death or Great Bodily Injury*, were all changed by staff in response to a statutory amendment changing the definition of a “government-issued document.”

Judge William J. Murray, Jr., of San Joaquin County, proposed adding three new instructions for publication: No. 1303, *Terrorism by Symbol*; No. 1304, *Cross Burning*

*and Religious Symbol Desecration*; and No. 1305, *Obstructing Religion by Threat*. The advisory committee agreed with his suggestion to expand the set of hate crimes.

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*, reflects two new changes. First, along with the other instructions relating to criminal street gangs, CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*, and CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*, CALCRIM No. 1400 has a revised definition of “pattern of criminal gang activity” in response to an amendment to Penal Code section 186.22. Second, the advisory committee updated the bench notes to indicate that the predicate offenses establishing a pattern of criminal gang activity are not lesser included offenses of active participation in a criminal street gang, citing *People v. Burnell* (2005) 132 Cal.App.4th 938, 944—945.

Both of the lesser included offense instructions, CALCRIM Nos. 3517 and 3518, were completely rewritten in response to numerous comments from judges that they were too detailed to work well in cases with multiple lesser offenses.

#### *References to Code Sections*

In response to suggestions from RUPRO as well as several judges, the advisory committee decided to add a reference to the relevant code section, if any, to every CALCRIM instruction that instructs on a statutory crime. The statutory reference would be included in: (1) the title and (2) the last line of each introductory paragraph of the instructions (to be inserted into a blank by the judge).

The official publisher is currently working with the advisory committee to implement this change if the council approves. However, the current drafts do not yet reflect this change since it will require coordinating extensive modifications in pagination and formatting with the official publisher.

The other, substantive changes to CALCRIM described elsewhere in this report are more urgent. Because the official publisher, LexisNexis Matthew Bender, is sensitive to that urgency, it is planning to publish the new edition of CALCRIM as soon as possible after receiving the council’s approval. As a result, the publisher may have to wait until 2007 to add the code section references to the instructions, if the council approves this change.

#### Alternative Actions Considered

Rule 6.59 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

All revisions and additions to the criminal jury instructions were circulated for public comment, with the exception of two urgent updates to CALCRIM Nos. 2180 and 2181, both of which instruct on “evading a peace officer.” The definition of “distinctively marked vehicle” was revised in both of those instructions to reflect the Supreme Court’s recent ruling in *People v. Hudson* (2006) 38 Cal.4th 1002, which was decided on June 19, 2006, after the close of the public comment period. That case held that a distinctively marked vehicle must now have one additional distinctive feature in addition to a red lamp and siren.

The advisory committee received many comments from court executives, criminal defense attorneys, district attorneys, and trial judges. The advisory committee evaluated the comments and made changes to the instructions based on the recommendations. A chart summarizing the public comments and the committee response is included at pages 8–24.

The revisions that generated the most attention from commentators were those involving CALCRIM No. 220, the reasonable doubt instruction. Many members of the criminal defense bar objected to deleting the reference to the elements of the offense. The advisory committee had chosen to delete this language in response to a comment from a judge who noted that the reference to the elements was inappropriate in a case where the only issue was the identity of the perpetrator. After careful consideration of the comments, the advisory committee decided to retain the proposed changes, which deleted that reference because the reference to the elements is not legally necessary and its deletion makes the instruction appropriate for use in all cases, including those in which identity of the perpetrator is the only issue.

### 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**  
**SPRING 2006 REVISIONS**  
**TABLE OF CONTENTS**

INSTRUCTION NUMBER	INSTRUCTION TITLE	PAGE NUMBER
106	Jurors Asking Questions	1
220	Reasonable Doubt	2
225	Circumstantial Evidence: Intent or Mental State	5
251	Union of Act and Intent: Specific Intent or Mental State	8
359	Corpus Delicti: Independent Evidence of a Charged Crime	10
415	Conspiracy	13
416	Evidence of Uncharged Conspiracy	20
521	Murder: Degrees	24
563	Conspiracy to Commit Murder	32
602	Attempted Murder: Peace Officer, or Firefighter, or Custodial Officer	37
736	Special Circumstances: Killing by Street Gang Member, Pen. Code, § 109.2(a)(22)	41
763	Death Penalty: Factors to Consider – Not Identified as Aggravating or Mitigating	46
801	Mayhem	51
823	Child Abuse	55
852	Evidence of Uncharged Domestic Violence	59
853	Evidence of Uncharged Abuse of Elder or Dependent Person	65
945	Battery Against Peace Officer	70
1030	Sodomy by Force, Fear, or Threats	74
1112	Lewd or Lascivious Act: Child 14 or 15 Years	80
1162	Soliciting Lewd Conduct in Public	83
1170	Failure to Register as Sex Offender	86
1300	Criminal Threat	91

<b>INSTRUCTION NUMBER</b>	<b>INSTRUCTION TITLE</b>	<b>PAGE NUMBER</b>
1303	Terrorism by Symbol	96
1304	Cross Burning and Religious Symbol Desecration	98
1305	Obstructing Religion by Threat	101
1400	Active Participation in Criminal Street Gang	103
1401	Felony Committed for Benefit of Criminal Street Gang	111
1750	Receiving Stolen Property	117
1804	Theft by False Pretense	121
1904	Forgery by Falsifying, Altering, or Counterfeiting Document	127
1905	Forgery by Passing or Attempting to Use Forged Document	131
2101	Driving With 0.08 Percent Blood Alcohol Causing Injury	135
2111	Driving With 0.08 Percent Blood Alcohol	141
2180	Evading Peace Officer: Death or Serious Bodily Injury	145
2181	Evading Peace Officer: Reckless Driving	150
2302	Possession for Sale of Controlled Substance	155
2303	Possession of Controlled Substance While Armed With Firearm	158
2400	Using or Being Under the Influence of Controlled Substance	161
2500	Illegal Possession, etc., of Weapon	164
2542	Carrying Firearm: Active Participant in Criminal Street Gang	172
2560	Possession, etc., of Assault Weapon or .50 BMG Rifle	179
2562	Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280 — Charged Only as Enhancement	183
2655	Causing Death or Serious Bodily Injury While Resisting Peace Officer	188
2701	Violation of Court Order: Protective Order or Stay Away	192
2800	Failure to File Tax Return	197
2810	False Tax Return	201
2826	Willful Failure to Pay Tax	205
2962	Selling or Furnishing Alcoholic Beverage to Person Under 21	208

INSTRUCTION NUMBER	INSTRUCTION TITLE	PAGE NUMBER
2963	Permitting Person Under 21 to Consume Alcoholic Beverage	212
2964	Purchasing Alcoholic Beverage for Person Under 21: Resulting in Death or Great Bodily Injury	216
2982	Persuading, Luring, or Transporting Minor Under 14 Years of Age	220
3115	Armed With Firearm, Pen. Code, § 12022(a)(1)	223
3116	Armed With Firearm: Assault Weapon, Machine Gun, or .50 BMG Rifle, Pen. Code, § 12022(a)(2)	227
3117	Armed With Firearm: Knowledge That Coparticipant Armed, Pen. Code, § 12022(d)	231
3261	During Commission of Felony: Defined–Escape Rule	235
3454	Commitment as Sexually Violent Predator	239
3517	Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees Without <i>Stone</i> Instruction (Non-Homicide)	244
3518	Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees With <i>Stone</i> Instruction (Non-Homicide)	249

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
Generally	Judge Richard Keller, Alameda County	The HotDocs program is not as user friendly as the West JIS Program.	West is now offering to provide the JIS program to judges free of charge on request.
Generally	Judge Helios Hernandez, Riverside County	Condense it down to one book by putting the notes in volume two and the instructions in volume 1.  Dump the duplicates such as CALCRIM 102/202, 103/220, etc.  Would like to see a list of sua sponte instructions.  Would like to see a list of lesser included offenses, as well as a list of specific vs. general intent crimes.	The committee disagrees with this suggestion.  The committee disagrees with this suggestion.  CJER is planning to publish a book next year that has sua sponte instructions and lesser included offenses.  CALCRIM does not distinguish between specific and general intent in the traditional way, so that would not be helpful.
Generally	Judge Alice Vilardi, Alameda County	Add a verdict-generation feature to HotDocs.	We will discuss this possibility with our official publisher once a new one is selected as a result of the RFP.
Generally	Mr. Mike Roddy Executive Officer Superior Court of California, County of San Diego	Agree with proposed changes.	No response required.
Generally	Judge David De Alba, Sacramento County	He would edit the instructions to eliminate references to the court as "I" and substitute the term "the court."	The committee disagrees with this comment.

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
Generally	Judge Runston Maino, San Diego County	He believes the instructions are awkward and difficult to follow when read aloud, but acknowledges that this may be because they are unfamiliar.	No response required.
Generally	Judge John Conley, Orange County	Would like to see two new instructions, one telling the jury that the instructions may be printed, typed or handwritten, and all are of equal significance. He'd also like an instruction about not having cell phones on or available during deliberations.	The committee will discuss this possibility at its next meeting.
Generally	Superior Court of California, County of Los Angeles	Agree with proposed changes: The new instructions continue to need refinement, but the judges seem to accept them once they start using them. They are a work in progress.	No response required.
Generally	First District Appellate Project	They would like the committee to provide the rationale for proposed changes whenever they circulate a release for public comment.	The committee disagrees with this comment. This has never been the practice of either the task force on jury instructions, nor the advisory committees.
Generally	Judge Burt Pines, Los Angeles County	He would like to see the code sections referenced in the titles of the instructions.	The committee agrees with this comment.

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
220	Judge Runston Maino, San Diego County	He believes that the reasonable doubt instruction should follow the exact language of Penal Code section 1096.	The committee disagrees with this comment.
	Katherine Ruz, Criminal Defense Attorney, Sacramento County	Wants to retain the language about the People proving each element.	The committee notes that the reference to the elements is not in CALJIC, either, and its deletion in this version makes this instruction appropriate for use in a case in which identity is the only issue.
	Jennifer Nelson, Criminal Defense Attorney, El Dorado Hills	Same comment	
	Rod Simpson, Public Defender, Sacramento County	Same comment	
	Paulino G. Duran, Public Defender, Sacramento County	Same comment	
	Los Angeles County Public Defender	Same comment	
	Michael McMann, Chief Deputy Public Defender, Ventura County	Same comment	
	Jose Varela, Assistant Public Defender, Marin County	Same comment	
	Mark Arnold, Public Defender, Kern County	Same comment	
First District Appellate Project	Same comment		

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
225	Public Defenders of Los Angeles and Kern Counties	Disagrees with adding brackets to “intent/[or] mental state.” Thinks there should be an “and” in addition to the “or”, e.g., and/or as an option. In other words, they either want no options or more options.	The committee agrees with this comment.
251	Public Defenders of Los Angeles and Kern Counties	Disagrees with adding brackets to “intent/[or] mental state.” Thinks there should be an “and” in addition to the “or”, e.g., and/or as an option. In other words, they either want no options or more options.	The committee agrees with this comment.
359	Public Defenders of Los Angeles and Kern Counties	<p>They believe the corpus instruction misstates the law by suggesting that the People do not need to prove each of the elements independently.</p> <p>They also believe that the language about lesser included offenses is misleading and should be corrected to state: “ONLY to determine whether (he/she) committed that lesser included offense.”</p> <p>They would add a phrase in brackets to the original first paragraph: “Unless you conclude that other evidence shows that someone committed each element of the charged offense, <b>[including any specific intent and/or mental state element of the crime].</b>”</p> <p>They would also change the reference in the final line of this instruction to mention “<b>every element</b> of guilt.”</p>	<p>The committee will take up this issue at its next full meeting.</p> <p>The committee disagrees with this comment.</p> <p>The committee disagrees with this comment.</p> <p>The committee disagrees with this comment.</p>

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
521	Mark Boessenecker Chief Deputy District Attorney County of Napa	Noted typo in the “lying in wait” language, the “and” between deliberation and premeditation should be an “or” (as noted in the bench note to this instruction).	The committee agrees with this comment.
563	Public Defenders of Los Angeles and Kern Counties	They say this instruction is incorrect because conspiracy to commit murder requires express malice. They would change “commit murder” to “unlawfully kill with express malice.”	The committee agrees with this comment.
763	First District Appellate Project	For factors d – j, with the exception of h, they would delete our new phrase “the crimes of which the defendant was convicted in this case” and substitute “the offense” because they believe that neither the current phrase nor the proposed change really work for the wide range of charges and evidence of possible criminal offenses presented in the guilt and penalty trials of a capital case. It may unduly limit the application of these factors. They note that their proposed word, “offense” is the one used in section 190.3, except for 190.3(i).	The committee disagrees with this comment.
801	Craig Fisher, Deputy District Attorney, San Diego County	Disagrees with adding the requirement of serious bodily injury because it is unnecessary and confusing. It is not part of the statutory definition, PC 203. Instead it comes from a case, People v. Ausbie, 123 CA4th 855, 859, in which the AG conceded that battery with serious bodily injury was a LIO of mayhem. Just because one crime is a LIO of another does not require all the elements of the LIO to be listed under the greater offense.	The committee disagrees with this comment.

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
	District Attorney of Ventura County	He claims the directions instructing when to use the bracketed paragraphs on serious bodily injury are incorrect. The real problem is a missing opening bracket on the previous sentence.	The committee will correct this typo.
	First District Appellate Project	They noticed the missing opening bracket in the first paragraph on serious bodily injury.	
	First District Appellate Project	They would add a reference to People v. Pitts, (1990) 223 Cal.App. 3d 1547, 1559-1560, to the authority section for the serious bodily injury definition.	The committee agrees with this comment.
852	District Attorney of Ventura County	They find the last bracketed paragraph confusing and would modify it to say: "You may also consider this evidence for the limited purpose of -- . . Do not consider . . ."	The committee disagrees with this comment.
853	Los Angeles County District Attorney's Office	They don't see any changes in this instruction.	There are very minor changes in the bench notes based on revisions to the statute that are not immediately apparent.
	District Attorney of Ventura County	Same comment as for 852 above	The committee disagrees with this comment.
945	Craig Fisher, Deputy District Attorney, San Diego County	He thinks we should have left this instruction as is, that is, as simple battery without the need for serious bodily injury. There are actually three levels to this crime, and by adding the serious injury requirement here we have added confusion as well. He would ultimately like to see us add a new instruction that covers the other two levels.	The committee will make an appropriate change that addresses this concern.

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
	Los Angeles County District Attorney's Office	They would fix the problem addressed in the above comment by retitling the instruction as "Battery Against Peace Officer with Injury" or by referring to the code section to make clear this version no longer applies to simple battery.	
1030	Public Defenders of Los Angeles and Kern Counties	They would substitute the term "penis" for "sexual organ" in the final paragraph of the related issues section because they believe that the latter term is too vague.	The committee disagrees with this comment.
1112	Los Angeles County Public Defender	They object to removing "attempt" as a lesser included offense.	The committee disagrees with this comment.
1162	First District Appellate Project	<p>They disagree with deleting element three and believe that without it the instruction insufficiently states the required mental state for this crime, i.e., the intent that the conduct be performed in public. They dislike the language "it was possible" in element 8 because it is vague, and would substitute: "The defendant knew or reasonably should have known that someone might be present who would be offended by the requested conduct."</p> <p>They would modify the definition of "public place" to explain that it does not include a place that is closed to the public because it is presently occupied. They would substitute: [As used here, a public place is a place that is open and accessible at the time of the alleged offense to anyone who wishes to go there.]</p>	The committee will take up all of the suggestions regarding this instruction at its next full meeting.

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
	Los Angeles County Public Defender	<p>They claim that only element 1 is legally correct, and would redraft the other three elements as follows:</p> <ol style="list-style-type: none"> <li>2. The defendant requested that the other person engage in conduct that the defendant intended to take place in (a public place/ [or] a place open to the public [or in public view].</li> <li>2a. The defendant made the request while (he/she) was in (a public place/ [or] a place open to the public [or in public view].</li> <li>3. The conduct in which the defendant asked the other person to participate was intended to sexually arouse or gratify (himself/herself) or another person, or to offend or annoy another person.</li> <li>4. The defendant knew or reasonably should have known that there would be another person present when the requested conduct occurred, and the defendant knew or reasonably should have known that the other person would be offended by the conduct.</li> </ol>	
1170	First District Appellate Project	<p>They would amplify the reference to <i>People v. Sorden</i> in the Authority section to specify that the involuntary condition may be <b>temporary or permanent, physical or mental</b> in two places.</p>	

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
		They would likewise modify the reference to <i>People v. Smith</i> to clarify that it only applies to prosecutions under the prior version of the statute. They would add a reference to a new case, <i>People v. Hofsheier</i> , in the related issues section.	The committee agrees with the latter two comments.
1300	First District Appellate Project	They would amplify the cite to <i>People v. Chaney</i> to include a description of the holding, since the holding of the case to which it is being contrasted is described.	The committee agrees with this comment.
1303	First District Appellate Project	<p>They note that the US Supreme Court case of <i>Virginia v. Black</i> may render it unconstitutional to prosecute a PC 11411 offense on the basis of “reckless disregard” although they acknowledge that the term is in the statute and there is no specific case law on this issue. They would bracket the phrase and put a note in the bench notes to explain.</p> <p>They would have the second element include “sign, mark, symbol, emblem, or physical impression” instead of just “symbol” so that it is consistent with the first element and the statute.</p> <p>They would add a note to the discussion of <i>People v. Carr</i> in the bench notes to explain that it only applies “if the People proceed on a reckless disregard theory.”</p>	<p>The committee agrees with this comment.</p> <p>The committee agrees with this comment.</p> <p>The committee disagrees with this comment because the concept it is already explained in the notes.</p>

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
1304	First District Appellate Project	<p>Rather than leave a blank space to insert the name of the religious symbol, they would state, “The defendant burned or desecrated a religious symbol . . .” thereby reinforcing the prosecutions’ burden to prove that the object in question is in fact a religious symbol.</p> <p>Elements two and three of Alternative A and the second element of Alternative B should read “burned or desecrated” instead of just “burned.”</p> <p>As with 1303, they would add a reference to <i>Virginia v. Black</i> in the benchnotes, explaining that in order for symbolic speech to constitute a true threat unprotected by the First Amendment, there must be evidence of a specific intent to intimidate.</p>	<p>The committee agrees with this comment.</p> <p>The committee agrees with this comment.</p> <p>The committee agrees with this comment.</p>
2040	<p>District Attorney of Ventura County</p> <p>First District Appellate Project</p>	<p>When given as modified, all element paragraphs, 1 – 5 will be read to jury. Element 3 requires use of personal identifying info, but PC 530.5(e) does not. Elements 3 and 4 should be bracketed with instructions to use only element 4 when PC 530.5(e) is charged.</p> <p>They believe that the crimes denoted in Penal Code sections 530.5(d) and (e) are significantly different than that in section 530(a). They recommend creating a new instruction to be numbered 2041.</p> <p>They note what they believe is a typo in the reference to the definition of person, PC 530.5(g).</p>	<p>The committee agrees with this comment; see next comment and response.</p> <p>The committee will consider this suggestion when it reconvenes since it calls for new drafting.</p> <p>The statute was recently updated and the citation is correct.</p>

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
	Public Defenders of Los Angeles and Kern Counties	They would insert the “intent to defraud” definition used in the other CALCRIM instructions.	The committee agrees with this comment and will follow it in the new instruction.
2180	Change in Case Law: <i>People v. Hudson</i>	Change definition of “distinctively marked” to read: A vehicle is <i>distinctively marked</i> if it has physical features that other drivers would reasonably notice, including a red lamp, siren, and at least one other feature that makes it appear different from vehicles that are not used for law enforcement purposes.”	The committee agrees with this comment.
2181	Change in Case Law: <i>People v. Hudson</i>	Change definition of “distinctively marked” to read: A vehicle is <i>distinctively marked</i> if it has physical features that other drivers would reasonably notice, including a red lamp, siren, and at least one other feature that makes it appear different from vehicles that are not used for law enforcement purposes.”	The committee agrees with this comment.
2400	First District Appellate Project	In the bench notes they would change the phrase “if the court deems it appropriate” to “if substantial evidence supports it.”	The committee agrees with this comment.
2500	First District Appellate Project	They would modify this instruction to comport with the language of <i>People v. King</i> (2006) 38 Cal.4th 617.	The committee is already planning to consider whether changes to this instruction are necessary at its next meeting.
2542	Public Defenders of Los Angeles and Kern Counties	They would rewrite the new bench note paragraph by breaking it down and simplifying it.	The committee disagrees with this comment.

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
2655	First District Appellate Project	They disagree with singling out that willful resistance may include fleeing from the officer because it is potentially argumentative.	The committee disagrees with this comment.
3115	District Attorney of Ventura County  First District Appellate Project	Notes that 3261 should get the same change in conforming language.  They disagree with using the term using a firearm “in connection” with the offense, citing <i>People v. Bland</i> . They believe this language is too broad, and would prefer the term “in furtherance of the crimes.”	The committee agrees with this comment.  The committee disagrees with this comment.
3116	First District Appellate Project	They disagree with using the term using a firearm “in connection” with the offense, citing <i>People v. Bland</i> . They believe this language is too broad, and would prefer the term “in furtherance of the crimes.”	The committee disagrees with this comment.
3117	First District Appellate Project	They disagree with using the term using a firearm “in connection” with the offense, citing <i>People v. Bland</i> . They believe this language is too broad, and would prefer the term “in furtherance of the crimes.”	The committee disagrees with this comment.
3261	District Attorney of Ventura County	Note need for conforming change to this instruction to make it consistent with changes to 3115-3117.	The committee agrees with this comment.
3454	Judge David De Alba, Sacramento County	He does not like the reference to percentages in the definition of “substantial, serious and well-founded risk.”	The committee disagrees with this comment.



**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
3517		<p>Form per Charge: Lesser Offenses or Degrees (Non-Homicides) (Revised).</p> <p>To be consistent with the title, they would have the instruction refer consistently to “(greater crime/higher degree)” and “(lesser crime/lower degree)” to cover cases where the crimes are divided into degrees.</p> <p>They would delete the part of line 21 beginning “and give me a signed verdict form” since the instruction contemplates that the jury will only return one verdict form per charge.</p> <p>They would add the following phrase: “If you all cannot agree whether the defendant is guilty or not guilty of the greater crime, inform me about the disagreement and do not fill out any verdict form.” They note that the instruction could confuse a jury by not telling them how to return a not guilty verdict. They would add the following after line 33: “If all of you find the defendant not guilty of any crime, complete and sign the not guilty verdict form.”</p> <p>They would rewrite lines 36-39 to say “If you find the defendant guilty, but all of you have a reasonable doubt that it is the (greater/higher degree), you may find the defendant guilty of only the (lesser crime/lower degree).” This would eliminate potential confusion if a jury is split as to a greater crime or degree.</p>	<p>The committee disagrees with this comment.</p> <p>The committee disagrees with this comment.</p> <p>The committee agrees with this comment; see response to next commentator.</p> <p>The committee disagrees with this comment; see response to next commentator.</p>

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
3517	Public Defenders of Los Angeles and Kern Counties	<p>They note captions and cross-references will need to be changed if titles are changed.  They make two recommendations for new language that the committee may choose to consider for future rounds of revisions.</p> <p><u>They would reinsert two paragraphs that appeared in the original draft:</u>  “If you all agree that the People have not proved that the defendant committed any of these offenses, then you must complete each verdict form stating that (he/she) is not guilty.” <u>And:</u>  “The People have the burden of proving beyond a reasonable doubt that the defendant committed (greater offense/first lesser) rather than (lesser). If the People have not met this burden, you must find defendant not guilty of (greater/first lesser).”</p> <p>They believe that the 5th paragraph should read:  “I can accept a guilty verdict on a lesser crime <u>only</u> if you all agree that the defendant is not guilty of the (charged/greater) crime . . .”</p>	<p>The committee agrees with this comment.</p> <p>The committee agrees with the first part of this comment.</p> <p>The committee disagrees with this comment.</p>
3518	<p>Judge William Hamlin, Fresno County</p> <p>First District Appellate Project</p>	<p>He proposes extensive rewrites that comport with his view of the “preferred practice.”</p> <p>They note that their comments are similar to those for 3517.  They recommend clarifying language at lines 4-5 because it is unclear as to what earlier instructions</p>	<p>The committee accepts a few of his suggestions but declines to do the radical rewrites that he proposes.</p> <p>The committee agrees with this comment.</p>

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

Instruction	Commentator	Summary of Comments	Committee Response
3518	Public Defenders of Los Angeles and Kern Counties	<p>are to be disregarded “Because of your disagreement on count[s] ____, it is necessary to follow a different procedure for using verdict forms for (that/those) count[s] . . .”</p> <p>They note that this instruction only tells the jury how to return a guilty verdict for the greater crime at lines 27-30, but not how to return a not guilty verdict or a guilty verdict on a lesser crime.</p> <p>They would add at lines 43-46: “If you find the defendant guilty but all of you have a reasonable doubt that it is the (greater crime/higher degree), you may find the defendant guilty of only the (lesser crime/lower degree).”</p> <p>They would like to see a future revision that provides adequate guidance for situations in which there is more than one lesser crime.</p> <p><u>They would reinsert two paragraphs that appeared in the original draft:</u></p> <p>“If you all agree that the People have not proved that the defendant committed any of these offenses, then you must complete each verdict form stating that (he/she) is not guilty.” <u>And:</u></p> <p>“The People have the burden of proving beyond a reasonable doubt that the defendant committed (greater offense/first lesser) rather than (lesser). If the People have not met this burden, you must find defendant not guilty of (greater/first lesser).”</p>	<p>The committee agrees with this comment.</p> <p>The committee agrees with the first part of this comment.</p>

**Spring 2006**  
**Judicial Council Jury Instructions**  
(update and revise criminal instructions)

<b>Instruction</b>	<b>Commentator</b>	<b>Summary of Comments</b>	<b>Committee Response</b>
3518	Public Defenders of Los Angeles and Kern Counties (continued)	They believe that the 5th paragraph should read: “I can accept a guilty verdict on a lesser crime <u>only</u> if you all agree that the defendant is not guilty of the (charged/greater) crime . . .”	The committee disagrees with this comment.

**CRIMINAL JURY INSTRUCTIONS – SPRING 2006 REVISIONS**  
**TABLE OF CONTENTS**

<b>INSTRUCTION NUMBER</b>	<b>INSTRUCTION TITLE</b>	<b>PAGE NUMBER</b>
106	Jurors Asking Questions	1
220	Reasonable Doubt	2
225	Circumstantial Evidence: Intent or Mental State	5
251	Union of Act and Intent: Specific Intent or Mental State	8
359	Corpus Delicti: Independent Evidence of a Charged Crime	10
415	Conspiracy	13
416	Evidence of Uncharged Conspiracy	20
521	Murder: Degrees	24
563	Conspiracy to Commit Murder	32
602	Attempted Murder: Peace Officer, or Firefighter, or Custodial Officer	37
736	Special Circumstances: Killing by Street Gang Member, Pen. Code, § 109.2(a)(22)	41
763	Death Penalty: Factors to Consider – Not Identified as Aggravating or Mitigating	46
801	Mayhem	51
823	Child Abuse	55
852	Evidence of Uncharged Domestic Violence	59
853	Evidence of Uncharged Abuse of Elder or Dependent Person	65
945	Battery Against Peace Officer	70
1030	Sodomy by Force, Fear, or Threats	74
1112	Lewd or Lascivious Act: Child 14 or 15 Years	80
1162	Soliciting Lewd Conduct in Public	83
1170	Failure to Register as Sex Offender	86
1300	Criminal Threat	91
1303	Terrorism by Symbol	96
1304	Cross Burning and Religious Symbol Desecration	98

INSTRUCTION NUMBER	INSTRUCTION TITLE	PAGE NUMBER
1305	Obstructing Religion by Threat	101
1400	Active Participation in Criminal Street Gang	103
1401	Felony Committed for Benefit of Criminal Street Gang	111
1750	Receiving Stolen Property	117
1804	Theft by False Pretense	121
1904	Forgery by Falsifying, Altering, or Counterfeiting Document	127
1905	Forgery by Passing or Attempting to Use Forged Document	131
2101	Driving With 0.08 Percent Blood Alcohol Causing Injury	135
2111	Driving With 0.08 Percent Blood Alcohol	141
2180	Evading Peace Officer: Death or Serious Bodily Injury	145
2181	Evading Peace Officer: Reckless Driving	150
2302	Possession for Sale of Controlled Substance	155
2303	Possession of Controlled Substance While Armed With Firearm	158
2400	Using or Being Under the Influence of Controlled Substance	161
2500	Illegal Possession, etc., of Weapon	164
2542	Carrying Firearm: Active Participant in Criminal Street Gang	172
2560	Possession, etc., of Assault Weapon or .50 BMG Rifle	179
2562	Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280 — Charged Only as Enhancement	183
2655	Causing Death or Serious Bodily Injury While Resisting Peace Officer	188
2701	Violation of Court Order: Protective Order or Stay Away	192
2800	Failure to File Tax Return	197
2810	False Tax Return	201
2826	Willful Failure to Pay Tax	205
2962	Selling or Furnishing Alcoholic Beverage to Person Under 21	208
2963	Permitting Person Under 21 to Consume Alcoholic Beverage	212
2964	Purchasing Alcoholic Beverage for Person Under 21: Resulting in Death or Great Bodily Injury	216
2982	Persuading, Luring, or Transporting Minor Under 14 Years of Age	220

INSTRUCTION NUMBER	INSTRUCTION TITLE	PAGE NUMBER
3115	Armed With Firearm, Pen. Code, § 12022(a)(1)	223
3116	Armed With Firearm: Assault Weapon, Machine Gun, or .50 BMG Rifle, Pen. Code, § 12022(a)(2)	227
3117	Armed With Firearm: Knowledge That Coparticipant Armed, Pen. Code, § 12022(d)	231
3261	During Commission of Felony: Defined–Escape Rule	235
3454	Commitment as Sexually Violent Predator	239
3517	Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees Without <i>Stone</i> Instruction (Non-Homicide)	244
3518	Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees With <i>Stone</i> Instruction (Non-Homicide)	249

## 106. Jurors Asking Questions

---

If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through the bailiff. I will discuss the question with the attorneys and decide whether it may be asked. **Do not feel slighted or disappointed if your question is not asked.** Your question may not be asked for a variety of reasons, including the reason that the question may call for an answer that is inadmissible for legal reasons. ~~Do not feel slighted or disappointed if your question is not asked.~~ Also, do not guess the reason your question was not asked or speculate about what the answer might have been. Always remember that you are not advocates for one side or the other in this case. You are impartial judges of the facts.

---

### BENCH NOTES

#### *Instructional Duty*

This instruction may be given on request.

### AUTHORITY

- Statutory Admonitions ▶ See generally Pen. Code, § 1122.

#### *Secondary Sources*

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

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.02[2] (Matthew Bender).

## 220. Reasonable Doubt

---

The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty ~~prove each element of a crime [and special allegation]~~ beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

---

### BENCH NOTES

#### *Instructional Duty*

The court has a *sua sponte* duty to instruct on the presumption of innocence and the state's burden of proof. (*People v. Vann* (1974) 12 Cal.3d 220, 225–227 [115 Cal.Rptr. 352, 524 P.2d 824]; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463 [114 P.2d 415]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–958 [69 Cal.Rptr.2d 532].)

If the court will be instructing that the prosecution has a different burden of proof, give the bracketed phrase “unless I specifically tell you otherwise.”

### AUTHORITY

- Instructional Requirements ▶ Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *Victor v.*

*Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583];  
*Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997.

### **Secondary Sources**

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, §§ 521, 637, 640.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 83, *Evidence*, § 83.03[1], Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], [2][a][i], 85.04[2][a] (Matthew Bender).

## **COMMENTARY**

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Garcia* (1975) 54 Cal.App.3d 61 [126 Cal.Rptr. 275].) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language. For an alternate view of instructing on reasonable doubt, see Committee on Standard Jury Instructions—Criminal, Minority Report to CALJIC "Reasonable Doubt" Report, in *Alternative Definitions of Reasonable Doubt: A Report to the California Legislature* (May 22, 1987; repr., San Francisco: Daily Journal, 1987) pp. 51-53.

## **RELATED ISSUES**

### ***Pinpoint Instruction on Reasonable Doubt***

A defendant is entitled, on request, to a nonargumentative instruction that directs attention to the defense's theory of the case and relates it to the state's burden of proof. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [84 Cal.Rptr. 711, 465 P.2d 847] [error to deny requested instruction relating defense evidence to the element of premeditation and deliberation].) Such an instruction is sometimes called a pinpoint instruction. "What is pinpointed is not specific evidence as such, but the theory of the defendant's case. It is the specific evidence on which the theory of the defense 'focuses' which is related to reasonable doubt." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338 [185 Cal.Rptr. 506] [court erred in refusing to

give requested instruction relating self-defense to burden of proof]; see also *People v. Granados* (1957) 49 Cal.2d 490, 496 [319 P.2d 346] [error to refuse instruction relating reasonable doubt to commission of felony in felony-murder case]; *People v. Brown* (1984) 152 Cal.App.3d 674, 677–678 [199 Cal.Rptr. 680] [error to refuse instruction relating reasonable doubt to identification].)

## 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 instructions for each crime explain 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. ~~which charges it applies to.~~

## 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*.

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

---

Every crime [or other allegation] 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] \_\_\_].

In order to be guilty of the crime[s] of \_\_\_\_\_ <insert name[s] of alleged offense[s]> [or the allegation[s] of \_\_\_\_\_ <insert name[s] of enhancement[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/ [and/or] mental state). The act and the (intent/ [and/or] mental state) required are explained in the instruction for every crime [or allegation].

---

### 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 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].)

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).

### 359. Corpus Delicti: Independent Evidence of a Charged Crime

---

The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict (him/her) if you conclude that other evidence shows that the charged crime [or a lesser included offense] was committed. ~~Unless you conclude that other evidence shows someone committed the charged crime [or a lesser included offense], you may not rely on any out-of-court statement[s] by the defendant to convict (him/her) [of that crime or lesser offense].~~

Theat other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed, someone's criminal conduct caused an injury, loss, or harm. ~~The other evidence does not have to prove beyond a reasonable doubt that the charged crime actually was committed.~~

The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone.

You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt.

---

### BENCH NOTES

#### *Instructional Duty*

The court has a *sua sponte* duty to instruct on corpus delicti whenever an accused's extrajudicial statements form part of the prosecution's evidence. (*People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].)

The corpus delicti cannot be proved by statements made before or after the crime, but can be proved by statements made during the crime. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 [63 Cal.Rptr.2d 1, 935 P.2d 708].)

Give the bracketed language in the first paragraph if the court will be instructing on lesser included offenses.

### ***Related Instructions***

Since the corpus delicti instruction concerns statements of guilt by the defendant, this instruction must always be given along with CALCRIM No. 358, *Evidence of Defendant's Statements*. If the statements are reported oral statements, the bracketed cautionary paragraph in CALCRIM No. 358 must also be given.

### **AUTHORITY**

- Instructional Requirements ▶ *People v. Ray* (1996) 13 Cal.4th 313, 342 [52 Cal.Rptr.2d 296, 914 P.2d 846]; *People v. Jennings* (1991) 53 Cal.3d 334, 368 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].
- Burden of Proof ▶ *People v. Lara* (1994) 30 Cal.App.4th 658, 676.

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 45–52.

2 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 30, *Confessions and Admissions*, §§ 30.04[2], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.04[2][c], Ch. 87, *Death Penalty*, § 87.13[17][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.01 (Matthew Bender).

### **COMMENTARY**

#### ***Harm Caused by Criminal Conduct***

The instruction states that the other evidence need only “be enough to support a reasonable inference that someone’s criminal conduct caused an injury, loss, or harm.” This is based in part on *People v. Alvarez* (2002) 27 Cal.4th 1161, 1171 [119 Cal.Rptr.2d 903, 46 P.3d 372], in which the court stated that “[t]here is no requirement of independent evidence ‘of every physical act constituting an element of an offense,’ so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency.” (Quoting *People v. Jones* (1998) 17 Cal.4th 279, 302, 303 [70 Cal.Rptr.2d 793, 949 P.2d 890].)

*Copyright 2006 Judicial Council of California*

### ***Scope of Corpus Delicti***

The following are not elements of a crime and need not be proved by independent evidence: the degree of the crime charged (*People v. Cooper* (1960) 53 Cal.2d 755, 765 [3 Cal.Rptr. 148, 349 P.2d 964]), the identity of the perpetrator (*People v. Westfall* (1961) 198 Cal.App.2d 598, 601 [18 Cal.Rptr. 356]), elements of the underlying felony when the defendant is charged with felony murder (*People v. Cantrell* (1973) 8 Cal.3d 672, 680–681 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]), special circumstances when the defendant is charged with a felony-based special circumstance murder as listed in Penal Code section 190.2(a)(17) (Pen. Code, § 190.41; see *People v. Ray* (1996) 13 Cal.4th 313, 341, fn. 13 [52 Cal.Rptr.2d 296, 914 P.2d 846]), the knowledge and intent required for aider-abettor liability (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1128–1129 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Ott* (1978) 84 Cal.App.3d 118, 131 [148 Cal.Rptr. 479]), or facts necessary for a sentencing enhancement (see *People v. Shoemaker* (1993) 16 Cal.App.4th 243, 252–256 [20 Cal.Rptr.2d 36]).

## **RELATED ISSUES**

### ***Truth-in-Evidence Initiative***

The “truth-in-evidence” provision of the California Constitution abrogates the corpus delicti rule insofar as it restricts the admissibility of incriminatory extrajudicial statements by an accused. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173–1174 [119 Cal.Rptr.2d 903, 46 P.3d 372]; see Cal. Const., art. I, § 28(d) [Proposition 8 of the June 8, 1982 General Election].) The constitutional provision, however, does not eliminate the rule insofar as it prohibits *conviction* when the only evidence that the crime was committed is the defendant’s own statements outside of court. Thus, the provision does not affect the rule to the extent it requires a jury instruction that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1180.)

## 415. Conspiracy

---

[I have explained that the defendant may be guilty of a crime if (he/she) either commits the crime or aids and abets the crime. (He/She) may also be guilty if (he/she) is a member of a conspiracy.]

(The defendant[s]/Defendant[s] \_\_\_\_\_ <insert name[s]>) (is/are) charged [in Count \_\_\_] with conspiracy to commit \_\_\_\_\_ <insert alleged crime[s]>.

To prove that (the/a) defendant is guilty of this crime, the People must prove that:

1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>) to commit \_\_\_\_\_ <insert alleged crime[s]>;
2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit \_\_\_\_\_ <insert alleged crime[s]>;

(The/One of the) defendant[s][,] [or \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>][,] [or (both/all) of them] committed [at least one of] the alleged overt act[s] to accomplish \_\_\_\_\_ <insert alleged crime[s]>;

AND

3. At least one of these overt acts was committed in California.

**To decide whether the defendant committed one or more overt acts, consider all of the evidence presented about the following alleged overt acts:**

<insert the alleged overt acts>.

To decide whether the defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit \_\_\_\_\_ <insert alleged crime[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

**The People must prove that the members of the alleged conspiracy had an agreement and intent to commit \_\_\_\_\_ <insert alleged crime[s]>. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit (that/one or more of those) crime[s]. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime[s].**

**An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.**

**[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]**

**[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]**

**[The People allege that the defendant conspired to commit the following crimes: \_\_\_\_\_ <insert alleged crime[s]>. You may not find the defendant guilty of conspiracy unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.] [You must also all agree on the degree of the crime.]**

**[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]**

**[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]**

**[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]**

---

## BENCH NOTES

### ***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) If the defendant is charged with conspiracy to commit murder, do not give this instruction. Give CALCRIM No. 563, *Conspiracy to Commit Murder*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give this instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of the offense or offenses alleged as targets of the conspiracy.

The court has a **sua sponte** duty to give a unanimity instruction if “the evidence suggested two discrete crimes, i.e., two discrete conspiracies . . .” (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971].) A unanimity instruction is not required if there is “merely possible uncertainty on how the defendant is guilty of a particular conspiracy.” (*People v. Russo, supra*, 25 Cal.4th at p. 1135.) Thus, the jury need not unanimously agree as to what overt act was committed or who was part of the conspiracy. (*People v. Russo, supra*, 25 Cal.4th at pp. 1135–1136.) However, it appears that a unanimity instruction is required when the prosecution alleges multiple crimes that may have been the target of the conspiracy. (See *People v. Diedrich, supra*, 31 Cal.3d at pp. 285–286 [approving of unanimity instruction as to crime that was target of conspiracy]; but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210] [not error to decline to give unanimity instruction; if was error, harmless].) Give the bracketed paragraph that begins, “The People alleged that the defendant[s] conspired to commit the following crimes,” if multiple crimes are alleged as target offenses of the conspiracy. Give the bracketed sentence regarding the degree of the crime if any target felony has different punishments for different degrees. (See Pen. Code, § 182(a).) The court must also give the jury a verdict form on which it can state the specific crime or crimes that the jury unanimously agrees the defendant conspired to commit.

In addition, if a conspiracy case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction

may be required. (*People v. Russo, supra*, 25 Cal.4th at p. 1136, fn. 2; see also Related Issues section below on statute of limitations.)

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with “You must make a separate decision,” if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [288 P.2d 307].)

Give the bracketed sentence that begins with “A member of a conspiracy does not have to personally know,” on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 528].)

#### ***Defenses—Instructional Duty***

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a *sua sponte* duty to give CALCRIM No. 420, *Withdrawal from Conspiracy*.

### **AUTHORITY**

- Elements ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 655, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75]; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368 [277 Cal.Rptr. 309]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11 [24 Cal.Rptr.2d 480].
- Association Alone Not a Conspiracy ▶ *People v. Drolet* (1973) 30 Cal.App.3d 207, 218 [105 Cal.Rptr. 824]; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].

- Elements of Underlying Offense ▶ *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].
- Two Specific Intent ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773].
- Unanimity on Specific Overt Act Not Required ▶ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Unanimity on Target Offenses of Single Conspiracy ▶ *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210].

### **Secondary Sources**

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 68–97.

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01, 141.02, 141.10 (Matthew Bender).

## **COMMENTARY**

It is sufficient to refer to coconspirators in the accusatory pleading as “persons unknown.” (*People v. Sacramento Butchers’ Protective Ass’n* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

## **LESSER INCLUDED OFFENSES**

The court has a **sua sponte** duty to instruct the jury on a lesser included target offense if there is substantial evidence from which the jury could find a conspiracy to commit that offense. (*People v. Horn* (1974) 12 Cal.3d 290, 297 [115 Cal.Rptr. 516, 524 P.2d 1300], disapproved on other ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1237–1238 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Cook* (2001) 91 Cal.App.4th 910, 918 [111 Cal.Rptr.2d 204]; *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1365–1366, 1369 [269 Cal.Rptr. 900]. Alternatively, the court may look to the overt acts in the accusatory pleadings to determine if it has a

duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra*, 91 Cal.App.4th at pp. 919–920, 922; contra, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708–1709 [54 Cal.Rptr.2d 608] [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)

## RELATED ISSUES

### ***Acquittal of Coconspirators***

The “rule of consistency” has been abandoned in conspiracy cases. The acquittal of all alleged conspirators but one does not require the acquittal of the remaining alleged conspirator. (*People v. Palmer* (2001) 24 Cal.4th 856, 858, 864–865 [103 Cal.Rptr.2d 13, 15 P.3d 234].)

### ***Conspiracy to Collect Insurance Proceeds***

A conspiracy to commit a particular offense does not necessarily include a conspiracy to collect insurance proceeds. (*People v. Leach* (1975) 15 Cal.3d 419, 435 [124 Cal.Rptr. 752, 541 P.2d 296].)

### ***Death of Coconspirator***

A surviving conspirator is liable for proceeding with an overt act after the death of his or her coconspirator. (*People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1262–1262 [98 Cal.Rptr.2d 737].)

### ***Factual Impossibility***

Factual impossibility of accomplishing a substantive crime is not a defense to conspiracy to commit that crime. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1130–1131 [54 Cal.Rptr.2d 578]; see also *United States v. Jimenez Recio* (2003) 537 U.S. 270, 274–275 [123 S.Ct. 819, 154 L.Ed.2d 744] [rejecting the rule that a conspiracy ends when the object of the conspiracy is defeated].)

### ***Statute of Limitations***

The defendant may assert the statute of limitations defense for any felony that is the primary object of the conspiracy. The limitations period begins to run with the last overt act committed in furtherance of the conspiracy. (*Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 410 [173 Cal.Rptr. 906]; *People v. Crosby* (1962) 58 Cal.2d 713, 728 [25 Cal.Rptr. 847, 375 P.2d 839]; see Pen. Code, §§ 800, 801.) If the substantive offense that is the primary object of the conspiracy is successfully attained, the statute begins to run at the same time as for the substantive offense. (*People v. Zamora* (1976) 18 Cal.3d 538, 560 [134 Cal.Rptr. 784, 557 P.2d 75].) “[W]here there is a question regarding the statute of limitations, a trial court may be required to give a form of unanimity instruction obligating the jury to agree an overt act was committed within the limitations

period.” (See *People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641] [dicta].) See generally CALCRIM No. 3410, *Statute of Limitations* and CALCRIM No. 3500, *Unanimity*.

### ***Supplier of Goods or Services***

A supplier of lawful goods or services put to an unlawful use is not liable for criminal conspiracy unless he or she both knows of the illegal use of the goods or services and intends to further that use. The latter intent may be established by direct evidence of the supplier’s intent to participate, or by inference based on the supplier’s special interest in the activity or the aggravated nature of the crime itself. (*People v. Lauria* (1967) 251 Cal.App.2d 471, 476–477, 482 [59 Cal.Rptr. 628].)

### ***Wharton’s Rule***

If the cooperation of two or more persons is necessary to commit a substantive crime, and there is no element of an alleged conspiracy that is not present in the substantive crime, then the persons involved cannot be charged with both the substantive crime and conspiracy to commit the substantive crime. (*People v. Mayers* (1980) 110 Cal.App.3d 809, 815 [168 Cal.Rptr. 252] [known as Wharton’s Rule or “concert of action” rule].)

## 416. Evidence of Uncharged Conspiracy

---

The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.

To prove that that (the/a) defendant was a member of a conspiracy in this case, the People must prove that:

1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>) to commit \_\_\_\_\_ <insert alleged crime[s]>;
2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit \_\_\_\_\_ <insert alleged crime[s]>;
3. (The/One of the) defendant[s][,] [or \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>][,] [or (both/all) of them] committed at least one overt act to accomplish \_\_\_\_\_ <insert alleged crime[s]>;

AND

4. At least one of these overt acts was committed in California.

**To decide whether the defendant committed one or more overt acts, consider all of the evidence presented about the following alleged overt acts:**

\_\_\_\_\_ <insert the alleged overt acts>.

To decide whether the defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit \_\_\_\_\_ <insert alleged crime[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit \_\_\_\_\_ <insert alleged crime[s]>. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit (that/one or more of those) crime[s]. An agreement may be inferred from conduct if

you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

[You must all agree that at least one overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

[You must decide as to each defendant whether he or she was a member of the alleged conspiracy.]

[The People contend that the defendant[s] conspired to commit one of the following crimes: \_\_\_\_\_ <insert alleged crime[s]>. You may not find the defendant guilty under a conspiracy theory unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.]  
[You must also all agree on the degree of the crime.]

[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]

[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]

---

## BENCH NOTES

### *Instructional Duty*

The court has a *sua sponte* duty to give this instruction when the prosecution has not charged the crime of conspiracy but has introduced evidence of a conspiracy to prove liability for other offenses or to introduce hearsay statements of coconspirators. (See, e.g., *People v. Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr.

664, 372 P.2d 656]; *People v. Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714].)

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of the offense or offenses alleged as targets of the conspiracy.

The court has a **sua sponte** duty to give a unanimity instruction if “the evidence suggested two discrete crimes, i.e., two discrete conspiracies . . .” (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971].) See the Bench Notes to CALCRIM No. 415, *Conspiracy*, on when the court is required to give a unanimity instruction.

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section to CALCRIM No. 415, *Conspiracy*.

Give the bracketed sentence that begins with “You must make a separate decision,” if the prosecution alleges that more than one defendant was a member of the conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Give the bracketed sentence that begins with “A member of a conspiracy does not have to personally know,” on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

#### ***Defenses—Instructional Duty***

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal from Conspiracy*.

#### ***Related Instructions***

CALCRIM No. 417, *Liability for Coconspirators’ Acts*.

CALCRIM No. 418, *Coconspirator's Statements*.  
CALCRIM No. 419, *Acts Committed or Statements Made Before Joining Conspiracy*.

## AUTHORITY

- Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75]; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368 [277 Cal.Rptr. 309]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11 [24 Cal.Rptr.2d 480].
- Association Alone Not a Conspiracy ▶ *People v. Drolet* (1973) 30 Cal.App.3d 207, 218 [105 Cal.Rptr. 824]; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].
- Elements of Underlying Offense ▶ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Two Specific Intent ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1240 [77 Cal.Rptr.2d 733, 960 P.2d 537].

## Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 68–97.

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01, 141.02 (Matthew Bender).

## RELATED ISSUES

See the Related Issues section to CALCRIM No. 415, *Conspiracy*.

## 521. Murder: Degrees

---

**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;**

**AND**

- 3. 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 show a state of mind equivalent to deliberation and 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.
- 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. 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].)

### 563. Conspiracy to Commit Murder

---

(The defendant[s]/Defendant[s] \_\_\_\_\_ <insert name[s]>) (is/are) charged [in Count \_\_\_] with conspiracy to commit murder.

To prove that (the/a) defendant is guilty of this crime, the People must prove that:

1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>) to intentionally and unlawfully kill, commit murder;
2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would intentionally and unlawfully kill, commit murder;
3. (The/One of the) defendant[s][,] [or] \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>][,] [or (both/all) of them] committed [at least one of] the overt act[s] alleged to accomplish the murder, killing;

AND

4. At least one of these overt acts was committed in California.

To decide whether the defendant committed one or more overt acts, consider all of the evidence presented about the following alleged overt acts:

\_\_\_\_\_ <insert the alleged overt acts>.

To decide whether the defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit murder, please refer to Instructions \_\_, which define that crime.

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

**An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.**

**[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]**

**[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]**

**[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]**

**[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]**

**[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]**

---

## BENCH NOTES

### *Instructional Duty*

The court has a *sua sponte* duty to give an instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) Use this instruction only if the defendant is charged with conspiracy to commit murder. If the defendant is charged with conspiracy to commit another crime, give CALCRIM No. 415, *Conspiracy*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give either instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a *sua sponte* duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46

Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of murder.

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with “You must all agree that at least one overt act alleged” if multiple overt acts are alleged in connection with a single conspiracy. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136 [108 Cal.Rptr.2d 436, 25 P.3d 641].)

Give the bracketed sentence that begins with “You must make a separate decision,” if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Give the bracketed sentence that begins with “A member of a conspiracy does not have to personally know,” on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr.1500 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

#### ***Defenses—Instructional Duty***

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a *sua sponte* duty to give CALCRIM No. 420, *Withdrawal from Conspiracy*.

If the case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also Related Issues section to CALCRIM No. 415, *Conspiracy*, and CALCRIM 3500, *Unanimity*.)

#### ***Related Instructions***

CALCRIM No. 415, *Conspiracy*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

## AUTHORITY

- Elements ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75].
- Elements of Underlying Offense ▶ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Express Malice Murder ▶ *People v. Swain* (1996) 12 Cal.4th 593, 602, 603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].
- Premeditated First Degree Murder ▶ *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Two Specific Intent for Conspiracy ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved by *People v. Cortez* (1998) 18 Cal.4th 1223 [960 P.2d 537] to the extent it suggests instructions on premeditation and deliberation must be given in every conspiracy to murder case.
- Unanimity on Specific Overt Act Not Required ▶ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 35 P.3d 641].

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 77, 78.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[2], 141.02[3], [4][b], [5][c], Ch. 142, *Crimes Against the Person*, § 142.01[2][e] (Matthew Bender).

## COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as “persons unknown.” (*People v. Sacramento Butchers’ Protective Association* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

Conspiracy to commit murder cannot be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 602, 603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) All conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr. 2d 733, 960 P.2d 537].)

## LESSER INCLUDED OFFENSES

There is no crime of conspiracy to commit attempted murder. (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79 [116 Cal.Rptr.2d 634].)

## RELATED ISSUES

### *Multiple Conspiracies*

Separately planned murders are punishable as separate conspiracies, even if the separate murders are incidental to a single objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1133 [54 Cal.Rptr.2d 578].)

See the Related Issues section to CALCRIM No. 415, *Conspiracy*.

**564–569. Reserved for Future Use**

**602. Attempted Murder: Peace Officer, ~~or~~ Firefighter, or Custodial Officer**

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) lawfully performing (his/her) duties as a (peace officer/firefighter/custodial officer);

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) 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, ~~or~~ firefighter, or custodial officer>* 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 (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.]

<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: Peace 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.
- 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).

**736. Special Circumstances: Killing by Street Gang Member,  
Pen. Code, § 190.2(a)(22)**

---

The defendant is charged with the special circumstance of committing murder while an active participant in a criminal street gang.

To prove that this special circumstance is true, the People must prove that:

1. The defendant ~~intentionally killed~~ ~~to kill~~ <insert name of victim>;
2. At the time of the killing, the defendant was an active participant in a criminal street gang;
3. The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

**AND**

4. The murder was carried out to further the activities of the criminal street gang.

*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)>*;

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)>*

**1A. [any combination of two or more of the following crimes]:**

\_\_\_\_\_ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25)>*;

**[OR]**

*<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)-(30)>*

**1B. any combination of \_\_\_\_\_ *<insert crime or crimes in Pen. Code, § 186.22(e)(26)-(30)>* and \_\_\_\_\_ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)-(25)>*;**

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 by two or more persons.]

[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.]

[Other instructions explain what is necessary for the People to prove that a member of the gang [or the defendant] committed \_\_\_\_\_ <insert crimes from Pen. Code, § 186.22(e)(1)-(2530) inserted in definition of pattern of criminal gang activity>.]

---

## BENCH NOTES

### *Instructional Duty*

The court has a *sua sponte* duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The effective date of this special circumstance was March 8, 2000.

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) 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). 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). (See Pen. Code, § 186.22(i) [“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 element 1 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].) Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank.~~

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. 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*.

### ***Related Instructions***

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

## **AUTHORITY**

- Special Circumstance ▶ Pen. Code, § 190.2(a)(22).
- 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].
- 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*

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, § 443.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 87, *Death Penalty*, §§ 87.13[22], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.03[3][a] (Matthew Bender).

## RELATED ISSUES

See the Bench Notes and Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

The criminal street gang special circumstance applies when a participant in a criminal street gang intends to kill one person but kills someone else by mistake. *People v. Shabazz* (2006) 38 Cal.4th 55, 66; see CALCRIM 562, Transferred Intent.

### 763. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating

---

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, 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, murder of \_\_\_\_\_ *<insert name of murder victim>*. *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) Any felony of which the defendant has been convicted other than the crime[s] of which the defendant was convicted in this case, murder of \_\_\_\_\_ *<insert name of murder victim>*.

- (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 ~~murder of \_\_\_\_\_~~ *<insert name of murder victim>*.
- (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 ~~murder of \_\_\_\_\_~~ *<insert name of murder victim>*.
- (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 ~~murder of \_\_\_\_\_~~ *<insert name of murder victim>*.
- (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 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.

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.

~~Insert the name of the murder victim in the blanks provided.~~

Copyright 2006 Judicial Council of California

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) 335 F.3d 1024, 1060 [reprinted as amended at *Belmontes v. Woodford* (2003) 350 F.3d 861, 876].
- 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. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 509; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].) In *People v. Hillhouse, supra*, 27 Cal.4th at p. 508, fn. 6, 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.”

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).

## 801. Mayhem

---

The defendant is charged [in Count \_\_] with mayhem.

To prove that the defendant is guilty of mayhem, the People must prove that the defendant **caused serious bodily injury when (he/she) unlawfully and maliciously:**

[1. Removed a part of someone's body(;/.)]

[OR]

[2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]

[OR]

[3. Permanently disfigured someone(;/.)]

[OR]

[4. Cut or disabled someone's tongue(;/.)]

[OR]

[5. Slit someone's (nose[, ]/ear[,]/ [or] lip) (;/.)]

[OR]

[6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

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.

**[A serious bodily injury means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]**

[ <Insert description of injury when appropriate: see Bench Notes> is a serious bodily injury.

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

---

## BENCH NOTES

### *Instructional Duty*

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

Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph.

The last bracketed sentence may be given on request if there is evidence of a disfiguring injury that may be repaired by medical procedures. (See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [28 Cal.Rptr.2d 783] [not error to instruct that injury may be permanent even though cosmetic repair may be medically feasible].)

## AUTHORITY

- Elements ▶ Pen. Code, § 203.
- Malicious Defined ▶ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Serious Bodily Injury Defined ▶ *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559-1560.
- Disabled ▶ See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [158 Cal.Rptr. 120] [serious ankle injury lasting over six months], overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803].
- General Intent Crime ▶ *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1226 [113 Cal.Rptr.2d 1]; *People v. Sekona* (1994) 27 Cal.App.4th 443, 453 [32 Cal.Rptr.2d 606].

- Permanent Disfigurement ▶ *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783]; ~~*People v. Goodman*~~ *Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [174 Cal.Rptr. 637] [head is member of body for purposes of disfigurement].
- Put Out Eye ▶ *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1138 [215 Cal.Rptr. 750]; *People v. Green* (1976) 59 Cal.App.3d 1, 3–4 [130 Cal.Rptr. 318] [addressing corrective lenses]; *People v. Nunes* (1920) 47 Cal.App. 346, 350 [190 P. 486].
- Slit Lip ▶ *People v. Caldwell* (1984) 153 Cal.App.3d 947, 952 [200 Cal.Rptr. 508] [defendant bit through victim's lower lip].

### **Secondary Sources**

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 84–86.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.16 (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Attempted Mayhem ▶ Pen. Code, §§ 203, 663.
- Assault ▶ Pen. Code, § 240; see *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 [159 Cal.Rptr. 111] [mayhem occurred during continuing assault].
- Battery with Serious Bodily Injury ▶ Pen. Code, § 243(d); *People v. Ausbie* (2004) 123 Cal.App.4th 855 [20 Cal.Rptr.3d 371].
- Battery ▶ Pen. Code, § 242.

Assault with force likely to produce great bodily injury (Pen. Code, § 245(a)(1)) is not a lesser included offense to mayhem. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 862-863 [20 Cal.Rptr.3d 371].)

### **RELATED ISSUES**

#### ***Disfigurement***

Disfigurement constitutes mayhem “only when the injury is permanent.” (*People v. Goodman* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783].) However, the “possibility that a victim’s disfigurement might be alleviated through

reconstructive surgery is no bar to a finding of ‘permanent’ injury.” (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1774 [54 Cal.Rptr.2d 521].) “We . . . reject [the] contention that evidence of medical alleviation may be used in a mayhem trial to prove an injury, permanent by its nature, may be corrected by medical procedures.” (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574 [28 Cal.Rptr.2d 783].) In addition, “[t]he fact that [disfiguring injuries] are on a normally unexposed portion of [a] body does not render them any less significant.” (*People v. Keenan* (1991) 227 Cal.App.3d 26, 36 [277 Cal.Rptr. 687] [burns inflicted on victim’s breasts by a cigarette].)

#### ***Imperfect Self-Defense Not Available***

“[A]part from the *McKelvy* lead opinion, there is no authority to support [the] claim that the mere use of the term ‘malicious’ in section 203 requires a court to instruct a jury that an actual but unreasonable belief will negate the malice required to convict for mayhem . . . . [Mayhem] involves a different requisite mental state and has no statutory history recognizing a malice aforethought element or the availability of the *Flannel* defense.” (*People v. Sekona* (1994) 27 Cal.App.4th 443, 457 [32 Cal.Rptr.2d 606]; contra, *People v. McKelvy* (1987) 194 Cal.App.3d 694, 702–704 [239 Cal.Rptr. 782] (lead opn. of Kline, P.J.).)

#### ***Victim Must Be Alive***

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058 [99 Cal.Rptr.2d 1, 5 P.3d 68]; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629 [138 Cal.Rptr. 250].)

**802–809. Reserved for Future Use**

## 823. Child Abuse

---

The defendant is charged [in Count \_\_] with child abuse.

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

<Alternative 1A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on a child;]

<Alternative 1B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering;]

<Alternative 1C—while having custody, caused or permitted to suffer injury>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child's person or health to be injured;]

<Alternative 1D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health might have been ~~was~~ endangered;]

<Give element 2 when giving alternative 1B, 1C, or 1D.>

[AND]

[2. The defendant was criminally negligent when (he/she) caused or permitted the child to (suffer[,]/ [or] be injured[,]/ [or] be endangered)(;/.)]

<Give element 2/3 when instructing on parental right to discipline.>

[AND]

(2/3). The defendant did not act while reasonably disciplining a child.]

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

A *child* is any 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.]

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

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

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 criminal 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.]

---

## 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, the court has a *sua sponte* duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 Cal.Rptr.2d 33].) Give bracketed element 2/3 and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Give alternative 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give alternative 1B if it is alleged that the defendant caused or permitted a child to suffer. If it is alleged that the defendant had care or custody of a child and caused or permitted the child's person or health to be injured, give alternative 1C. Finally, give alternative 1D if it is alleged that the defendant had care or custody of a child and endangered the child's person or health. (See Pen. Code, § 273a(b).)

Give bracketed element 2 and the bracketed definition of “criminal negligence” if alternative 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (See *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780].)

Give on request the bracketed definition of “unjustifiable” physical pain or mental suffering if there is a question about the necessity or degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

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, § 273a(b); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].
- Child Defined ▸ See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [in context of Pen. Code, § 273d].
- Willfully Defined ▸ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct ▸ *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926] [criminal negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135 [253 Cal.Rptr.1, 763 P.2d 852].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering ▸ *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409]; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 361 [125 Cal.Rptr. 855]; *People v. Wright* (1976) 60 Cal.App.3d 6, 14 [131 Cal.Rptr. 311].

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–163.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, §§ 142.13[1], 142.23[7] (Matthew Bender).

### **COMMENTARY**

See Commentary to CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

### **RELATED ISSUES**

See the Related Issues section of CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

**824–829. Reserved for Future Use**

## 852. Evidence of Uncharged Domestic Violence

---

The People presented evidence that the defendant committed domestic violence that was not charged in this case[, specifically: \_\_\_\_\_ <insert other domestic violence alleged>.]

<Alternative A—As defined in Pen. Code, § 13700>

[*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 who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).]

<Alternative B—As defined in Fam. Code, § 6211>

[*Domestic violence* means abuse committed against a (child/grandchild/parent/grandparent/brother/sister) of 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.

[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.]

[The term *cohabitants* means two unrelated 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, (5) the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. 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.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ <insert charged offense[s] involving domestic violence>, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ <insert charged offense[s] involving domestic violence>. The People must still prove each element of every charge beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of \_\_\_\_\_ <insert other permitted purpose, e.g., determining the defendant's credibility>].]

---

## BENCH NOTES

### *Instructional Duty*

The court must give this instruction on request when evidence of other domestic violence has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.112(f) [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor

conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

The definition of “domestic violence” contained in Evidence Code section 1109(d) was amended, effective January 1, 2005~~6~~. The definition is now in subd. (d)(3), which states that, as used in section 1109 statute now states:

~~As used in this section,~~ ‘Domestic violence’ has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to section 352, which shall include consideration of any corroboration and remoteness in time, ‘domestic violence’ has the further meaning as set forth in section 6211 of the Family Code if the act occurred no more than five years before the charged offense.

If the court determines that the evidence is admissible pursuant to the definition of domestic violence contained in Penal Code section 13700, give the definition of domestic violence labeled alternative A. If the court determines that the evidence is admissible pursuant to the definition contained in Family Code section 6211, give the definition labeled alternative B.

Depending on the evidence, give on request the bracketed paragraphs defining “emancipated minor” (see Fam. Code, § 7000 et seq.) and “cohabitant” (see Pen. Code, § 13700(b)).

In the paragraph that begins with “If you decide that the defendant committed,” the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the final sentence that begins with “Do not consider” on request.

***Related Instructions***

- CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*
- CALCRIM No. 1191, *Evidence of Uncharged Sex Offense.*
- CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person.*

## AUTHORITY

- Instructional Requirement ▶ Evid. Code, § 1109(a)(1); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- Abuse Defined ▶ Pen. Code, § 13700(a).
- Cohabitant Defined ▶ Pen. Code, § 13700(b).
- Domestic Violence Defined ▶ Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); Fam. Code, § 6211; see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Emancipation of Minors Law ▶ Fam. Code, § 7000 et seq.
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358 [96 Cal.Rptr.2d 823], fn. 8; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

### *Secondary Sources*

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Trial, § 640.

1 Witkin, *California Evidence* (4th ed. 2003) Circumstantial Evidence, § 98.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 83, *Evidence*, § 83.12[1] (Matthew Bender).

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

## COMMENTARY

The paragraph that begins with “If you decide that the defendant committed” tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with “If you decide that the defendant committed the uncharged domestic violence” may be replaced with the following:

If you decide that the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed \_\_\_\_\_ <insert charged offense involving domestic violence>. Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged offense involving domestic violence>. The People must still prove each element of \_\_\_\_\_ <insert charged offense involving domestic violence> beyond a reasonable doubt.

## RELATED ISSUES

### ***Constitutional Challenges***

Evidence Code section 1109 does not violate a defendant’s rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096 [98 Cal.Rptr.2d 696]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028–1029 [92 Cal.Rptr.2d 208]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 [91 Cal.Rptr.2d 596]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra*, 55 Cal.App.4th at pp. 184–185).

***Exceptions***

Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109 of the Evidence Code, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

### 853. Evidence of Uncharged Abuse of Elder or Dependent Person

---

The People presented evidence that the defendant committed abuse of (an elder/a dependent person) that was not charged in this case[, specifically: \_\_\_\_\_ *<insert other abuse alleged>.*] *Abuse of (an elder/a dependent person)* means (physical abuse[,]/ [or] sexual abuse[,]/ [or] neglect[,]/ [or] financial abuse[,]/ [or] abandonment[,]/ [or] isolation[,]/ [or] abduction[,]/[or] the act by a care custodian of not providing goods or services that are necessary to avoid physical harm or mental suffering[,]/ [or] [other] treatment that results in physical harm or pain or mental suffering).

[An *elder* is a person residing in California who is age 65 or older.]

[A *dependent person* is a person who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have significantly diminished because of age.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged abuse of (an elder/a dependent person). 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.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit abuse of (an elder/a dependent person), and based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ *<insert charged offense[s] involving abuse of elder or dependent person>*, as charged here. If you conclude that the defendant committed the uncharged abuse of (an elder/a dependent person), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ *<insert charged offense[s] involving abuse of elder or dependent person>*. The People must still prove each element of every charge beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of \_\_\_\_\_ <insert other permitted purpose, e.g., determining the defendant's credibility>].]

---

## BENCH NOTES

### *Instructional Duty*

The court must give this instruction on request when evidence of other abuse of an elder or dependent person has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.112(g) [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

Depending on the evidence, give on request the bracketed definition of an elder or dependent person. (See Welf. & Inst. Code, §§ 15610.23 [dependent adult], 15610.27 [elder].) Other terms may be defined on request depending on the evidence. See the Authority section below for references to selected definitions from the Elder Abuse and Dependent Adult Civil Protection Act. (See Welf. & Inst. Code, § 15600 et seq.)

In the paragraph that begins with “If you decide that the defendant committed,” the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96

Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with “Do not consider” on request.

***Related Instructions***

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, or Common Plan, etc.*

CALCRIM No. 852, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 1191, *Evidence of Uncharged Sex Offense.*

**AUTHORITY**

- Instructional Requirement ▶ Evid. Code, § 1109(a)(2).
- Abandonment Defined ▶ Welf. & Inst. Code, § 15610.05.
- Abduction Defined ▶ Welf. & Inst. Code, § 15610.06.
- Abuse of Elder or Dependent Person Defined ▶ Evid. Code, § 1109(d)(1).
- Care Custodian Defined ▶ Welf. & Inst. Code, § 15610.17.
- Dependent Person Defined ▶ Evid. Code, § 177.
- Elder Defined ▶ Welf. & Inst. Code, § 15610.27.
- Financial Abuse Defined ▶ Welf. & Inst. Code, § 15610.30.
- Goods and Services Defined ▶ Welf. & Inst. Code, § 15610.35.
- Isolation Defined ▶ Welf. & Inst. Code, § 15610.43.
- Mental Suffering Defined ▶ Welf. & Inst. Code, § 15610.53.
- Neglect Defined ▶ Welf. & Inst. Code, § 15610.57.
- Physical Abuse Defined ▶ Welf. & Inst. Code, § 15610.63.
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [in context of prior domestic violence offenses]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

## *Secondary Sources*

1 Witkin, California Evidence (4th ed. 2003) Circumstantial Evidence, § 98.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, Evidence, § 83.12[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, Crimes Against the Person, § 142.13[5] (Matthew Bender).

## COMMENTARY

The paragraph that begins with “If you decide that the defendant committed” tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with “If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person)” may be replaced with the following:

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person>. Remember, however, that evidence of uncharged abuse of (an elder/a dependent person) is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person>. The People must prove each element of \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person> beyond a reasonable doubt.

## RELATED ISSUES

### *Exceptions*

Evidence of abuse of an elder or dependent person occurring more than 10 years before the charged offense is inadmissible under Evidence Code section 1109, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of

administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*; CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*; and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

**854–859. Reserved for Future Use**

**945. Simple Battery Against Peace Officer**

The defendant is charged [in Count \_\_\_] with battery against a peace officer.

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

1. \_\_\_\_\_ <Insert officer's name, excluding title> was a peace officer performing the duties of (a/an) \_\_\_\_\_ <insert title of peace officer specified in Pen. Code, § 830 et seq.>;

2. The defendant willfully [and unlawfully] touched \_\_\_\_\_ <insert officer's name, excluding title> in a harmful or offensive manner;

[AND]

3. When the defendant acted, (he/she) 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 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).]

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 slightest touching can be enough to commit a battery 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.]

[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 \_\_\_\_\_ <insert title of officer> **include** \_\_\_\_\_ <insert job duties>.]

[It does not matter whether \_\_\_\_\_ <insert officer's name, excluding title> was actually on duty at the time.]

[A \_\_\_\_\_ <insert title of peace officer specified in Pen. Code, § 830 et seq.> is also performing the duties of a peace officer if (he/she) is in a police uniform and performing the duties required of (him/her) as a peace officer and, at the same time, is working in a private capacity as a part-time or casual private security guard or (patrolman/patrolwoman).]

<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 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<sub>5</sub>, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) 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*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give the bracketed paragraph on indirect touching if that is an issue.

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, “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].)

Give the bracketed language about a peace officer working in a private capacity if relevant. (Pen. Code, § 70.)

## AUTHORITY

- Elements ▶ Pen. Code, §§ 242, 243(b), (c)(2); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- 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, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Assault ▶ Pen. Code, § 240.
- Assault on Specified Victim ▶ Pen. Code, § 241(b).
- Battery ▶ Pen. Code, § 242.
- Misdemeanor Battery on Specified Victim ▶ Pen. Code, § 243(b).
- Resisting Officer ▶ Pen. Code, § 148.

### **RELATED ISSUES**

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and 2670, *Lawful Performance: Peace Officer*.

### 1030. Sodomy by Force, Fear, or Threats

---

The defendant is charged [in Count    ] with sodomy by force.

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

1. The defendant committed an act of sodomy with another person;
2. The other person did not consent to the act;

AND

3. The defendant accomplished the act:

*<Alternative 3A—force or fear>*

[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone~~anyone~~.]

*<Alternative 3B—future threats of bodily harm>*

[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

*<Alternative 3C—threat of official action>*

[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

*Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]

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

[Evidence that the defendant and the other person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the other person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.]

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or he or she is actually but unreasonably afraid and the defendant knows of his or her fear and takes advantage of it].]

<Defense: Reasonable Belief in Consent>

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

---

## BENCH NOTES

### *Instructional Duty*

The court has a *sua sponte* duty to give an instruction defining the elements of sodomy. (Pen. Code, § 286(c)(2) & (3), (k); *People v. Martinez* (1986) 188 Cal.App.3d 19, 24–26 [232 Cal.Rptr. 736]; *People v. Moore* (1989) 211 Cal.App.3d 1400, 1407 [260 Cal.Rptr. 134].)

The court should select the appropriate alternative in element 3 to instruct how the sodomy was accomplished.

### ***Defenses—Instructional Duty***

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.” (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

### **AUTHORITY**

- Elements ▶ Pen. Code, § 286(c)(2) & (3), (k).
- Consent Defined ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined ▶ *People v. Leal* (2004) 33 Cal.4th 999, ~~1001–1002~~ 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined ▶ Pen. Code, § 261(c) [in context of rape].
- Sodomy Defined ▶ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Threatening to Retaliate Defined ▶ Pen. Code, § 286(l).
- Fear Defined ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25, 26, 28.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [2] (Matthew Bender).

## COMMENTARY

Penal Code section 286 requires that the sodomy be “against the will” of the other person. (Pen. Code, § 286(c)(2) & (3), (k).) “Against the will” has been defined as “without consent.” (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of “fear” because that term has meaning in the context of forcible sodomy that is technical and may not be readily apparent to jurors. (See; *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 286 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of “duress” is based on *People v. Leal* (2004) 33 Cal.4th 999, ~~1001–1002~~ 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of “menace” is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal*, *supra*, 33 Cal.4th at pp. ~~1001–1002~~ 1004–1010, the court held that the statutory definition of “duress” contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of “menace.” The court should consider the *Leal* opinion before giving the definition of “menace.”

The term “force” as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin*, *supra*, the Supreme Court further stated,

Nor is there anything in the common usage definitions of the term “force,” or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in an act of consensual sexual intercourse. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) To the contrary, it has long been recognized that “in order to establish force within the meaning of section 261, [former]

subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361] . . . .)

(*Ibid.* [emphasis in original] see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].)

The committee has provided a bracketed definition of “force,” consistent with *People v. Griffin, supra*, that the court may give on request.

### LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Assault With Intent to Commit Sodomy ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Forcible Sodomy ▶ Pen. Code, §§ 664, 286.
- Battery ▶ Pen. Code, § 242; *People v. Hughes* (2002) 27 Cal.4th 287, 366 [116 Cal.Rptr.2d 401, 39 P.3d 432].

Non-forcible sex crimes requiring the perpetrator and victim to be within certain age limits are not lesser included offenses of forcible sex crimes. (*People v. Scott* (2000) 83 Cal.App.4th 784, 794 [100 Cal.Rptr.2d 70].)

### RELATED ISSUES

#### ***Consent Obtained by Fraudulent Representation***

A person may also induce someone else to consent to engage in sodomy by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant’s argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

### ***Consent Withdrawn***

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sodomy was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

### ***Victim Must Be Alive***

Sodomy requires that the victim be alive at the moment of penetration. (*People v. Davis* (1995) 10 Cal.4th 463, 521, fn. 20 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176 [270 Cal.Rptr. 286, 791 P.2d 965].) Sodomy with a deceased victim can constitute attempted sodomy if the defendant attempted an act of forcible sodomy while the victim was alive or with the mistaken belief that the victim was alive. (*People v. Davis, supra*, 10 Cal.4th at p. 521, fn. 20; *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683].)

### ***Penetration May Be Through Victim's Clothing***

If there is penetration into a victim's anus by a perpetrator's sexual organ, it is sodomy, even if the victim is wearing clothing at the time. (*People v. Ribera* (2005) 133 Cal.App.4th 81, 85-86).

**1112. Lewd or Lascivious Act: Child 14 or 15 Years**

---

The defendant is charged [in Count \_\_] with a lewd or lascivious act on a 14- or 15-year-old child who was at least 10 years younger than the defendant.

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

*<Alternative 1A—defendant touched child>*

**[1A. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing;]**

**[OR]**

*<Alternative 1B—child touched defendant>*

**[1B. The defendant willfully caused a child to touch (his/her) own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;]**

- 2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child;**
- 3. The child was (14/15) years old at the time of the act;**

**AND**

- 4. When the defendant acted, the child was at least 10 years younger than the defendant.**

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.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.]

[It is not a defense that the child may have consented to the act.]

[In determining whether a person is at least 10 years older than a child, measure from the person's birthdate to the child's birthdate.]

[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.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra*, 51 Cal.3d at pp. 321–322.

Give the bracketed sentence that begins, “Actually arousing, appealing to,” on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Give the bracketed paragraph that begins with “It is not a defense that the child,” on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

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

## AUTHORITY

- Elements ▶ Pen. Code, § 288(c)(1).
- Actual Arousal Not Required ▶ *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse ▶ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].

- Child Touching Own Body Parts at Defendant's Instigation ▶ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] [“constructive” touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Lewd Defined ▶ *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Minor's Consent Not a Defense ▶ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].
- Mistaken Belief About Victim's Age Not a Defense ▶ *People v. Paz* (2000) 80 Cal.App.4th 293, 298 [95 Cal.Rptr.2d 166].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–40, 44–46.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][iii], [b]–[d] (Matthew Bender).

### LESSER INCLUDED OFFENSES

- ~~Attempted Lewd Act With Child Under 14 ▶ Pen. Code, §§ 664, 288(c)(1); *People v. Imler* (1992) 9 Cal.App.4th 1178, 1181–1182 [11 Cal.Rptr.2d 915]; *People v. Herman* (2002) 97 Cal.App.4th 1369, 1389–1390 [119 Cal.Rptr.2d 199].~~
- Simple Assault ▶ Pen. Code, § 240.
- Simple Battery ▶ Pen. Code, § 242.

### RELATED ISSUES

See the Related Issues section of the Bench Notes for CALCRIM No. 1110, *Lewd or Lascivious Act: Child Under 14 Years*.

**1113–1119. Reserved for Future Use**

## 1162. Soliciting Lewd Conduct in Public

The defendant is charged [in Count    ] with soliciting another person to engage in lewd conduct in public.

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 the touching of ((his/her) own/ [or] another person's) genitals, buttocks, or female breast;
2. The defendant requested that the other person engage in the requested conduct in (a public place/ [or] a place open to the public [or ~~to~~in public view]);
3. When the defendant made the request, (he/she) was in (a public place/ [or] a place open to the public [or in public view]);
4. The defendant intended for the conduct to occur in (a public place/ [or] a place open to the public [or in public view]);

~~5.3.~~ When the defendant made the request, (he/she) proposed conduct did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;

~~5.~~

~~4.~~ When the defendant made the request, a third person who might have been offended by the conduct was present;

~~7.~~

[AND]

~~8.4.~~ The defendant knew or reasonably should have known that it was possible someone would ~~might be present who could~~ might be offended by the requested conduct ~~who might have been offended by the conduct was present(;/.)~~

<Give element ~~755~~ when instructing that person solicited must receive message; see Bench Notes.>

[AND

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

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

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

---

## 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. Saepanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saepanh*, 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 7.

## AUTHORITY

- Elements ▶ Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4 [181 Cal.Rptr. 723].
- Willfully Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Solicitation Requires Specific Intent ▶ *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134].
- 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. Saepanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].

- “Lewd” and “Dissolute” Synonymous ▶ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined ▶ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined ▶ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant’s home not a “public place”].

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 46–47.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order* § 144.20 (Matthew Bender).

### **RELATED ISSUES**

See the Related Issues sections of CALCRIM No. 1161, *Lewd Conduct in Public* and CALCRIM No. 441, *Solicitation: Elements*.

**1163–1169. Reserved for Future Use**

## 1170. Failure to Register as Sex Offender

---

The defendant is charged [in Count \_\_\_] with failing to register as a sex offender.

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

1. The defendant was previously (convicted of/found to have committed) \_\_\_\_\_ <specify the offense for which the defendant is allegedly required to register>;
2. The defendant resided (in \_\_\_\_\_ <insert name of city>, California/in an unincorporated area or a city with no police department in \_\_\_\_\_ <insert name of county> County, California/on the campus or in the facilities of \_\_\_\_\_ <insert name of university or college>);
3. The defendant actually knew (he/she) had a duty to register as a sex offender under Penal Code section 290 [within five working days of (his/her) birthday] wherever (he/she) resided;

AND

<Alternative 4A—change of residence>

- [4. The defendant willfully failed to register as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus or its facilities) within five working days of (coming into/ [or] changing (his/her) residence within) that (city/county/campus).]

<Alternative 4B—birthday>

- [4. The defendant willfully failed to annually update (his/her) registration as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus) within five working days of (his/her) birthday.]

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

---

## BENCH NOTES

### *Instructional Duty*

The court has a *sua sponte* duty to give this instruction defining the elements of the crime. This instruction is based on the language of the statute effective January 1, 2004<sup>6</sup>. The instruction may not be appropriate for offenses that occurred prior to that date. Note also that this is an area where case law is developing rapidly. The court should review recent decisions on Penal Code section 290 before instructing.

In element 4, give alternative 4A if the defendant is charged with failing to register within five working days of changing his or her residence or becoming homeless. (Pen. Code, § 290(a)(1)(A).) Give alternative 4B if the defendant is charged with failing to update his or her registration within five working days of his or her birthday. (Pen. Code, § 290(a)(1)(D).) If alternative 4B is given, also give the bracketed phrase in element 3.

If the defendant is charged with a prior conviction for failing to register, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (See *People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr. 2d 21]; *People v. Bouzas* (1991) 53 Cal.3d 467, 477-480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].)

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].) The court should consider whether it is more appropriate to give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, or to give a modified version of CALCRIM No. 250, *Union Of Act And Intent: General Intent*, as explained in the Related Issues section to CALCRIM No. 250.

## AUTHORITY

- Elements ▸ Pen. Code, § 290(a)(1)(A) [change in residence] & (a)(1)(D) [birthday]; *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Willfully Defined ▸ Pen. Code, § 7, subd. 1; see *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260].

- Actual Knowledge of Duty Required ▶ *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Continuing Offense ▶ *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527–528 [63 Cal.Rptr.2d 322, 936 P.2d 101].
- General Intent Crime ▶ *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260]; *People v. Johnson* (1998) 67 Cal.App.4th 67, 72 [78 Cal.Rptr.2d 795].
- No Duty to Define Residence ▶ *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219 [64 Cal.Rptr.2d 545].
- Registration is Not Punishment ▶ *In re Alva* (2004) 33 Cal.4th 254, 262 [14 Cal.Rptr.3d 811, 92 P.3d 311].
- Jury May Consider Evidence That Significant Involuntary Condition Deprived Defendant of Actual Knowledge ▶ *People v. Sorden* (2005) 36 Cal.4th 65, 72.

### *Secondary Sources*

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 184–188.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.04[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.20[1][a], Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

## RELATED ISSUES

### *Other Violations of Section 290*

This instruction applies to violations under Penal Code section 290(a)(1)(A) and (a)(1)(D). Section 290 imposes numerous other duties on persons convicted of sex offenses. For example, a registered sex offender must:

1. Notify the agency where he or she was *last* registered of any new address or location, whether inside or outside California, or any name change. (See Pen. Code, § 290(f)(1)(A-C) & (3); *People v. Smith* (2004) 32 Cal.4th 792, 800–802 [11 Cal.Rptr.3d 290] [under former Pen. Code, § 290(f), which allowed notice of change of address in writing, there is sufficient notice if defendant mails change of address form even if agency does not receive it]; *People v. Annin* (2004) 116 Cal.App.4th

725, 737–740 [10 Cal.Rptr.3d 712] [discussing meaning of “changed” residence]; *People v. Davis* (2002) 102 Cal.App.4th 377, 385 [125 Cal.Rptr.2d 519] [must instruct on requirement of actual knowledge of duty to notify law enforcement moving out of jurisdiction]; see also *People v. Franklin* (1999) 20 Cal.4th 249, 255–256 [84 Cal.Rptr.2d 241, 975 P.2d 30] [construing former Pen. Code, § 290(f), which did not specifically require registration when registrant moved outside California].)

2. Register multiple residences wherever he or she regularly resides. (See Pen. Code, § 290(a)(1)(B); *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222 [127 Cal.Rptr.2d 662] [court failed to instruct that jury must find that defendant actually knew of duty to register multiple residences]; *People v. Vigil* (2001) 94 Cal.App.4th 485, 501 [114 Cal.Rptr.2d 331].)
3. Update his or her registration at least once every 30 days if he or she is “a transient.” (See Pen. Code, § 290(a)(1)(C).)

A sexually violent predator who is released from custody must verify his or her address at least once every 90 days and verify any place of employment. (See Pen. Code, § 290(a)(1)(E).) Other special requirements govern:

1. Residents of other states who must register in their home state but are working or attending school in California. (See Pen. Code, § 290(a)(1)(G).)
2. Sex offenders enrolled at, employed by, or carrying on a vocation at any university, college, community college, or other institution of higher learning. (See Pen. Code, § 290.01.)

| In addition, providing false information on the registration form is a violation of section 290(g)(2). (See also *People v. Chan* (2005) 128 Cal.App.4th 408 [26 Cal.Rptr.3d 878].)

### ***Forgetting to Register***

If a person actually knows of his or her duty to register, “just forgetting” is not a defense. (*People v. Barker* (2004) 34 Cal.4th 345, 356357 [18 Cal.Rptr.3d 260].) In reaching this conclusion, the court stated, “[w]e do not here express an opinion as to whether forgetfulness resulting from, for example, an *acute psychological condition*, or a *chronic deficit of memory or intelligence*, might negate the willfulness required for a section 290 violation.” (*Id.* at p. 358 [italics in original].)

### ***Registration Requirement for Consensual Oral Copulation With Minor***

Penal Code section 290 requires lifetime registration for a person convicted of consensual oral copulation with a minor but does not require such registration for a person convicted of consensual sexual intercourse with a minor. (Pen. Code, § 290(a)(2)(A).) The mandatory registration requirement for consensual oral copulation with a minor is unenforceable because this disparity denies equal protection of the laws. (*People v. Hofsheier* 37 Cal.4th 1185, 1191, 1205-1206.) A defendant convicted of consensual oral copulation with a minor might, however, be required to register pursuant to judicial discretion under section 290(a)(2)(E). (*Id.* at 1208) ~~Two cases are currently pending before the Supreme Court currently raising the question of whether this distinction violates equal protection.~~

### ***Moving Between Counties—Failure to Notify County Leaving and County Moving To Can Only Be Punished as One Offense***

A person who changes residences a single time, failing to notify both the jurisdiction he or she is departing from and the jurisdiction he or she is entering, commits two violations of Penal Code section 290 but can only be punished for one. (*People v. Britt* (2004) 32 Cal.4th 944, 953–954 [12 Cal.Rptr.2d 66, 87 P.3d 812].) Further, if the defendant has been prosecuted in one county for the violation, and the prosecutor in the second county is aware of the previous prosecution, the second county cannot subsequently prosecute the defendant. (*Id.* at pp. 955–956.)

### ***Notice of Duty to Register on Release From Confinement***

No reported case has held that the technical notice requirements are elements of the offense, especially when the jury is told that they must find the defendant had actual knowledge. (See Pen. Code, § 290(b); *People v. Garcia* (2001) 25 Cal.4th 744, 754, 755–756 [10 Cal.Rptr.2d 355, 23 P.3d 590] [if defendant willfully and knowingly failed to register, *Buford* does not require reversal merely because authorities failed to comply with technical requirements]; see also *People v. Buford* (1974) 42 Cal.App.3d 975, 987 [117 Cal.Rptr. 333] [revoking probation for noncompliance with section 290, an abuse of discretion when court and jail officials also failed to comply].) The court in *Garcia* did state, however, that the “court’s instructions on ‘willfulness’ should have required proof that, in addition to being formally notified by the appropriate officers as required by section 290, in order to willfully violate section 290 the defendant must actually know of his duty to register.” (*People v. Garcia, supra*, 25 Cal.4th at p. 754.)

**1171–1179. Reserved for Future Use**

## 1300. Criminal Threat

---

The defendant is charged [in Count \_\_\_] with having made a criminal threat.

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>;
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 [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; see 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, 684 [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, 1016 [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, 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, 629–628 [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], 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 [70 Cal.Rptr.2d 644].)

### 1303. Terrorism By Symbol (New)

---

The defendant is charged [in Count \_\_] with terrorizing by use of a symbol.

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

1. The defendant placed or displayed a sign, mark, symbol, emblem, or physical impression on the private property of another person;
2. The defendant did not have authorization to place or display the ~~symbol~~ sign, symbol, emblem or physical impression on the property;

[AND]

3. The defendant committed (this/these) act[s] with the intent to terrorize the owner or occupant of the property [or with reckless disregard of the risk of terrorizing the owner or occupant of the property].

<Include the fourth element in Penal Code section 11411(b) prosecutions>

[AND]

4. The defendant committed these acts on two or more occasions.]

*To terrorize* means to cause a person of ordinary emotions and sensibilities to fear for his or her personal safety.

<Alternative A – Reckless Disregard: General Definition>

[A person acts with *reckless disregard* when (1) he or she knows there is a substantial and unjustifiable risk that his or her act will terrorize the owner or occupant, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

<Alternative B – Reckless Disregard: Voluntary Intoxication>

[A person acts with *reckless disregard* when (1) he or she does an act that presents a substantial and unjustifiable risk of terrorizing the owner or occupant, and (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

---

## BENCH NOTES

### *Instructional Duty*

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

Give alternative A or B depending on whether or not there is evidence that the defendant was voluntary intoxicated.

The legislature included the Nazi swastika as an example of a prohibited symbol.

Although Pen. Code, § 11411 states that reckless disregard may provide the necessary mental state for committing this crime, this provision may run counter to the Supreme Court's holding in *Virginia v. Black* (2003) 538 U.S. 343, 365-366 [without specific intent requirement, statute prohibiting cross burning was unconstitutional.]

## AUTHORITY

- Elements ▶ Pen. Code, §§ 11411(a) & (b).
- Definition of Reckless Disregard per Pen. Code, § 11411(c) ▶ *People v. Carr* (2000) 81 Cal.App.4th 837, 845–846 [97 Cal.Rptr.2d 143] [noting that voluntary intoxication is not a defense to violations of Pen. Code, § 11411].
- Requirement of Specific Intent ▶ *Virginia v. Black* (2003) 538 U.S. 343, 365-366.

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 18.

### 1304. Cross Burning and Religious Symbol Desecration (New)

---

The defendant is charged [in Count \_\_] with (Terrorism by Cross Burning/Terrorism by Religious Symbol Desecration).

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

*<Alternative A - Private Property>*

1. The defendant burned or desecrated a religious symbol \_\_\_\_\_ *<insert type of religious symbol>* on the private property of another person;
2. The defendant knew the object that he or she burned or desecrated was a religious symbol;
3. The defendant did not have authorization to burn or desecrate the religious symbol on the property; and
4. The defendant committed (this/these) act[s] with the intent to terrorize the owner or occupant of the property [or with reckless disregard of the risk of terrorizing the owner or occupant of the property].

*<Alternative B - School Grounds>*

1. The defendant burned or desecrated a \_\_\_\_\_ *<insert type of religious symbol>* on a the property of a primary school, (junior high school/middle school), or high school;
2. The defendant knew the object that he or she burned was a religious symbol; and
3. The defendant committed (this/these) act[s] with the intent to terrorize any person who attends the school, works at the school or is associated with the school.

*To terrorize* means to cause a person of ordinary emotions and sensibilities to fear for his or her personal safety.

<Alternative A – Reckless Disregard: General Definition>

[A person acts with *reckless disregard* when (1) he or she knows there is a substantial and unjustifiable risk that his or her act will terrorize the owner or occupant, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

<Alternative B – Reckless Disregard: Voluntary Intoxication>

[A person acts with *reckless disregard* when (1) he or she does an act that presents a substantial and unjustifiable risk of terrorizing the owner or occupant, but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

---

## BENCH NOTES

### *Instructional Duty*

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

Give alternative A or B regarding reckless disregard depending on whether or not there is evidence that the defendant was voluntary intoxicated.

Although Pen. Code, § 11411 states that reckless disregard may provide the necessary mental state for committing this crime, this provision may run counter to the Supreme Court's holding in *Virginia v. Black* (2003) 538 U.S. 343, 365-366 [without specific intent requirement, statute prohibiting cross burning was unconstitutional.]

## AUTHORITY

- Elements ▶ Pen. Code, § 11411(c).
- Definition of Reckless Disregard per Pen. Code, § 11411(c) ▶ *People v. Carr* (2000) 81 Cal.App.4th 837, 845–846 [97 Cal.Rptr.2d 143] [noting that voluntary intoxication is not a defense to violations of Pen. Code, § 11411].
- Requirement of Specific Intent ▶ *Virginia v. Black* (2003) 538 U.S. 343, 365-366.

*Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 18.

### 1305. Obstructing Religion By Threat (New)

---

The defendant is charged [in Count \_\_\_] with obstructing religion by threat.

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

1. The defendant caused or attempted to cause a person to refrain from (exercising his or her religion/engaging in a religious service) by threatening to inflict an unlawful injury upon that person or upon property;
2. The defendant directly communicated the threat to that person;
3. The person reasonably believed the threat could be carried out; and

*<Alternative A – Exercising religion>*

4. At the time the defendant made the threat, (he/she) intended to cause the person to refrain from exercising his or her religion.

*<Alternative B – Religious service>*

4. At the time the defendant made the threat, (he/she) intended to cause the person to refrain from engaging in a religious service.

---

### BENCH NOTES

#### *Instructional Duty*

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

Give alternative A or B depending on the alleged intent of the defendant.

### AUTHORITY

- Elements ▶ Pen. Code, § 11412.

*Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 19.

**1306-1349. Reserved for Future Use**

### 1400. Active Participation in Criminal Street Gang

---

The defendant is charged [in Count \_\_] with participating in a criminal street gang.

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.

*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)>*;

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)>

**1A. [any combination of two or more of the following crimes]:**

<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25)>;

**[OR]**

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)-(30)>

**1B. any combination of** <insert crime or crimes in Pen. Code, § 186.22(e)(26)-(30)> **and** <insert one or more crimes from Pen. Code, § 186.22(e)(1)-(25)>;

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)-(2530) 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 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.]

---

## 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) 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). 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). (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].) 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].
- 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, subd. 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. Loewen* (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 1448, 1458, fn. 4 [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.)

## 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].)

## 1401. Felony Committed for Benefit of Criminal Street Gang

---

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 offense[s] of \_\_\_\_\_ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[, ]/ at the direction of[, ]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[You must also decide whether the crime[s] charged in Count[s] \_\_\_\_ (was/were) committed on the grounds of, or within 1,000 feet of a public or private (elementary/ [or] vocational/ [or] junior high/ [or] middle school/ [or] high) school open to or being used by minors for classes or school-related programs at the time.]

To prove this allegation, the People must prove that:

1. The defendant (committed/ [or] attempted to commit) the crime (for the benefit of[, ]/ at the direction of[, ]/ [or] in association with) a criminal street gang;

AND

2. The defendant intended to assist, further, or promote criminal conduct by gang members.

*<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)>*;

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 alleged crime or crimes are in Pen. Code, § 186.22(e)(1)-(25)>

**1A. [any combination of two or more of the following crimes]:**

<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25)>;

**[OR]**

<Give 1B if one or more of the alleged crimes are in Pen. Code, § 186.22(e)(26)-(30)>

**1B. any combination of** <insert alleged crime or crimes in Pen. Code, § 186.22(e)(26)-(30)> **and** <insert one or more crimes from Pen. Code, § 186.22(e)(1)-(25)>;

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 crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[The People need not prove that the defendant is an active or current member of the alleged criminal street gang.]

[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.]

To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(2530)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

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 sentencing enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

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) 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). 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). (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 element 1 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].) Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank.~~

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of “criminal street gang” or “pattern of criminal gang activity.”

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 Gang Evidence*.

The court may bifurcate the trial on the gang enhancement, at its discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 [16 Cal.Rptr.3d 880, 94 P.3d 1080].)

#### ***Related Instructions***

CALCRIM No. 1400, *Participation in Criminal Street Gang*.

## AUTHORITY

- Elements ▶ Pen. Code, § 186.22(b)(1).
- 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]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required ▶ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▶ *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].

### *Secondary Sources*

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 25.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03 (Matthew Bender).

## RELATED ISSUES

### *Commission On or Near School Grounds*

In imposing a sentence under Penal Code section 186.22(b)(1), it is a circumstance in aggravation if the defendant's underlying felony was committed on or within 1,000 feet of specified schools. (Pen. Code, § 186.22(b)(2).)

### *Enhancements for Multiple Gang Crimes*

Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple criminal intents. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339–340 [65 Cal.Rptr.2d 338].)

### ***Wobblers***

Specific punishments apply to any person convicted of an offense punishable as a felony or a misdemeanor that is committed for the benefit of a criminal street gang and with the intent to promote criminal conduct by gang members. (See Pen. Code, § 186.22(d); see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909 [135 Cal.Rptr.2d 30, 69 P.3d 951].) However, the felony enhancement provided by Penal Code section 186.22(b)(1) cannot be applied to a misdemeanor offense made a felony pursuant to section 186.22(d). (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1449 [118 Cal.Rptr.2d 380].)

### ***Murder—Enhancements Under Penal Code section 186.22(b)(1) Do Not Apply***

The enhancements provided by Penal Code section 186.22(b)(1) do not apply to crimes “punishable by imprisonment in the state prison for life . . .” (Pen. Code, § 186.22(b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [22 Cal.Rptr.3d 869, 103 P.3d 270].) Thus, the ten-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang does not apply to the crime of murder.

See also the Related Issues Section to CALCRIM No. 1400, *Participation in Criminal Street Gang*.

## 1750. Receiving Stolen Property

---

The defendant is charged [in Count \_\_] with receiving stolen property.

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

1. The defendant (bought/received/sold/aided in selling/concealed or withheld from its owner/aided in concealing or withholding from its owner) property that had been (stolen/obtained by extortion);

[AND]

2. When the defendant (bought/received/sold/aided in selling/concealed or withheld/aided in concealing or withholding) the property, (he/she) knew that the property had been (stolen/obtained by extortion)(;/.)

<Give element 3 when instructing on knowledge of presence of property; see Bench Notes>

[AND]

3. The defendant actually knew of the presence of the property.]

[Property is *stolen* if it was obtained by any type of theft, or by burglary or robbery. [Theft includes obtaining property by larceny, embezzlement, false pretense, or trick.]]

[Property is *obtained by extortion* if: (1) the property was obtained from another person with that person's consent, and (2) that person's consent was obtained through the use of force or fear.]

[To *receive property* means to take possession and control of it. Mere presence near or access to the property is not enough.] [Two or more people can possess the property 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.]

---

## 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 also charged with a theft crime, the court has a **sua sponte** duty to instruct that the defendant may not be convicted of both theft and receiving the same stolen property. (*People v. Garza* (2005) 35 Cal.4th 866, 881-882 [upholding dual convictions for receiving stolen property and a violation of Vehicle Code section 10851(a) as a nontheft conviction for post-theft driving].)

If substantial evidence exists, a specific instruction must be given on request that the defendant must have knowledge of the presence of the stolen goods. (*People v. Speaks* (1981) 120 Cal.App.3d 36, 39-40 [174 Cal.Rptr. 65]; see *People v. Gory* (1946) 28 Cal.2d 450, 455-456, 458-459 [170 P.2d 433] [possession of narcotics requires knowledge of presence]; see also discussion of voluntary intoxication in Related Issues, below.) Give bracketed element 3 when supported by the evidence.

### *Related Instructions*

For instructions defining extortion and the different forms of theft, see series 1800, Theft and Extortion. On request, the court should give complete instruction on the elements of theft or extortion.

For an instruction about when guilt may be inferred from possession of recently stolen property, see CALCRIM No. 376, *Possession of Recently Stolen Property as Evidence of a Crime*.

## AUTHORITY

- Elements ▶ Pen. Code, § 496(a); *People v. Land* (1994) 30 Cal.App.4th 220, 223 [35 Cal.Rptr.2d 544].
- Extortion Defined ▶ Pen. Code, § 518.
- Theft Defined ▶ Pen. Code, § 490a.
- Concealment ▶ *Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 343-344 [146 Cal.Rptr. 311].
- General Intent Required ▶ *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 [161 Cal.Rptr. 680] [general intent crime]; but see *People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39] [knowledge element is a “specific mental state”].

- Knowledge Element ▶ *People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39].
- Possession and Control ▶ *People v. Land* (1994) 30 Cal.App.4th 220, 223–224 [35 Cal.Rptr.2d 544]; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336 [75 Cal.Rptr. 616]; see *People v. Gatlin* (1989) 209 Cal.App.3d 31, 44–45 [257 Cal.Rptr. 171] [constructive possession means knowingly having the right of control over the property directly or through another]; *People v. Scott* (1951) 108 Cal.App.2d 231, 234 [238 P.2d 659] [two or more persons may jointly possess property].
- Stolen Property ▶ *People v. Kunkin* (1973) 9 Cal.3d 245, 250 [107 Cal.Rptr. 184, 507 P.2d 1392] [theft]; see, e.g., *People v. Candiotto* (1960) 183 Cal.App.2d 348, 349 [6 Cal.Rptr. 876] [burglary]; *People v. Siegfried* (1967) 249 Cal.App.2d 489, 493 [57 Cal.Rptr. 423] [robbery].

### **Secondary Sources**

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Property, §§ 72–81.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 143, *Crimes Against Property*, §§ 143.01[2][c], 143.03, 143.10[2][c], [d] (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Attempted Receiving Stolen Property ▶ Pen. Code, §§ 664, 496(d); *People v. Rojas* (1961) 55 Cal.2d 252, 258 [10 Cal.Rptr. 465, 358 P.2d 921] [stolen goods recovered by police were no longer “stolen”]; *People v. Moss* (1976) 55 Cal.App.3d 179, 183 [127 Cal.Rptr. 454] [antecedent theft not a necessary element].

Theft by appropriation of lost property (Pen. Code, § 485) is not a necessarily included offense of receiving stolen property. (*In re Greg F.* (1984) 159 Cal.App.3d 466, 469 [205 Cal.Rptr. 614].)

### **RELATED ISSUES**

#### ***Defense of Voluntary Intoxication or Mental Disease***

Though receiving stolen property is a general intent crime, one element of the offense is knowledge that the property was stolen, a specific mental state. With regard to the element of knowledge, receiving stolen property is a “specific intent

crime” as that term is used in Penal Code sections 22(b) and 28(a). (*People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39].) Therefore, the defendant should have the opportunity to introduce evidence and request instructions regarding the lack of requisite knowledge. (*Id.* at p. 986; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131 [77 Cal.Rptr.2d 428, 959 P.2d 735]; but see *People v. Atkins* (2001) 25 Cal.4th 76, 96 [104 Cal.Rptr.2d 738, 18 P.3d 660] (conc. opn. of Brown, J.) [criticizing *Mendoza* and *Reyes* as wrongly transmuting a knowledge requirement into a specific intent].) See CALCRIM No. 3426, *Voluntary Intoxication*.

#### ***Dual Convictions Prohibited***

A person may not be convicted of stealing and of receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706]; see *People v. Tatum* (1962) 209 Cal.App.2d 179, 183 [25 Cal.Rptr. 832].) See CALCRIM No. 3516, *Multiple Counts: Alternative Charges For One Event*.

#### ***Receiving Multiple Items on Single Occasion***

A defendant who receives more than one item of stolen property on a single occasion commits one offense of receiving stolen property. (See *People v. Lyons* (1958) 50 Cal.2d 245, 275 [324 P.2d 556].)

#### ***Specific Vendors***

The Penal Code establishes separate crimes for specific persons buying or receiving particular types of stolen property, including the following:

1. Swap meet vendors and persons dealing in or collecting merchandise or personal property. (Pen. Code, § 496(b).)
2. Dealers or collectors of junk metals or secondhand materials who buy or receive particular metals used in providing telephone, transportation, or public utility services. (Pen. Code, § 496a(a).)
3. Dealers or collectors of secondhand books or other literary materials. (Pen. Code, § 496b [misdemeanors].)
4. Persons buying or receiving motor vehicles, trailers, special construction equipment, or vessels. (Pen. Code, § 496d(a).)
5. Persons buying, selling, receiving, etc., specific personal property, including integrated computer chips or panels, electronic equipment, or appliances, from which serial numbers or identifying marks have been removed or altered. (Pen. Code, § 537e(a).)

### 1804. Theft by False Pretense

---

The defendant is charged [in Count \_\_\_\_] with [grand/petty] theft by false pretense.

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

1. The defendant knowingly and intentionally deceived a property owner [or the owner's agent] by false or fraudulent representation or pretense;
2. The defendant did so intending to persuade the owner [or the owner's agent] to let the defendant [or another person] take ~~give up~~ let the defendant take possession and ownership of the property;
3. The owner [or the owner's agent] let the defendant [or another person] give up ~~let the defendant have take~~ possession and ownership of the property because the owner [or the owner's agent] relied on the representation or pretense;

AND

4. When the defendant acted, (he/she) ~~When the defendant got the property, (he/she)~~ intended (to deprive the owner of the property ~~it~~ 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).

You may not find the defendant guilty of this crime unless the People have proved that:

[A. The false pretense was accompanied by either a writing or false token(;/.)]

[OR]

[(A/B). There was a note or memorandum of the pretense signed or handwritten by the defendant(;/.)]

[OR]

[(A/B/C). Testimony from two witnesses or testimony from a single witness along with other evidence supports the conclusion that the defendant made the pretense.]

[*Property* includes money, labor, and real or personal property.]

A *false pretense* is any act, word, symbol, or token the purpose of which is to deceive.

[Someone makes a false pretense if, intending to deceive, he or she does [one or more of] the following:

1. Gives information he or she knows is false(./;)]

[OR

2. Makes a misrepresentation recklessly without information that justifies a reasonable belief in its truth(./;)]

[OR

3. Does not give information when he or she has an obligation to do so(./;)]

[OR

4. Makes a promise not intending to do what he or she promises.]]

[Proof that the representation or pretense was false is not enough by itself to prove that the defendant intended to deceive.]

[Proof that the defendant did not perform as promised is not enough by itself to prove that the defendant did not intend to perform as promised.]

[A false token is a document or object that is not authentic, but appears to be, and is used to deceive.]

[For petty theft, the property taken can be of any value, no matter how slight.]

[An owner [or an owner's agent] relies on false pretense, if the falsehood is an important part of the reason the owner [or agent] decides to give up the property. The false pretense must be an important factor, but it does not have to be the only factor the owner [or agent] considers in making the decision. [If the owner [or agent] gives up property some time after the pretense is made, the owner [or agent] must do so because he or she relies on the pretense.]]

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

---

## BENCH NOTES

### *Instructional Duty*

The court has a *sua sponte* duty to instruct on the elements of this crime, including the corroboration requirements stated in Penal Code section 532(b). (*People v. Mason* (1973) 34 Cal.App.3d 281, 286 [109 Cal.Rptr. 867] [error not to instruct on corroboration requirements].)

To have the requisite intent for theft, the thief must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 4.

### *Related Instructions*

If the defendant is also 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; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842 [52 Cal.Rptr.2d 765]; see *People v. Webb* (1999) 74 Cal.App.4th 688, 693–694 [88 Cal.Rptr.2d 259] [false statement of opinion].
- Corroboration Requirements ▶ Pen. Code § 532(b); *People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Fujita* (1974) 43 Cal.App.3d 454, 470–471 [117 Cal.Rptr. 757].
- Agent ▶ *People v. Britz* (1971) 17 Cal.App.3d 743, 752 [95 Cal.Rptr. 303].

- Intent to Deprive Owner of Main Value ▶ *People v. Avery* (2002) 27 Cal.4th 49, 57–59 [115 Cal.Rptr.2d 403, 38 P.3d 1], disapproving, to extent it is inconsistent, *People v. Marquez* (1993) 16 Cal.App.4th 115, 123 [20 Cal.Rptr.2d 365].
- Reckless Misrepresentation ▶ *People v. Schmitt* (1957) 155 Cal.App.2d 87, 110 [317 P.2d 673]; *People v. Ryan* (1951) 103 Cal.App.2d 904, 908–909 [230 P.2d 359].
- Defendant Need Not Be Beneficiary of Theft ▶ *People v. Cheeley* (1951) 106 Cal.App.2d 748, 753.
- Reliance ▶ *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842–1843 [52 Cal.Rptr.2d 765] [defining reliance]; *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413 [79 Cal.Rptr.2d 806 [reversible error to fail to instruct on reliance]; *People v. Whight* (1995) 36 Cal.App.4th 1143, 1152–1153 [43 Cal.Rptr.2d 163] [no reliance if victim relies solely on own investigation].
- Theft of Real Property by False Pretenses ▶ *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Property, §§ 12, 64.

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**

### ***Attempted Theft by False Pretense***

Reliance on the false pretense need not be proved for a person to be guilty of attempted theft by false pretense. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 467 [117 Cal.Rptr. 757].)

### ***Continuing Nature of False Pretense***

Penal Code section 484 recognizes that theft by false pretense is a crime of a continuing nature and covers any "property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question." (Pen. Code, § 484(a).)

### ***Corroboration—Defined/Multiple Witnesses***

"Corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way so as to reasonably satisfy the jury that the complaining witness is telling the truth." (*People v. Fujita* (1974) 43 Cal.App.3d 454, 470 [117 Cal.Rptr. 757].) When considering if the pretense is corroborated the jury may consider "the entire conduct of the defendant, and his declarations to other persons." (*People v. Wymer* (1921) 53 Cal.App. 204, 206 [199 P. 815].) The test for corroboration of false pretense is the same as the test for corroborating the testimony of an accomplice in Penal Code section 1111. (*Ibid.*; see also *People v. MacEwing* (1955) 45 Cal.2d 218, 224 [288 P.2d 257].) To establish corroboration by multiple witnesses, the witnesses do not have to testify to the same false pretense. The requirement is satisfied as long as they testify to the same scheme or type of false pretense. (*People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Ashley* (1954) 42 Cal.2d 246, 268 [267 P.2d 271].)

### ***Distinguished from Theft by Trick***

Although fraud is used to obtain the property in both theft by trick and theft by false pretense, in theft by false pretense, the thief obtains *both* possession and title to the property. For theft by trick, the thief gains only possession of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258 [267 P.2d 271]; *People v. Rondono* (1973) 32 Cal.App.3d 164, 172 [108 Cal.Rptr. 326].) False pretenses does not require that the title pass perfectly and the victim may even retain a security interest in the property transferred to the defendant. (*People v. Counts* (1995) 31 Cal.App.4th 785, 789–792 [37 Cal.Rptr.2d 425].)

### ***Fraudulent Checks***

If a check is the basis for the theft by false pretense, it cannot also supply the written corroboration required by statute. (*People v. Mason* (1973) 34 Cal.App.3d 281, 288 [109 Cal.Rptr. 867].)

### ***Genuine Writings***

A genuine writing that is falsely used is not a false token. (*People v. Beilfuss* (1943) 59 Cal.App.2d 83, 91 [138 P.2d 332] [valid check obtained by fraud not object of theft by false pretense].)

### ***Implicit Misrepresentations***

The misrepresentation does not have to be made in an express statement; it may be implied from behavior or other circumstances. (*People v. Mace* (1925) 71 Cal.App. 10, 21 [234 P. 841]; *People v. Rondono* (1973) 32 Cal.App.3d 164, 174–175 [108 Cal.Rptr. 326] [analogizing to the law of implied contracts].)

### ***Non-Performance of a Promise Is Insufficient to Prove a False Pretense***

The pretense may be made about a past or present fact or about a promise to do something in the future. (*People v. Ashley* (1954) 42 Cal.2d 246, 259–265 [267 P.2d 271].) If the pretense relates to future actions, evidence of non-performance of the promise is not enough to establish the falsity of a promise. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 469 [117 Cal.Rptr. 757].) The intent to defraud at the time the promise is made must be demonstrated. As the court in *Ashley* stated, “[w]hether the pretense is a false promise or a misrepresentation of fact, the defendant’s intent must be proved in both instances by something more than mere proof of non-performance or actual falsity.” (*People v. Ashley, supra*, at p. 264 [court also stated that defendant is entitled to instruction on this point but did not characterize duty as sua sponte].)

See the Related Issues section under CALCRIM No. 1800, *Theft by Larceny*.

## 1904. Forgery by Falsifying, Altering, or Counterfeiting Document

---

The defendant is charged [in Count \_\_] with forgery committed by (falsely making[,]/ [or] altering[,]/ [or] forging[,]/ [or] counterfeiting) a document.

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

1. The defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) (a/an) \_\_\_\_\_ <insert type[s] of document[s] from Pen. Code, § 470(d)>;

AND

2. When the defendant did that act, (he/she) intended to defraud.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) the following documents: \_\_\_\_\_ <insert description of each document when multiple items alleged>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) at least one of these documents and you all agree on which document (he/she) (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited).]

---

## BENCH NOTES

### *Instructional Duty*

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with “For the purpose of this instruction” if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with “It is not necessary” if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

## AUTHORITY

- Elements ▶ Pen. Code, § 470(d).
- Intent to Defraud ▶ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▶ Pen. Code, § 8.
- Alteration Defined ▶ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents ▶ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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. 143, *Crimes Against Property*, § 143.04[1], [2] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Attempted Forgery ▶ Pen. Code, §§ 664, 470.

### COMMENTARY

Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added “or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false” after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase “falsifies the acknowledgment of any notary public” seems to refer back to “person” at the beginning of subdivision (d), but it’s not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was “acknowledgement of a notary public,” which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that “[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false” is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to make a notary’s issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel’s Digest of Assembly Bill 361 states that the bill makes it a “misdemeanor for a notary public to willfully fail to perform the required duties of a notary public” and makes “other related changes.”

The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

## 1905. Forgery by Passing or Attempting to Use Forged Document

---

The defendant is charged [in Count \_\_\_] with forgery committed by (passing[,]/ [or] using[,]/ [or] (attempting/ [or] offering) to use) a forged document.

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

1. The defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) [a/an] (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) \_\_\_\_\_ <insert type[s] of document[s] from Pen. Code, § 470(d)>;
2. The defendant knew that the \_\_\_\_\_ <insert type[s] of document[s] from Pen. Code, § 470(d)> (was/were) (false[,]/ altered[,]/ [or] forged[,]/ [or] counterfeited);

AND

3. When the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the \_\_\_\_\_ <insert type[s] of document[s] from Pen. Code, § 470(d)>, (he/she) intended that (it/they) be accepted as genuine and (he/she) intended to defraud.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person (*passes*[,]/ [or] *uses*[,]/ [or] (*attempts*/ [or] *offers*) to use) a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the following documents: \_\_\_\_\_ <insert description of each document when multiple items alleged>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) at least one document that was (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) and you all agree on which document (he/she) (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use).]

---

## BENCH NOTES

### *Instructional Duty*

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

If the prosecution alleges under a single count that the defendant passed or attempted to use multiple forged documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

*People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term “utter” as to “use” or “attempt to use” an instrument. The committee has omitted the unfamiliar term “utter” in favor of the more familiar terms “use” and “attempt to use.”

Give the bracketed sentence that begins with “For the purpose of this instruction” if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with “It is not necessary” if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant forged the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

## AUTHORITY

- Elements ▶ Pen. Code, § 470(d).
- Intent to Defraud ▶ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▶ Pen. Code, § 8.
- Pass or Attempt to Use Defined ▶ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr.2d 585, 742 P.2d 1306].
- Unanimity Instruction If Multiple Documents ▶ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Property, § 169.

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. 143, *Crimes Against Property*, § 143.04[1], [2] (Matthew Bender).

## COMMENTARY

The committee was unable to locate any authority for what constitutes “offering to pass” a forged document. In *People v. Compton* (1899) 123 Cal. 403, 409–411 [56 P. 44], the court held that attempting to pass a forged document requires, at a minimum, that the defendant present the document to an innocent party, with an assertion that the document is genuine. (*Ibid.*; see also *People v. Fork* (1965) 233 Cal.App.2d 725, 730–731 [43 Cal.Rptr. 804] [discussing sufficiency of the evidence for attempting to pass].) In light of this holding, it is unclear if any act less than this would be sufficient for a conviction for “offering to pass.” The committee urges caution when considering whether to instruct the jury with the phrase “offering to pass.”

## COMMENTARY

Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added “or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false” after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase “falsifies the acknowledgment of any notary public” seems to refer back to “person” at the beginning of subdivision (d), but it’s not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was “acknowledgement of a notary public,” which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that “[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false” is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to make a notary’s issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel’s Digest of Assembly Bill 361 states that the bill makes it a “misdemeanor for a notary public to willfully fail to perform the required duties of a notary public” and makes “other related changes.” The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

## 2101. Driving With 0.08 Percent Blood Alcohol Causing Injury

---

The defendant is charged [in Count \_\_] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more.

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

1. The defendant drove a vehicle;
2. When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;
3. When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

4. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath/urine) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: \_\_\_\_\_ <list name[s] of offense[s]>.

To decide whether the defendant committed \_\_\_\_\_ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/ \_\_\_\_\_ <insert other duty or duties 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 illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury 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 injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

---

## BENCH NOTES

### *Instructional Duty*

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

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 injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (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, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); 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 instructions have been written as permissive inferences. 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 have proved beyond a reasonable doubt that a sample of” if there is evidence that the defendant’s blood alcohol level was below 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2110, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

#### ***Defenses—Instructional Duty***

On request, if supported by the evidence, the court must instruct on the “imminent peril/sudden emergency” doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d

268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

### **Related Instructions**

CALCRIM No. 2100, *Driving Under the Influence Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

### **AUTHORITY**

- Elements ▶ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 149, 673 P.2d 732].
- Partition Ratio ▶ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▶ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense ▶ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▶ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282.
- Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- 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].
- Statute Constitutional ▶ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Misdemeanor Driving Under the Influence or With 0.08 Percent ▸ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

### **RELATED ISSUES**

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving Under the Influence Causing Injury*.

**2102–2109. Reserved for Future Use**

## 2111. Driving With 0.08 Percent Blood Alcohol

---

The defendant is charged [in Count \_\_\_] with driving with a blood alcohol level of 0.08 percent or more.

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

1. The defendant drove a vehicle;

AND

2. When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath/~~urine~~) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

---

### BENCH NOTES

#### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate

and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); 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 instructions have been written as permissive inferences. 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 have proved beyond a reasonable doubt that a sample of” if there is evidence that the defendant’s blood alcohol level was below 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

#### *Related Instructions*

CALCRIM No. 2110, *Driving Under the Influence*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

### AUTHORITY

- Elements ▶ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio ▶ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▶ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Statute Constitutional ▶ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

### LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

### RELATED ISSUES

#### *Partition Ratio*

In 1990, the Legislature amended Vehicle Code section 23152(b) to state that the “percent, by weight, of alcohol in a person’s blood is based upon grams of alcohol

per 100 milliliters of blood or grams of alcohol per 210 liters of breath.”  
Following this amendment, the Supreme Court held that evidence of variability of  
breath-alcohol partition ratios was not relevant and properly excluded. (*People v.*  
*Bransford* (1994) 8 Cal.4th 885, 890–893 [35 Cal.Rptr.2d 613, 884 P.2d 70].)  
~~However, evidence of variability in urine alcohol partition ratios is admissible.~~  
~~(*People v. Acevedo* (2001) 93 Cal.App.4th 757, 765 [113 Cal.Rptr.2d 437].)~~

See the Related Issues section in CALCRIM No. 2110, *Driving Under the  
Influence*.

## 2180. Evading Peace Officer: Death or Serious Bodily Injury

---

The defendant is charged [in Count \_\_\_] with evading a peace officer and causing (death/ [or] serious bodily injury).

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

1. A peace officer in a vehicle was pursuing the defendant, who was also driving a vehicle;
2. The defendant intended to evade the peace officer;
3. While driving, the defendant willfully fled from, or tried to elude, the pursuing peace officer;
4. The defendant's attempt to flee from, or elude, the pursuing peace officer caused (the death of/ [or] serious bodily injury to) someone else;

AND

5. All of the following were true:
  - (a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;
  - (b) The defendant either saw or reasonably should have seen the lamp;
  - (c) The peace officer's vehicle was sounding a siren as reasonably necessary;
  - (d) The peace officer's vehicle was distinctively marked;

AND

- (e) The peace officer was wearing a distinctive uniform.

[A person 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">.]

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 *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 vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes. ~~and siren. [It may also have additional markings or devices that identify it as a peace officer's vehicle.] The vehicle's appearance must be such that a person would know or reasonably should know that it is a law enforcement vehicle.~~

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

[An act causes (death/ [or] serious bodily injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the act and the (death/ [or] injury) 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/ [or] serious bodily injury). An act causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

## BENCH NOTES

### *Instructional Duty*

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

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 or injury, 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 or injury, 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].)

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury on the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is an error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that “Officer Bridgeman and Officer Gurney are peace officers” was error].) If the witness is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the witness is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

~~There is a split in authority over whether a law enforcement vehicle must have something more than a red lamp and siren to be “distinctively marked.” (*People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723 [37 Cal.Rptr.2d 383] [something in addition to red lamp and siren required]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 490 [75 Cal.Rptr.2d 289] [following *Estrella*, vehicle sufficiently marked where it had red lamp, siren, and wigwag lights]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [84 Cal.Rptr.2d 1] [disagreeing with *Estrella*, finding that red lamp and siren may be sufficient if, under the circumstances of the case, these markings alone were enough to put the defendant on notice that this was a police vehicle].) This issue is currently pending before the Supreme Court. (*People v. Hudson*, No. S122816 (Cal.Sup.Ct., rev. granted May 12, 2004) 2004 Cal. LEXIS 4030.) In the definition of “distinctively marked,” the court may give the bracketed “in addition to the red lamp and siren” at its discretion, until the Supreme Court has resolved this issue.~~

On request, the court must give CALCRIM No. 3426, *Voluntary Intoxication*, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712 [168 Cal.Rptr. 80].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

## AUTHORITY

- Elements ▶ Veh. Code, §§ 2800.3(a), (b); 2800.1(a).
- Serious Bodily Injury Defined ▶ Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Distinctively Marked Vehicle ▶ *People v. Hudson* (2006) Cal.4th ~~*People v. Estrella* (1995) 31 Cal.App.4th 716, 722-723 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [84 Cal.Rptr.2d 1]~~.
- Distinctive Uniform ▶ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine If Peace Officers ▶ *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved ▶ ~~*People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237-238 [11 Cal.Rptr.3d 590]; *People v. Hudson* (2006) Cal.4th ~~*People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599-600 [264 Cal.Rptr. 906]~~.~~

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 63, *Double Jeopardy*, § 63.21[2][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.22[1][a][iv], 91.60[2][b][i], [ii], 91.81[1][d], [8] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b][ii][B], 142.02[2][c], [3][c] (Matthew Bender).

### LESSER INCLUDED OFFENSES

- Misdemeanor Evading a Pursuing Peace Officer ▶ Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681 [17 Cal.Rptr.2d 278].

### RELATED ISSUES

#### ***Not Inherently Dangerous Felony***

Vehicle Code section 2800.3 is not an inherently dangerous felony and does not support a felony-murder conviction. (*People v. Jones* (2000) 82 Cal.App.4th 663, 668–669 [98 Cal.Rptr.2d 724]; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 974 [103 Cal.Rptr.2d 809].)

See the related Issues section to CALCRIM No. 2182, *Evading Peace Officer: Misdemeanor*.

## 2181. Evading Peace Officer: Reckless Driving

---

The defendant is charged [in Count \_\_\_] with evading a peace officer with wanton disregard for safety.

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

1. A peace officer driving a motor vehicle was pursuing the defendant;
2. The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer;
3. During the pursuit, the defendant drove with willful or wanton disregard for the safety of persons or property;

AND

4. All of the following were true:
  - (a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;
  - (b) The defendant either saw or reasonably should have seen the lamp;
  - (c) The peace officer's vehicle was sounding a siren as reasonably necessary;
  - (d) The peace officer's vehicle was distinctively marked;

AND

- (e) The peace officer was wearing a distinctive uniform.

[A person 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">.]

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 acts with *wanton disregard for safety* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, (2) and he or she intentionally ignores that risk. The person does not, however, have to intend to cause damage.

[*Driving with willful or wanton disregard for the safety of persons or property* includes, but is not limited to, causing damage to property while driving or committing three or more violations that are each assigned a traffic violation point.]

[\_\_\_\_\_ <insert traffic violations alleged> are each assigned a traffic violation point.]]

A vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.  
~~and siren. [It may also have additional markings or devices that identify it as a peace officer's vehicle.] The vehicle's appearance must be such that a person would know or reasonably should know that it is a law enforcement vehicle.~~

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

---

## BENCH NOTES

### *Instructional Duty*

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

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].)

The court must instruct the jury in the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is an error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that “Officer Bridgeman and Officer Gurney are peace officers” was error].) If the witness is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the witness is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

Give the bracketed definition of “driving with willful or wanton disregard” if there is evidence that the defendant committed three or more traffic violations. The court may also, at its discretion, give the bracketed sentence that follows this definition, inserting the names of the traffic violations alleged.

~~There is a split in authority over whether a law enforcement vehicle must have something more than a red lamp and siren to be “distinctively marked.” (*People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723 [37 Cal.Rptr.2d 383] [something in addition to red lamp and siren required]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289] [following *Estrella*, vehicle sufficiently marked where it had red lamp, siren, and wigwag lights]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [84 Cal.Rptr.2d 1] [disagreeing with *Estrella*, finding that red lamp and siren may be sufficient if these markings alone were enough to put the defendant on notice that this was a police vehicle].) This issue is currently pending before the Supreme Court. (*People v. Hudson*, No. S122816 (Cal.Sup.Ct., rev. granted May 12, 2004) 2004 Cal. LEXIS 4030.) In the definition of “distinctively marked,” the court may give the bracketed “in addition to the red lamp and siren” at its discretion, until the Supreme Court has resolved this issue.~~

On request, the court must give CALCRIM No. 3426, *Voluntary Intoxication*, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712 [168 Cal.Rptr. 80].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

## AUTHORITY

- Elements ▶ Veh. Code, §§ 2800.2, 2800.1(a).
- Willful or Wanton Disregard ▶ *People v. Schumacher* (1961) 194 Cal.App.2d 335, 339–340 [14 Cal.Rptr. 924].
- Three Violations or Property Damage as Wanton Disregard—  
Definitional ▶ *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393 [5 Cal.Rptr.3d 274].

- Distinctively Marked Vehicle ▶ People v. Hudson (2006) Cal.4th ;  
~~People v. Estrella (1995) 31 Cal.App.4th 716, 722-723 [37 Cal.Rptr.2d 383];~~  
~~People v. Mathews (1998) 64 Cal.App.4th 485, 490 [75 Cal.Rptr.2d 289];~~  
~~People v. Chicanti (1999) 71 Cal.App.4th 956, 962 [84 Cal.Rptr.2d 1].~~
- Distinctive Uniform ▶ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine If Peace Officers ▶ *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved ▶ ~~*People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237-238 [11 Cal.Rptr.3d 590];~~ *People v. Hudson* (2006) Cal.4th ;  
*People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270];  
*People v. Brown* (1989) 216 Cal.App.3d 596, 599-600 [264 Cal.Rptr. 906].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.22[1][a][iv] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b][ii][B], 142.02[2][c] (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Misdemeanor Evading a Pursuing Peace Officer ▶ Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680-1681 [17 Cal.Rptr.2d 278].
- Failure to Yield ▶ Veh. Code, § 21806; *People v. Diaz* (2005) 125 Cal.App.4th 1484, 1491 [23 Cal.Rptr.3d 653]. (Lesser included offenses may not be used for the requisite “three or more violations.”)

## RELATED ISSUES

### *Inherently Dangerous Felony*

A violation of Vehicle Code section 2800.2 is not an inherently dangerous felony supporting a felony murder conviction. (*People v. Howard* (2005) 34 Cal.4th 1129, 1139 [23 Cal.Rptr.3d 306, 104 P.3d 107].)

See the related Issues section to CALCRIM No. 2182, *Evading Peace Officer: Misdemeanor*.

## 2302. Possession for Sale of Controlled Substance

---

The defendant is charged [in Count \_\_\_] with possession for sale of \_\_\_\_\_ *<insert type of controlled substance>*, a controlled substance.

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. When the defendant possessed the controlled substance, (he/she) intended to sell it;
5. The controlled substance was \_\_\_\_\_ *<insert type of controlled substance>*;

AND

6. The controlled substance was in a usable amount.

*Selling* for the purpose of this instruction means exchanging \_\_\_\_\_ *<insert type of controlled substance>* for money, services, or anything of value.

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.

[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.]

---

## BENCH NOTES

### *Instructional Duty*

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- 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].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 81–93.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[c], [e] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance ▶ *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465].

- Possession of cocaine for sale is not a necessarily included offense of selling cocaine base. People v. Murphy (2005) 134 Cal.App.4th 1504, 1508)

### 2303. Possession of Controlled Substance While Armed With Firearm

---

The defendant is charged [in Count \_\_\_] with possessing \_\_\_\_\_ <insert type of controlled substance specified in Health & Saf. Code, § 11370.1>, a controlled substance, while armed with a firearm.

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 \_\_\_\_\_ <insert type of controlled substance specified in Health & Saf. Code, § 11370.1>;
5. The controlled substance was in a usable amount;
6. While possessing that controlled substance, the defendant had a loaded, operable firearm available for immediate offensive or defensive use;

AND

7. The defendant knew that (he/she) had the firearm available for immediate offensive or defensive use.

**Knowledge that an available firearm is loaded and operable is not required.**

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

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.

[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.]

---

## BENCH NOTES

### *Instructional Duty*

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11370.1; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge of Controlled Substance ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- 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].
- Loaded Firearm ▶ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Knowledge of Presence of Firearm ▶ *People v. Singh* (2004) 119 Cal.App.4th 905, 912–913 [14 Cal.Rptr.3d 769].
- Knowledge That Firearm is Loaded or Operable Not Required ▶ *People v. Heath* (2005) 134 Cal.App.4th 490, 498.

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 80.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][f]; Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[d], [3][b] (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Simple Possession of a Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377.

See also Firearm Possession instructions, CALCRIM Nos. 2510 to 2530.

### **RELATED ISSUES**

#### ***Loaded Firearm***

“Under the commonly understood meaning of the term ‘loaded,’ a firearm is ‘loaded’ when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not ‘loaded’ if the shell or cartridge is stored elsewhere and not yet placed in a firing position.” (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

## 2400. Using or Being Under the Influence of Controlled Substance

---

The defendant is charged [in Count \_\_] with (using/ [or] being under the influence of) \_\_\_\_\_ <insert controlled substance listed in Health & Saf. Code, § 11550>, a controlled substance.

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

<Alternative A—use of controlled substance>

1. The defendant willfully [and unlawfully] used \_\_\_\_\_ <insert controlled substance listed in Health & Saf. Code, § 11550>, a controlled substance[, a short time before (his/her) arrest](;/.)

[OR]

<Alternative B—under the influence of controlled substance>

- (1/2). The defendant was willfully [and unlawfully] under the influence of \_\_\_\_\_ <insert controlled substance listed in Health & Saf. Code, § 11550>, a controlled substance, when (he/she) was arrested.

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

[Someone is *under the influence of a controlled substance* if that person has taken or used a controlled substance that has appreciably affected the person's nervous system, brain, or muscles or has created in the person a detectable abnormal mental or physical condition.]

<Defense: Prescription>

[The defendant is not guilty of (using/ [or] being under the influence of) \_\_\_\_\_ <insert controlled substance listed in Health & Saf. Code, § 11550> if (he/she) had a valid prescription for that substance written by a physician, dentist, podiatrist, [naturopathic doctor] or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty.]

---

## BENCH NOTES

### *Instructional Duty*

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

A violation of Health and Safety Code section 11550 based on “use” of a controlled substance requires “ ‘current use’ or ‘use immediately prior to arrest’ . . . .” (*People v. Jones* (1987) 189 Cal.App.3d 398, 403–404 [234 Cal.Rptr. 408]; see also *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699–700 [126 Cal.Rptr. 656]; *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402 [140 Cal.Rptr. 122].) In *People v. Jones, supra*, 189 Cal.App.3d at p. 406, the court found evidence of use within 48 hours prior to the defendant’s arrest sufficient. If there is an issue in the case over when the defendant allegedly used the substance, give the bracketed phrase “a short time before (his/her) arrest” in element 1. (*Ibid.*) Alternatively, the court may insert a specific time or time frame in element 1, e.g., “24 to 48 hours prior to (his/her) arrest.”

A recent amendment to section 11550 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.

If the court instructs the jury on both use and being under the influence, the court should consider whether a unanimity instruction is required. (See CALCRIM No. 3500, *Unanimity*.)

### *Defenses—Instructional Duty*

The prescription defense is codified in Health and Safety Code section 11550. The defendant need only raise a reasonable doubt about whether his or her use of the drug was lawful because of a valid prescription. (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. Give the bracketed “and unlawfully” in the elements and the bracketed paragraph on the defense.

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11550.
- Under the Influence ▶ *People v. Culberson* (1956) 140 Cal.App.2d Supp. 959, 960–961 [295 P.2d 598]; see also *People v. Cantry* (2004) 32 Cal.4th 1266,

1278 [14 Cal.Rptr.3d 1, 90 P.3d 1168]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [49 Cal.Rptr.2d 710].

- Under the Influence and Use Distinguished ▶ *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402 [140 Cal.Rptr. 122].
- Willfulness Element of Offense ▶ *People v. Little* (2004) 115 Cal.App.4th 766, 775 [9 Cal.Rptr.3d 446].
- Willfully Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Specific Controlled Substance Must Be Alleged ▶ *People v. Sallas* (1978) 86 Cal.App.3d 737, 743 [150 Cal.Rptr. 543].
- Requires Current Use ▶ *People v. Jones* (1987) 189 Cal.App.3d 398, 403–404 [234 Cal.Rptr. 408]; see also *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699–700 [126 Cal.Rptr. 656]; *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402 [140 Cal.Rptr. 122].
- Statute Constitutional ▶ *Bosco v. Justice Court* (1978) 77 Cal.App.3d 179, 191–192 [193 Cal.Rptr. 468].
- Prescription Defense ▶ Health & Saf. Code, § 11550.
- Prescription Defined ▶ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ▶ Health & Saf. Code, § 11150.

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §73.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [k], [l], [2][b] (Matthew Bender).

## 2500. Illegal Possession, etc., of Weapon

The defendant is charged [in Count \_\_\_] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending) a weapon, specifically (a/an) \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12020(a)>.

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

1. The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent) (a/an) \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12020(a)>;
2. The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12020(a)>;

[AND]

<Alternative 3A—object capable of innocent uses>

- [3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the object as a weapon. When deciding whether if the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent)[,] [and] [where the defendant 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.(;/.)]

<Alternative 3B—object designed solely for use as weapon>

- [3. The defendant knew that the object (was (a/an) \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12020(a), e.g., "cane sword," short-barreled shotgun>/could be used \_\_\_\_\_ <insert description of

weapon, e.g., "as a stabbing weapon," or "for purposes of offense or defense">).]

<Give element 4 only if defendant is charged with offering or exposing for sale.>

[AND

**4. The defendant intended to sell it.]**

<Give only if alternative 3B is given.>

**[The People do not have to prove that the defendant intended to use the object as a weapon.]**

(A/An) \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12020(a)> means  
\_\_\_\_\_ <insert appropriate definition from Pen. Code, § 12020(c)>.

~~**[The People do not have to prove that the defendant used the object as a weapon.]**~~

**[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]**

**[(A/An) \_\_\_\_\_ <insert prohibited firearm from Pen. Code, § 12020(a)> does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

**[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.]**

**[The People allege that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the following weapons: \_\_\_\_\_ <insert description of each weapon when multiple items alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) at least one of these weapons and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent).]**

<Defense: Statutory Exemptions>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/give/lend) (a/an) \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12020(a)> if \_\_\_\_\_ <insert exception from Pen. Code, § 12020(b)>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) (a/an) \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12020(a)>. 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.

In element 1, insert one of the following weapons from Penal Code section 12020(a):

#### Firearms

short-barreled shotgun  
short-barreled rifle  
undetectable firearm  
firearm that is not immediately recognizable as a firearm  
unconventional pistol  
cane gun, wallet gun, or zip gun

#### Firearm Equipment and Ammunition

camouflaging firearm container  
ammunition that contains or consists of any fléchette dart  
bullet containing or carrying an explosive agent  
multiburst trigger activator  
large-capacity magazine

#### Knives and Swords

ballistic knife  
belt buckle knife  
lipstick case knife  
cane sword  
shobi-zue  
air gauge knife

writing pen knife

Martial Arts Weapons

nunchaku

shuriken

Other Weapons

metal knuckles

leaded cane

metal military practice handgrenade or metal replica handgrenade

instrument or weapon of the kind commonly known as a blackjack,

slungshot, billy, sandclub, sap, or sandbag

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. ~~Select alternative 3A if the object “has no conceivable innocent function” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in Penal Code section 12020(e) (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]). On request, the court may give the bracketed sentence stating, “The People do not have to prove that the defendant intended to use the object as a weapon.”~~

Select alternative 3BA if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed “as a weapon.” (*People v. Fannin, supra*, 91 Cal.App.4th at p. 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].) Do not give the bracketed sentence stating, “The People do not have to prove that the defendant intended to use the object as a weapon.”

Select alternative 3B if the object “has no conceivable innocent function” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in Penal Code section 12020(c) (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]). On request, the court may give the bracketed sentence stating, “The People do not have to prove that the defendant intended to use the object as a weapon.”

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

Following the elements, insert the appropriate definition of the alleged weapon from Penal Code section 12020(c). Subdivision (c) defines all the terms used in subdivision (a), *except* the following:

“firearm which is not immediately recognizable as a firearm” (no cases on meaning but see definition of firearm in Penal Code, § 12001(b));

“bullet containing or carrying an explosive agent” (see *People v. Lanham* (1991) 230 Cal.App.3d 1396, 1400 [282 Cal.Rptr. 62], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]);

“metal military practice handgrenade or metal replica handgrenade” (no cases on meaning); and

“instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag” (see *People v. Fannin, supra*, 91 Cal.App.4th at p. 1402 [definition of “slungshot”]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons]).

For any of the weapons not defined in subdivision (c), use an appropriate definition from the case law, where available.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was “fragmented as to time . . . [or] space,” the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning “The People allege that the defendant possessed the following weapons,” inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

#### ***Defenses—Instructional Duty***

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, “The defendant did not unlawfully . . . .” (see Pen. Code, § 12020(b)).

## AUTHORITY

- Elements ▶ Pen. Code, § 12020(a)(1) & (2).
- Definitions ▶ Pen. Code, §§ 12020(c), 12001.
- Exemptions ▶ Pen. Code, § 12020(b).
- Need Not Prove Intent to Use ▶ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required ▶ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Specific Intent Required for Offer to Sell ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon ▶ *People v. King* (2006) Cal.4th . . . .
- Innocent Object—Must Prove Possessed as Weapon ▶ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. ▶ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable ▶ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun ▶ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart ▶ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession ▶ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, § 161.

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. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

## COMMENTARY

### *Element 3—Knowledge*

“Intent to use a weapon is not an element of the crime of weapon possession.” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496] .) However, interpreting Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that “[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020.” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) Applying this holding to possession of other weapons prohibited under Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object “as a weapon.” (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra*, 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra*, 92 Cal.App.4th at p. 547, for example, the court considered the possession of “metal knuckles,” defined in Penal Code section 12020(c)(7) as an object “worn for purposes of offense or defense.” The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that “the instrument may be used for purposes of offense or defense.” (*Id.* at p. 547.)

Similarly, in *People v. Taylor, supra*, 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that “[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword.”

Finally, *People v. Fannin, supra*, 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a “slungshot.” The court held that “if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon.*” (*Ibid.* [emphasis in original]; see also *People v. Grubb* (1965) 63 Cal.2d

614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100] [possession of modified baseball bat].)

Prior to *People v. Rubalcava*, *supra*, 23 Cal.4th 322, some cases held that the prosecution did not have to prove that the defendant knew that the object was a weapon of a prohibited class. (*People v. Lanham* (1991) 230 Cal.App.3d 1396, 1401–1405 [282 Cal.Rptr. 62] [exploding bullets—need not know exploding]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1415 [263 Cal.Rptr. 301] [sawed-off shotgun—need not know “sawed-off”]; *People v. Azevedo* (1984) 161 Cal.App.3d 235, 240 [207 Cal.Rptr. 270] [same].) The Supreme Court has questioned the continuing validity of these holdings in light of its holding in *Rubalcava*. (*In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].) This issue is currently pending before the Supreme Court. (*People v. King* (Dec. 17, 2004, S129052) 2004 DJDAR 14927.)

| In element 3 of the instruction, the court should give alternative 3AB if the object has no innocent uses, inserting the appropriate description of the weapon. If the  
| object has innocent uses, the court should give alternative 3AB. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M.* (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shot-gun was “sawed off” but that failure to give instruction was harmless if error].)

## 2542. Carrying Firearm: Active Participant in Criminal Street Gang

---

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.

*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)>;

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)>

**1A. [any combination of two or more of the following crimes]:**

<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25)>;

**[OR]**

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)-(30)>

**1B. any combination of** <insert crime or crimes in Pen. Code, § 186.22(e)(26)-(30)> **and** <insert one or more crimes from Pen. Code, § 186.22(e)(1)-(25)>;

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)-(2530) 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 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) 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). 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). (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 element 1 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].) Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank.~~

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), (i); *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*.

**2560. Possession, etc., of Assault Weapon or .50 BMG Rifle**

---

The defendant is charged [in Count \_\_] with unlawfully (possessing/manufacturing/causing to be manufactured/distributing/transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) (an assault weapon, specifically [a/an] \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>/a .50 BMG rifle).

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

1. The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) (an assault weapon, specifically [a/an] \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>/a .50 BMG rifle);
2. The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) it;

AND

3. The defendant knew or reasonably should have known that it had characteristics that made it (an assault weapon/a .50 BMG rifle).

[(A/An) \_\_\_\_\_ <insert type of weapon from Pen. Code, § 12276 or description from § 12276.1> is an *assault weapon*.]

[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.]

[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.]

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) the following weapons: \_\_\_\_\_ <insert description of each weapon when multiple items alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) at least one of these weapons, and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent).]

<Defense: Permit, Registration, or Exemption From Statute>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/distribute/transport/import/keep for sale/offer or expose for sale/give/lend) (an assault weapon/a .50 BMG rifle) if (he/she) (had registered the weapon/had a valid permit to (possess/manufacture/sell) the weapon/\_\_\_\_\_ <insert exemption from Pen. Code, § 12280(e)-(s)>). The People have the burden of proving beyond a reasonable doubt that the defendant did not (register the weapon/have a valid permit to (possess/manufacture/sell) the weapon/\_\_\_\_\_ <insert exemption from Pen. Code, § 12280(e)-(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.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was “fragmented as to time . . . [or] space,” the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins, “The People allege that the defendant possessed the following weapons,” inserting the items alleged. But see Pen. Code, § 12280(a)(3), which states that except in case of a first violation involving not more than two firearms, if more than one assault weapon or .50 BMG rifle is involved in any violation of this section, there shall be a distinct and separate offense for each.

The jury must decide if the weapon possessed was an assault weapon or a .50 BMG rifle. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) When instructing on the definition of assault weapon or .50 BMG rifle, the court should not state that the weapon possessed by the defendant was an assault weapon or was a .50 BMG rifle. In the case of an assault weapon, where indicated in the instruction, the court may insert a weapon listed in Penal Code section 12276 or a description of a weapon from section 12276.1. In the case of a .50 BMG rifle, give the bracketed definition of that term.

If the defendant is charged with both a separate count and an enhancement for violating Penal Code section 12280 while committing another crime, give this instruction and CALCRIM No. 2561, *Possession, etc., of Assault or .50 BMG Rifle Weapon While Committing Other Offense: Pen. Code, §12280 Charged as Separate Count and as Enhancement*. (Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281].) If the defendant is only charged with an enhancement under Penal Code section 12280(d) and not with a separate count for violating Penal Code section 12280, give only CALCRIM No. 2562, *Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, §12280 Charged Only as Enhancement*.

#### ***Defenses—Instructional Duty***

Registration and permitting procedures are contained in Penal Code sections 12285 to 12287. Exemptions to the statute are stated in Penal Code section 12280(e) to (s). The existence of a statutory exemption is an affirmative defense. (*People v. Jimenez, supra*, 8 Cal.App.4th at pp. 395–397.) If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for his or her actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, “The defendant did not unlawfully . . . .”

## AUTHORITY

- Elements ▶ Pen. Code, § 12280(a)(1) & (2).
- Assault Weapon Defined ▶ Pen. Code, §§ 12276, 12276.1; see also *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1142–1145 [108 Cal.Rptr.2d 445, 25 P.3d 649] [discussing statutory definition of assault weapon, amendments to statute and petition procedure by which the Attorney General may have weapon listed].
- .50 BMG Rifle Defined ▶ Pen. Code, § 12278.
- Permits and Registration ▶ Pen. Code, §§ 12285–12287.
- Exemptions ▶ Pen. Code, § 12280(e)–(s).
- Knowledge Required ▶ *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Permits, Registration, and Exemptions Are Affirmative Defenses ▶ *People v. Jimenez* (1992) 8 Cal.App.4th 391, 395–397 [10 Cal.Rptr.2d 281].
- Constructive vs. Actual Possession ▶ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Statute Constitutional ▶ *Silviera v. Lockyer* (2002) 312 F.3d 1052, 1056; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 478 [97 Cal.Rptr.2d 334, 2 P.3d 581].

### **Secondary Sources**

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 165–166.

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. 144, *Crimes Against Order*, § 144.01[1][b], [d] (Matthew Bender).

**2562. Possession, etc., of Assault Weapon or .50 BMG Rifle While  
Committing Other Offense: Pen. Code, §12280 Charged Only as  
Enhancement**

---

If you find the defendant guilty of the crime of \_\_\_\_\_ *<insert other offense alleged>* [under Count \_\_], you must then decide whether the People have proved the additional allegation that (he/she) committed that offense while unlawfully (possessing/manufacturing/causing to be manufactured/distributing/transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) (an assault weapon, specifically [a/an] \_\_\_\_\_ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>*/a .50 BMG rifle).

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

1. The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) (an assault weapon, specifically [a/an] \_\_\_\_\_ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>*/a .50 BMG rifle);
2. The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) it;
3. The defendant knew or reasonably should have known that it had characteristics that made it (an assault weapon/a .50 BMG rifle);

AND

4. The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) the weapon while committing the crime of \_\_\_\_\_ *<insert other offense alleged>*.

[(A/An) \_\_\_\_\_ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>* is an assault weapon.]

[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.]

[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.]

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) the following weapons: \_\_\_\_\_ <insert description of each weapon when multiple items alleged>. You may not find this additional allegation true unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) at least one of these weapons, and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent).]

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.

<Defense: Permit, Registration, or Exemption From Statute>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/distribute/transport/import/keep for sale/offer or expose for sale/give/lend) (an assault weapon/a .50 BMG rifle) if (he/she) (had registered the weapon/had a valid permit to (possess/manufacture/sell) the weapon/\_\_\_\_\_ <insert exemption from Pen. Code, § 12280(e)-(s)>). The People have the burden of proving beyond a reasonable doubt that the

defendant did not (register the weapon/have a valid permit to (possess/manufacture/sell) the weapon/\_\_\_\_\_ <insert exemption from Pen. Code, § 12280(e)-(s)>). If the People have not met this burden, you must find the defendant not guilty of this allegation.]

---

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt]; *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281] [enhancement under Pen. Code, §12280 must be pleaded and proved].)

Give this instruction if the defendant is charged with an enhancement for violating Penal Code section 12280 while committing another crime but is not charged with a separate count for violating Penal Code section 12280. (Pen. Code, § 12280(d); *People v. Jimenez, supra*, 8 Cal.App.4th at p. 398.) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing enhancement has or has not been proved.

If the defendant has been charged with a separate count for violating Penal Code section 12280 and with the enhancement, do not give this instruction. Give CALCRIM No. 2561, *Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, §12280 Charged as Separate Count and as Enhancement*.

If the prosecution alleges under a single enhancement that the defendant possessed multiple weapons and the possession was “fragmented as to time . . . [or] space,” the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins, “The People allege that the defendant possessed the following weapons,” inserting the items alleged. But see Pen. Code, § 12280(a)(3), which states that except in case of a first violation involving not more than two firearms, if more than one assault weapon or .50 BMG rifle is involved in any violation of this section, there shall be a distinct and separate offense for each.

The jury must decide if the weapon possessed was an assault weapon or .50 BMG rifle. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957

P.2d 869].) When instructing on the definition of assault weapon or .50 BMG rifle, the court should not state that the weapon possessed by the defendant was an assault weapon or was a .50 BMG rifle. In the case of an assault weapon, where indicated in the instruction, the court may insert a weapon listed in Penal Code section 12276 or a description of a weapon from section 12276.1. In the case of a .50 BMG rifle, give the bracketed definition of that term.

### ***Defenses—Instructional Duty***

Registration and permitting procedures are contained in Penal Code sections 12285 to 12287. Exemptions to the statute are stated in Penal Code section 12280(e) to (s). The existence of a statutory exemption is an affirmative defense. (*People v. Jimenez, supra*, 8 Cal.App.4th at pp. 395–397.) If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant’s actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, “The defendant did not unlawfully. . . .”

## **AUTHORITY**

- Enhancement ▶ Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281].
- Assault Weapon Defined ▶ Pen. Code, §§ 12276, 12276.1; see also *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1142–1145 [108 Cal.Rptr.2d 445, 25 P.3d 649] [discussing statutory definition of assault weapon, amendments to statute and petition procedure by which the Attorney General may have weapon listed].
- .50 BMG Rifle Defined ▶ Pen. Code, § 12278.
- Permits and Registration ▶ Pen. Code, §§ 12285–12287.
- Exemptions ▶ Pen. Code, § 12280(e)–(s).
- Knowledge Required ▶ *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Permits, Registration, and Exemptions Are Affirmative Defenses ▶ *People v. Jimenez* (1992) 8 Cal.App.4th 391, 395–397 [10 Cal.Rptr.2d 281].
- Constructive vs. Actual Possession ▶ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

- Statute Constitutional ▶ *Silviera v. Lockyer* (2002) 312 F.3d 1052, 1056;  
*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 478 [97 Cal.Rptr.2d 334, 2 P.3d 581].

***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 165–166.

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

**2563–2569. Reserved for Future Use**

## 2655. Causing Death or Serious Bodily Injury While Resisting Peace Officer

---

The defendant is charged [in Count \_\_] with causing (the death of/serious bodily injury to) a peace officer performing (his/her) duties.

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

1. \_\_\_\_\_ *<insert officer's name, excluding title>* was a peace officer lawfully performing or attempting to perform (his/her) duties as a peace officer;
2. The defendant willfully resisted \_\_\_\_\_ *<insert officer's name, excluding title>* in the performance of or the attempt to perform (his/her) duties;
3. When the defendant acted, (he/she) knew, or reasonably should have known, that \_\_\_\_\_ *<insert officer's name, excluding title>* was a peace officer performing or attempting to perform (his/her) duties;
4. \_\_\_\_\_'s *<insert officer's name, excluding title>* actions were reasonable, based on the facts or circumstances confronting (him/her) at the time;
5. The detention and arrest of (the defendant/ \_\_\_\_\_ *<insert name of person other than defendant who was arrested>*) were lawful and there was probable cause to detain;

[AND]

6. The defendant's willful resistance caused (the death of/serious bodily injury to) \_\_\_\_\_ *<insert officer's name, excluding title>*(;/.)

*<Give element 7 when instructing on self-defense or defense of another.>*

[AND]

7. 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.

In order to prove that \_\_\_\_\_'s *<insert officer's name, excluding title>* (death/serious bodily injury) was *caused* by the defendant's willful resistance, the People must prove that:

1. A reasonable person in the defendant's position would have foreseen that (his/her) willful resistance could begin a chain of events likely to result in the officer's death or serious bodily injury;
2. Defendant's willful resistance was a direct and substantial factor in causing \_\_\_\_\_'s *<insert officer's name, excluding title>* (death/serious bodily injury);

AND

3. \_\_\_\_\_'s *<insert officer's name, excluding title>* (death/serious bodily injury) would not have happened if the defendant had not willfully resisted \_\_\_\_\_ *<insert officer's name, excluding title>* from performing or attempting to perform (his/her) duties.

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused \_\_\_\_\_'s *<insert officer's name, excluding title>* (death/serious bodily injury).

**[Willful resistance may include fleeing from the officer.]**

[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 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 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 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) 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 and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace 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.”

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

- Elements ▶ Pen. Code, § 148.10(a) & (b).
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Serious Bodily Injury Defined ▶ Pen. Code, §§ 148.10(d), 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Willful Resistance Includes Flight ▶ *People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1535.
- Unlawful Arrest or Act by Officer ▶ Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, § 21.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.06[3][b] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Misdemeanor Resisting Arrest ▶ Pen. Code, § 148(a)(1).

## RELATED ISSUES

### *Exclusions*

Penal Code section 148.10 “does not apply to conduct that occurs during labor picketing, demonstrations, or disturbing the peace.” (Pen. Code, § 148.10(c).)

## 2701. Violation of Court Order: Protective Order or Stay Away

---

The defendant is charged [in Count \_\_\_] with violating a court order.

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

1. A court [lawfully] issued a written order that the defendant \_\_\_\_\_ <insert description of content of order>;
2. The court order was a (protective order/stay-away court order/ \_\_\_\_\_ <insert other description of order from Pen. Code, § 166(c)(3) or § 273.6(c)>), issued [in a criminal case involving domestic violence and] under \_\_\_\_\_ <insert code section under which order made>;
3. The defendant knew of the court order;
4. The defendant had the ability to follow the court order;

AND

5. The defendant willfully violated the court order.

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

[The People must prove that the defendant knew of the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

[*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 who dated or is dating the defendant[,]/ [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 *cohabitants* means two unrelated 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.]

---

## BENCH NOTES

### *Instructional Duty*

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

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be "lawfully issued." (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 821, 824; *In re Berry, supra*, 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–820; *In re Berry, supra*, 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word "lawfully" in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

In element 2, give the bracketed phrase "in a criminal case involving domestic violence" if the defendant is charged with a violation of Penal Code section 166(c)(1). In such cases, also give the bracketed definition of "domestic violence" and the associated terms.

In element 2, if the order was not a "protective order" or "stay away order" but another type of qualifying order listed in Penal Code section 166(c)(3) or 273.6(c), insert a description of the type of order from the statute.

In element 2, in all cases, insert the statutory authority under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).)

Give the bracketed paragraph that begins with “The People must prove that the defendant knew” on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

If the prosecution alleges that physical injury resulted from the defendant’s conduct, in addition to this instruction, give CALCRIM No. 2702, *Violation of Court Order: Protective Order or Stay Away—Physical Injury*. (Pen. Code, §§ 166(c)(2), 273.6(b).)

If the prosecution charges the defendant with a felony based on a prior conviction and a current offense involving an act of violence or credible threat of violence, in addition to this instruction, give CALCRIM No. 2703, *Violation of Court Order: Protective Order or Stay Away—Act of Violence*. (Pen. Code, §§ 166(c)(4), 273.6(d).) The jury also must determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

## AUTHORITY

- Elements ▶ Pen. Code, §§ 166(c)(1), 273.6.
- Willfully Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Order Must Be Lawfully Issued ▶ Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366]; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- Knowledge of Order Required ▶ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Proof of Service Not Required ▶ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Must Have Opportunity to Read but Need Not Actually Read Order ▶ *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].

- Ability to Comply With Order ▶ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- General-Intent Offense ▶ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- Abuse Defined ▶ Pen. Code, § 13700(a).
- Cohabitant Defined ▶ Pen. Code, § 13700(b).
- Domestic Violence Defined ▶ Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

21 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Persons, § 63.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4] (Matthew Bender).

### COMMENTARY

Penal Code section 166(c)(1) also includes protective orders and stay aways “issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence . . . .” However, in *People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628], the court held that a defendant cannot be prosecuted for contempt of court under Penal Code section 166 for violating a condition of probation. Thus, the committee has not included this option in the instruction.

### LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on a prior conviction and the allegation that the current offense involved an act of violence or credible threat of violence (Pen. Code, §§ 166(c)(4), 273.6(d)), then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the additional allegations have or have not been

proved. If the jury finds that the either allegation was not proved, then the offense should be set at a misdemeanor.

### **RELATED ISSUES**

See the Related Issues section of CALCRIM No. 2700, *Violation of Court Order*.

2800. Failure to File Tax Return

---

The defendant is charged [in Count \_\_\_] with failing to (file a tax return with/ [or] supply information to) the Franchise Tax Board.

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;

**AND**

2. The defendant ~~did not~~ repeatedly failed to (file the a tax return/ [or] supply the required information) by the required time over a period of two years or more;

**AND**

3. The defendant's failure to (file the return[s]/ [or] supply required information) resulted in an estimated delinquent tax liability of at least fifteen thousand dollars.

[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).]

[If the People prove beyond a reasonable doubt that the defendant was the (president/ [or] chief operating officer) of a corporation, you may but are not required to conclude that the defendant is the person responsible for (filing a return with/ [or] supplying information to) the Franchise Tax Board as required for that corporation.]

[The People do not have to prove the exact amount of unreported income.]

[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 two bracketed paragraphs that begin with “If the People prove beyond a reasonable doubt that” both explain rebuttable presumptions created by statute. (See Rev. & Tax. Code, §§ 19703, 19701(d); 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 instructions have been written as permissive inferences. 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 the Franchise Tax Board” if there is evidence that the return was filed or the information was supplied.

Similarly, the court **must not** give the bracketed paragraph that begins with “If the People prove beyond a reasonable doubt that the defendant was the (president” if there is evidence that someone else was responsible for filing the return or supplying the information.

## AUTHORITY

- Elements ▶ Rev. & Tax. Code, § 19701(a).
- Certificate of Franchise Tax Board ▶ Rev. & Tax. Code, § 19703.
- President Responsible for Corporate Filings ▶ Rev. & Tax. Code, § 19701(d).
- 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].

- 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, § 127.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

## COMMENTARY

Revenue and Taxation Code section 19701(a) does not require that the defendant's conduct be "willful" and specifically states that the act may be "[w]ith or without intent to evade." (Rev. & Tax. Code, § 19701(a).) Courts have held that this language creates a strict liability offense with no intent requirement. (*People v. Allen* (1993) 20 Cal.App.4th 846, 849 [25 Cal.Rptr.2d 26]; *People v. Kuhn* (1963) 216 Cal.App.2d 695, 698 [31 Cal.Rptr. 253]; *People v. Jones* (1983) 149 Cal.App.3d Supp. 41, 47 [197 Cal.Rptr. 273].) In addition, in *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563], the Court held that section 19701 was a lesser included offense of section 19705, willful failure to file a tax return. The Court then concluded that the failure to instruct on the lesser included offense was not error since the "the evidence provided no basis for reasonable doubt as to willfulness." (*Id.* at p. 672.) Thus, it appears that "willfulness" is not an element of a violation of section 19701(a).

Revenue and Taxation Code section 19701(a) states that a person is liable if the person

repeatedly over a period of two years or more, fails to file any return or to supply any information required, or who . . . makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, resulting in an estimated delinquent tax liability of at least fifteen thousand dollars (\$15,000).

It is not completely clear from this language whether the requirement of an estimated delinquent tax liability of at least fifteen thousand dollars applies both to the failure to file a return and to the making, etc. of a false or fraudulent return. The Legislative Counsel's Digest of Assembly Bill No.

139, the bill that added this provision to the statute, indicates that this provision is intended to apply to all the violations specified in Revenue and Taxation Code section 19701(a), including the failure to file a return or supply required information. (See Legis. Counsel's Dig., Assem. Bill No. 139 (2005-2006 Reg. Sess.) Stats. 2005, ch. 74, par. (34).) The committee has adopted this interpretation pending clarification from either the Legislature or case law.

## 2810. False Tax Return

The defendant is charged [in Count \_\_\_] with (supplying (false/ [or] fraudulent) information to the Franchise Tax Board/ [or] (making[,]/ [or] verifying[,]/ [or] signing[,]/ [or] rendering) a (false/ [or] fraudulent) (tax return/ [or] statement)).

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

1. The defendant repeatedly (supplied information to the Franchise Tax Board/ [or] (made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered) [a] (tax return[s]/ [or] statement[s]) over a period of two years or more;
2. The (information[,]/ [or] tax return[,]/ [or] statement) was (false/ [or] fraudulent);

**AND**

*<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.]

**AND**

4. The defendant's (supplying of false/ [or] fraudulent information [or] making[,]/ [or] verifying[,]/ [or] signing[,]/ [or] rendering) the (false/ [or] fraudulent tax return/ [or] statement) resulted in an estimated delinquent tax liability of at least fifteen thousand dollars.

[If the People prove beyond a reasonable doubt that the defendant was the (president/ [or] chief operating officer) of a corporation, you may but are not required to conclude that the defendant is the person responsible for (filing a return with / [or] supplying information to) the Franchise Tax Board as required for that corporation.]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed).]

[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 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, § 19701(d); 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 someone else was responsible for filing the return or supplying the information.

## AUTHORITY

- Elements ▶ Rev. & Tax. Code, § 19701(a).
- President Responsible for Corporate Filings ▶ Rev. & Tax. Code, § 19701(d).
- 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].

- 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, § 127.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02, 140.03 (Matthew Bender).

## COMMENTARY

Revenue and Taxation Code section 19701(a) does not require that the defendant's conduct be "willful" and specifically states that the act may be "[w]ith or without intent to evade." (Rev. & Tax. Code, § 19701(a).) In the context of failure to file a tax return, courts have held that this language creates a strict liability offense with no intent requirement. (*People v. Allen* (1993) 20 Cal.App.4th 846, 849 [25 Cal.Rptr.2d 26]; *People v. Kuhn* (1963) 216 Cal.App.2d 695, 698 [31 Cal.Rptr. 253]; *People v. Jones* (1983) 149 Cal.App.3d Supp. 41, 47 [197 Cal.Rptr. 273].) In addition, in *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563], the Court held that section 19701 was a lesser included offense of section 19705, willful failure to file a tax return. (*Id.* at p. 670.) The Court then concluded that the failure to instruct on the lesser included offense was not error since the "the evidence provided no basis for reasonable doubt as to willfulness." (*Id.* at p. 672.) Thus, it appears that "willfulness" is not an element of a violation of section 19701(a).

Revenue and Taxation Code section 19701(a) states that a person is liable if the person

repeatedly over a period of two years or more, fails to file any return or to supply any information required, or who . . . makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, resulting in an estimated delinquent tax liability of at least fifteen thousand dollars (\$15,000).

It is not completely clear from this language whether the requirement of an estimated delinquent tax liability of at least fifteen thousand dollars applies both to the failure to file a return and to the making, etc. of a false or

fraudulent return. The Legislative Counsel's Digest of Assembly Bill No. 139, the bill that added this provision to the statute, indicates that this provision is intended to apply to all the violations specified in Revenue and Taxation Code section 19701(a), including the failure to file a return or supply required information. (See Legis. Counsel's Dig., Assem. Bill No. 139 (2005-2006 Reg. Sess.) Stats. 2005, ch. 74, par. (34).) The committee has adopted this interpretation pending clarification from either the Legislature or case law.

## 2826. Willful Failure to Pay Tax

---

The defendant is charged [in Count \_\_] with intentionally failing to pay a required (tax/estimated tax) to the Franchise Tax Board.

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

1. The defendant was required to pay a (tax/estimated tax) to the Franchise Tax Board;
2. The defendant failed to pay the (tax/estimated tax) by the date it was due;

AND

3. The defendant voluntarily chose not to pay, with intent to violate a legal duty known to (him/her).

[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).]

---

### 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, § 19701(c).) 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. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912.) “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, § 19701(c).
- 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.

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 127.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

### **COMMENTARY**

Revenue and Taxation Code section 19701(c) provides that a person who willfully fails to pay any estimated tax or tax that the person is required to pay is guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution. However, subdivision (c) also provides that the preceding sentence "shall not apply to any person who is mentally incompetent, or suffers from dementia, Alzheimer's disease, or similar condition." Rev. & Tax. Code, § 19701(c).

## 2962. Selling or Furnishing Alcoholic Beverage to Person Under 21

---

The defendant is charged [in Count \_\_] with [unlawfully] (selling[,]/ [or] furnishing[,]/ [or] giving away)[, or causing to be (sold[,]/ [or] furnished[,]/ [or] given away),] an alcoholic beverage to a person under 21 years old.

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

1. The defendant [unlawfully] (sold[,]/ [or] furnished[,]/ [or] gave away)[, or caused to be (sold[,]/ [or] furnished[,]/ [or] given away),] an alcoholic beverage to \_\_\_\_\_ <insert name of person under 21>;

AND

2. When the defendant did so, \_\_\_\_\_ <insert name of person under 21> was under 21 years old.

**An alcoholic beverage is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An alcoholic beverage includes \_\_\_\_\_ <insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>.]**

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

*<Defense: Good Faith Belief at Least 21>*

**[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that \_\_\_\_\_ <insert name of person under 21> was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that \_\_\_\_\_ <insert name of person under 21> was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

*<Defense: Actual Reliance on Identification>*

**[The defendant did not unlawfully (sell[,]/ [or] furnish[,]/ [or] give away)[, or cause to be (sold[,]/ [or] furnished[,]/ [or] given away,) an alcoholic beverage to a person under 21 years old if:**

1. The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity;
2. \_\_\_\_\_ *<insert name of person under 21>* showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;

AND

3. The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity.

As used here, a *government-issued document* is a document including a driver's license or an identification card issued to a person in the armed forces that has been, or appears to have been, issued by a government agency and contains the person's name, date of birth, description, and picture. ~~This definition includes a driver's license [or an identification card issued to a person in the armed forces].~~ The government-issued document does not have to be genuine.

[An *agent* is a person who is authorized to act for the defendant in dealings with other people.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government-issued document, as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity. 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.

Give the bracketed sentence 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***

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, although the prosecution is not required to prove that the defendant knew the age of the person he or she provided with alcohol, the defendant may assert as a defense a good faith belief that the person was at least 21. The burden is on the defendant to prove this defense. (*Ibid.*) The Court failed to state what burden of proof applies. Following *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067], the committee has drafted the instruction on the premise that the defendant’s burden is to merely raise a reasonable doubt about the defense, and the prosecution must then prove beyond a reasonable doubt that the defense does not apply. If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense. (*Ibid.*)

Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower, supra*, 28 Cal.4th at pp. 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) Give the bracketed word “unlawfully” in the first sentence and element 1, and the bracketed paragraph on the defense.

### **AUTHORITY**

- Elements ▶ Bus. & Prof. Code, § 25658(a).
- Alcoholic Beverage Defined ▶ Bus. & Prof. Code, § 23004.
- Knowledge of Age Not an Element ▶ *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 649, 95 P.3d 906].
- Good Faith Belief Person at Least 21 Defense ▶ *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 649, 95 P.3d 906].
- Bona Fide Evidence of Age Defense ▶ Bus. & Prof. Code, § 25660(c); *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899 [73 Cal.Rptr. 352].
- Affirmative Defenses ▶ See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

## RELATED ISSUES

### *Use of Underage Decoys*

The police may use underage decoys to investigate sales of alcohol to people under 21. (*Provigo Corp. v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561, 564 [28 Cal.Rptr.2d 638, 869 P.2d 1163].) Moreover, a criminal defendant may not raise as a defense the failure of the police to follow the administrative regulations regarding the use of decoys. (*People v. Figueroa* (1999) 68 Cal.App.4th 1409, 1414–1415 [81 Cal.Rptr.2d 216] [court properly denied instruction on failure to follow regulation].)

### *“Furnishing” Requires Affirmative Act*

“In order to violate section 25658, there must be some affirmative act of furnishing alcohol. . . . It is clear that assisting with food and decorations cannot conceivably be construed as acts of ‘furnishing’ liquor, nor . . . can providing the room for the party, even with the knowledge that minors would be drinking. . . . A permissible inference from [the] undisputed testimony was that [the defendant] tacitly authorized his son to provide his beer to the plaintiffs. . . . Such an authorization constitutes the requisite affirmative act as a matter of law. In order to furnish an alcoholic beverage the offender need not pour the drink; it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker.” (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157–1158 [721 Cal.Rptr. 675].)

### 2963. Permitting Person Under 21 to Consume Alcoholic Beverage

---

The defendant is charged [in Count \_\_] with [unlawfully] permitting a person under 21 years old to consume an alcoholic beverage.

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

1. The defendant was licensed to sell alcoholic beverages on the premises of a business;
2. The defendant [unlawfully] permitted \_\_\_\_\_ <insert name of person under 21> to consume an alcoholic beverage on the premises of that business;

AND

3. The defendant knew that \_\_\_\_\_ <insert name of person under 21> was consuming an alcoholic beverage.

**An alcoholic beverage is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An alcoholic beverage includes \_\_\_\_\_ <insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>.]**

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

**The People are not required to prove that the defendant knew that \_\_\_\_\_ <insert name of person under 21> was under 21.**

*<Defense: Good Faith Belief at Least 21>*

**[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that \_\_\_\_\_ <insert name of person under 21> was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that \_\_\_\_\_ <insert name of person under 21> was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

*<Defense: Actual Reliance on Identification>*

[The defendant did not unlawfully permit a person under 21 years old to consume an alcoholic beverage if:

1. The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity;
2. \_\_\_\_\_ *<insert name of person under 21>* showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;

AND

3. The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity.

**As used here, a government-issued document is a document [including a driver's license or an identification card issued to a person in the armed forces] that has been, or appears to have been, issued by a government agency and contains the person's name, date of birth, description, and picture. The government-issued document does not have to be genuine.**

~~As used here, a government issued document is a document that has been, or appears to have been, issued by a government agency and contains the person's name, date of birth, description, and picture. This definition includes a driver's license [or an identification card issued to a person in the armed forces]. The government issued document does not have to be genuine.~~

[An agent is a person who is authorized to act for the defendant in dealings with other people.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government issued document, as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity. 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.

Give the bracketed sentence 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*

Business and Professions Code section 25660(c) provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word “unlawfully” in the first sentence and element 1, and the bracketed paragraph on the defense.

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, for a prosecution under Business and Professions Code section 25658(a), the defendant may assert as a defense a good faith belief that the person was at least 21. If the trial court concludes that this defense also applies to a prosecution under Business and Professions Code section 25658(d) and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. The court may use the bracketed language to instruct on this defense if appropriate.

## AUTHORITY

- Elements ▶ Bus. & Prof. Code, § 25658(d).
- Alcoholic Beverage Defined ▶ Bus. & Prof. Code, § 23004.
- Bona Fide Evidence of Age Defense ▶ Bus. & Prof. Code, § 25660(c); *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899 [73 Cal.Rptr. 352].
- Affirmative Defenses ▶ See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

**RELATED ISSUES**

See the Related Issues section of CALCRIM No. 2962, *Selling or Furnishing Alcoholic Beverage to Person Under 21*.

**2964. Purchasing Alcoholic Beverage for Person Under 21:  
Resulting in Death or Great Bodily Injury**

---

The defendant is charged [in Count \_\_] with [unlawfully] (purchasing an alcoholic beverage for[,]/ [or] (furnishing[,]/ [or] giving[,]/ [or] giving away) an alcoholic beverage to[,]) a person under 21 years old causing (death/ [or] great bodily injury).

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

1. The defendant [unlawfully] (purchased an alcoholic beverage for[,]/ [or] (furnished[,]/ [or] gave[,]/ [or] gave away) an alcoholic beverage to[,]) \_\_\_\_\_ <insert name of person under 21>;
2. When the defendant did so, \_\_\_\_\_ <insert name of person under 21> was under 21 years old;
3. \_\_\_\_\_ <insert name of person under 21> consumed the alcoholic beverage;

**AND**

4. \_\_\_\_\_'s <insert name of person under 21> consumption of the alcoholic beverage caused (death/ [or] great bodily injury) to (himself/herself/ [or] another person).

**An alcoholic beverage** is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An alcoholic beverage includes \_\_\_\_\_ <insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>.]

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

An act causes (death/ [or] great bodily injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the act and the (death/ [or] injury) 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/ [or] great bodily injury). An act causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). 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/ [or] injury).]

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

*<Defense: Good Faith Belief at Least 21>*

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that \_\_\_\_\_ *<insert name of person under 21>* was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that \_\_\_\_\_ *<insert name of person under 21>* was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

*<Defense: Actual Reliance on Identification>*

[The defendant did not unlawfully furnish an alcoholic beverage to a person under 21 years old if:

1. The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity;
2. \_\_\_\_\_ *<insert name of person under 21>* showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;

AND

3. The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of \_\_\_\_\_'s *<insert name of person under 21>* age and identity.

**As used here, a government-issued document is a document [including a driver's license or an identification card issued to a person in the armed forces] that has been, or appears to have been, issued by a government agency and contains the person's name, date of birth, description, and picture. The government-issued document does not have to be genuine.**

[An agent is a person who is authorized to act for the defendant in dealings with other people.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government-issued document, as evidence of \_\_\_\_\_'s <insert name of person under 21> age and identity. 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.

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 there is evidence of multiple causes of death or injury, the court should also give the bracketed paragraph on causation that begins with “There may be more than one cause of (death/ [or] great bodily injury).” (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].)

Give the bracketed sentence 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*

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, although the prosecution is not required to prove that the defendant knew the age of the person he or she provided with alcohol, the defendant may assert as a defense a good faith belief that the person was at least 21. The burden is on the defendant to prove this defense. (*Ibid.*) The Court failed to state what burden of proof applies. Following *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067], the committee has drafted the instruction on the premise that the defendant’s burden is to merely raise a reasonable doubt about the defense, and the prosecution must then prove beyond a reasonable doubt that the defense does not apply. If there is sufficient evidence supporting the defense, the court has a **sua sponte** duty to give the bracketed paragraph on the defense. (*Ibid.*)

Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower, supra*, 28 Cal.4th at pp. 478–481.) Give the bracketed word “unlawfully” in the first sentence and element 1, and the bracketed paragraph on the defense.

### AUTHORITY

- Elements ▶ Bus. & Prof. Code, §§ 25658(a) & (c), ~~25660; *In re Jennings* (2004) 34 Cal.4th 254, 263 [17 Cal.Rptr.3d 645, 95 P.3d 906].~~
- Alcoholic Beverage Defined ▶ Bus. & Prof. Code, § 23004.
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f).
- Knowledge of Age Not an Element ▶ *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906].
- Good Faith Belief Person at Least 21 Defense ▶ *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906].
- Bona Fide Evidence of Age Defense ▶ Bus. & Prof. Code, § 25660(c); *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899 [73 Cal.Rptr. 352].
- Affirmative Defenses ▶ See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

### Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

### RELATED ISSUES

See the Related Issues section of CALCRIM No. 2962, *Selling or Furnishing Alcoholic Beverage to Person Under 21*.

**2982. Persuading, Luring, or Transporting a Minor Under 14 Years of Age~~12 Years Old or Younger~~**

The defendant is charged [in Count \_\_] with persuading, luring, or transporting a minor who is under 14 ~~12 years old or younger~~ years of age.

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

1. The defendant contacted or communicated with \_\_\_\_\_ *<insert name of minor>*;
2. When the defendant did so, (he/she) was an adult stranger to the minor;
3. \_\_\_\_\_ *<insert name of minor>* was under 14 years of age~~12 years old or younger~~ at the time;
4. The defendant knew that (he/she) was contacting or communicating with \_\_\_\_\_ *<insert name of minor>*;
5. The defendant knew or reasonably should have known that \_\_\_\_\_ *<insert name of minor>* was under 14 years of age~~12 years old or younger~~ at the time;
6. The defendant contacted or communicated with \_\_\_\_\_ *<insert name of minor>* with the intent to persuade, lure, or transport[, or attempt to persuade, lure, or transport,] (him/her), for any purpose, away from ( \_\_\_\_\_ 's *<insert name of minor>* home/ [or] any location known by \_\_\_\_\_ 's *<insert name of minor>* parent[, legal guardian, or custodian] as a place where the child is located);
7. The defendant did not have the express consent of \_\_\_\_\_ 's *<insert name of minor>* parent [or legal guardian];

[AND]

8. When the defendant acted, (he/she) intended to avoid the consent of \_\_\_\_\_ 's *<insert name of minor>* parent [or legal guardian](;/.)

*<Give element 9 when instructing on an emergency situation.>*

[AND

9. The defendant was not acting in an emergency situation.]

*An adult stranger* is a person at least 21 years old who has no substantial relationship with the child or is merely a casual acquaintance, or who has established or promoted a relationship with the child for the primary purpose of victimization.

*Express consent* means oral or written permission that is positive, direct, and unequivocal, requiring no inference or implication to supply its meaning.

[*Contact or communication* includes the use of a telephone or the Internet.]

[*Internet* means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described in this definition.]

[An *emergency situation* is a situation where a child is threatened with imminent bodily, emotional, or psychological harm.]

[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.

If there is sufficient evidence, the court has a *sua sponte* duty to instruct on the defense of an “emergency situation.” (Pen. Code, § 272(b)(2).) Give element 9 and the definition of “emergency situation.”

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 remaining bracketed paragraphs should be given on request as appropriate.

Note that the Penal Code section 272 was amended by Stats. 2005, ch. 461 (AB33) to change the victim's age to "under 14 years of age." Prosecutions based on conduct that occurred before January 1, 2006 should use the former age requirement of "twelve years old or younger."

## AUTHORITY

- Elements and Definitions ▶ Pen. Code, § 272(b)(1).
- Internet Defined ▶ Bus. & Prof. Code, § 17538(f)(6).
- Victimization as Predatory Sexual Conduct ▶ Welf. & Inst. Code, § 6600(e).
- Minor Defined ▶ Pen. Code, § 270e; Fam. Code, § 6500.

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 153.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.10[3] (Matthew Bender).

**2983–2989. Reserved for Future Use**

**3115. Armed With Firearm, Pen. Code, § 12022(a)(1)**

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 one of the principals was armed with a firearm during in 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 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 is *armed* with a firearm when that person:

1. Carries a firearm [or has a firearm available] for use in either offense or defense in connection with the crime[s] charged in Count[s] \_\_ [or the lesser crime[s] of \_\_\_\_\_ <insert name[s] of alleged lesser offense[s]>.,;

AND

2. Knows that he or she is carrying the firearm [or has it available].

<If there is an issue in the case over whether the principal was armed with the firearm "during in 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.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708 [76 Cal.Rptr.2d 660, 958 P.2d 412].) However, this procedure is not required. (*Id.* at p. 705.)

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 principal 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 there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, CALCRIM Nos. 400–410.

## AUTHORITY

- Enhancement ▶ Pen. Code, § 12022(a)(1).

- Principal Defined ▶ Pen. Code, § 31.
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Armed ▶ *People v. Marvin 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 [38 Cal.Rptr.2d 214], 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- 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/Facilitative Nexus ▶ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 1002; *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].
- Presence of Gun Cannot Be Accident or Coincidence ▶ (*Smith v. United States* (1993) 508 U.S. 223, 238).

### ***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 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 Need Not Know Principal Armed***

For an enhancement charged under Penal Code section 12022(a) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal was armed. (*People v. Overten* (1994) 28 Cal.App.4th 1497, 1501 [34 Cal.Rptr.2d 232].)

### ***Conspiracy***

A defendant convicted of conspiracy may also receive an enhancement for being armed during the conspiracy, regardless of whether the defendant is convicted of

the offense alleged to be the target of the conspiracy. (*People v. Becker* (2000) 83 Cal.App.4th 294, 298 [99 Cal.Rptr.2d 354].)

**Facilitative Nexus/Connection**

Even though the Supreme Court is currently reviewing the Court of Appeal's decision in *People v. Pitto*, the committee has revised the language of this instruction to more clearly express the facilitative nexus required in *People v. Marvin Bland* (1995) 10 Cal.4th 991, 1002 [contemporaneous possession of illegal drugs and firearm not sufficient without evidence of facilitative nexus between the two, comparing to federal law requirement of carrying a firearm 'during and in relation to' drug trafficking].

**3116. Armed With Firearm: Assault Weapon, Machine Gun, or .50  
BMG Rifle, Pen. Code, § 12022(a)(2)**

---

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 one of the principals was armed with (an assault weapon/a machine gun/a .50 BMG rifle) during-in 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 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/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.]

A principal is *armed* with (an assault weapon/a machine gun/a .50 BMG rifle) when that person:

1. Carries (an assault weapon/a machine gun/a .50 BMG rifle) [or has (an assault weapon/a machine gun/a .50 BMG rifle) available] for use in either offense or defense in connection with the crime[s] charged in Count[s] [or the lesser crime[s] of <insert name[s] of alleged lesser offense[s]>];

[AND]

2. Knows that he or she is carrying the weapon [or has it available](./;)

<See Bench Notes regarding element 3.>

[AND]

3. Knows or reasonably should know that the weapon has characteristics that make it (an assault weapon/a machine gun/a .50 BMG rifle).]

<If there is an issue in the case over whether the principal was armed with the firearm "~~during~~ in 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 being armed with an assault weapon. Element 3 is provided for the court to use at its discretion.

The court should give the bracketed definition of “assault weapon,” “machine gun,” or “.50 BMG rifle” 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.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708 [76 Cal.Rptr.2d 660, 958 P.2d 412].) However, this procedure is not required. (*Id.* at p. 705.)

In the definition of “armed,” the court may give the bracketed phrase “or has (an assault weapon/a machine gun) available” on request if the evidence shows that the weapon 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 principal 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 there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, CALCRIM Nos. 400–410.

## AUTHORITY

- Enhancement ▶ Pen. Code, § 12022(a)(2).

- Principal Defined ▶ Pen. Code, § 31.
- Assault Weapon Defined ▶ Pen. Code, §§ 12276, 12276.1.
- Machine Gun Defined ▶ Pen. Code, § 12200.
- .50 BMG Rifle Defined ▶ Pen. Code, § 12278.
- Knowledge Required for Possession of Assault Weapon ▶ *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Armed ▶ *People v. Marvin 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].
- 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/Facilitative Nexus ▶ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 1002; *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].
- Presence of Gun Cannot Be Accident or Coincidence ▶ (*Smith v. United States* (1993) 508 U.S. 223, 238).

### *Secondary Sources*

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

See the Related Issues section of CALCRIM No. 3115, *Armed With Firearm*, Pen. Code, § 12022(a)(1).

**3117. Armed With Firearm: Knowledge That Coparticipant Armed,  
Pen. Code, § 12022(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 knew that someone who was a principal was armed with a firearm ~~during~~ in 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.]

To prove this allegation, the People must prove that:

1. Someone who was a principal in the crime was armed with a firearm during the commission [or attempted commission] of that crime;

**AND**

2. The defendant was also a principal in the crime and knew that the other person was armed with a firearm.

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 is *armed* with a firearm when that person:

1. Carries a firearm [or has a firearm available] for use in either offense or defense in connection with the crime[s] charged in

Count[s] [or the lesser crime[s] of <insert name[s] of  
alleged lesser offense[s]>];

AND

2. Knows that he or she is carrying the firearm [or has it available].

<If there is an issue in the case over whether the principal was armed with the firearm "~~during~~ in 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.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708 [76 Cal.Rptr.2d 660, 958 P.2d 412].) However, this procedure is not required. (*Id.* at p. 705.)

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 principal 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 there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, CALCRIM Nos. 400–410.

## AUTHORITY

- Enhancement ▶ Pen. Code, § 12022(d).
- Principal Defined ▶ Pen. Code, § 31.
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Armed ▶ *People v. Marvin 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].
- 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/Facilitative Nexus ▶ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 1002; *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].
- Presence of Gun Cannot Be Accident or Coincidence ▶ (*Smith v. United States* (1993) 508 U.S. 223, 238).

### *Secondary Sources*

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

### *Conspiracy*

A defendant convicted of conspiracy may also receive an enhancement for being armed during the conspiracy, regardless of whether the defendant is convicted of the offense alleged to be the target of the conspiracy. (*People v. Becker* (2000) 83 Cal.App.4th 294, 298 [99 Cal.Rptr.2d 353].)

**3118–3129. Reserved for Future Use**

### 3261. During Commission of Felony: Defined—Escape Rule

---

The People must prove that \_\_\_\_\_ *<insert allegation, e.g., the defendant personally used a firearm>* **during** the commission [or attempted commission] of \_\_\_\_\_ *<insert felony or felonies>*.

*<Give one or more bracketed paragraphs below depending on crime[s] alleged.>*

*<Robbery>*

[The crime of robbery [or attempted robbery] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety.

The perpetrator[s] (has/have) reached a temporary place of safety if:

- (He/She/They) (has/have) successfully escaped from the scene; [and]
- (He/She/They) (is/are) no longer being chased(; [and]/.)
- [(He/She/They) (has/have) unchallenged possession of the property; [and]/.)]
- [(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]

*<Burglary>*

[The crime of burglary [or attempted burglary] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[, and (has/have) unchallenged possession of the property].]

*<Sexual Assault>*

[The crime of \_\_\_\_\_ *<insert sexual assault alleged>* [or attempted \_\_\_\_\_ *<insert sexual assault alleged>*] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[,and (is/are) no longer in continuous physical control of the person who was the target of the crime].]

<Kidnapping>

[The crime of kidnapping [or attempted kidnapping] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/) (has/have) successfully escaped from the scene, (is/are) no longer being chased, and (is/are) no longer in continuous physical control of the person kidnapped.]

<Other Felony>

[The crime of \_\_\_\_\_ <insert felony alleged> [or attempted \_\_\_\_\_ <insert felony alleged>] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene and (is/are) no longer being chased.]

---

## BENCH NOTES

### *Instructional Duty*

Give this instruction whenever the evidence raises an issue over the duration of the felony and another instruction given to the jury has required some act “during the commission or attempted commission” of the felony. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 208 [14 Cal.Rptr.3d 281, 91 P.3d 222].)

In *People v. Cavitt* (2004) 33 Cal.4th 187, *supra*, at p. 208, the Court explained the “escape rule” and distinguished this rule from the “continuous-transaction” doctrine:

[W]e first recognize that we are presented with two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule. The “escape rule” defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary safety. [Citation.] The continuous-transaction doctrine, on the other hand, defines the duration of *felony-murder* liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. [Citations.] . . .

(*Ibid.* [italics in original].)

This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing. Instead, the court

should give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*. This instruction should only be given if it is required to explain the duration of the felony for other ancillary purposes, such as use of a weapon.

Similarly, this instruction should **not** be given if the issue is when the defendant formed the intent to aid and abet a robbery or a burglary. For robbery, give CALCRIM No. 1603, *Robbery: Intent of Aider and Abettor*. For burglary, give CALCRIM No. 1702, *Burglary: Intent of Aider and Abettor*.

## AUTHORITY

- Escape Rule ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 208–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Temporary Place of Safety ▶ *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7]; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [17 Cal.Rptr.2d 23].
- Continuous Control of Victim ▶ *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857] [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [23 Cal.Rptr.2d 888] [robbery].
- Robbery ▶ *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1170 [282 Cal.Rptr. 450, 811 P.2d 742].
- Burglary ▶ *People v. Bodely* (1995) 32 Cal.App.4th 311, 313–314 [38 Cal.Rptr.2d 72].
- Lewd Acts on Child ▶ *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857].
- Sexual Assault ▶ *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289].
- Kidnapping ▶ *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [280 Cal.Rptr. 584]; *People v. Silva* (1988) 45 Cal.3d 604, 632 [247 Cal.Rptr. 573, 754 P.2d 1070].

## Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 139–142.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b][v], 142.10[1][b] (Matthew Bender).

## RELATED ISSUES

### ***Temporary Place of Safety Based on Objective Standard***

Whether the defendant had reached a temporary place of safety is judged on an objective standard. The “issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location.” (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].)

**3262–3399. Reserved for Future Use**

### 3454. Commitment as Sexually Violent Predator

---

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 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 ~~it is likely that (he/she) will be a danger to the health and safety of others because (he/she) will engage in sexually violent predatory criminal behavior(;/.)~~

*<Give element 4<sup>5</sup> when instructing on confinement in a secure facility.>*

[AND]

- 44.5 [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~~ongenital or acquired conditions that affect~~ affecting a person's ability to control emotions and behavior~~emotional or volitional capacity~~ and predisposing 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, danger, that is, a 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.]

~~[The term *diagnosed mental disorder* includes congenital or acquired conditions affecting a person's emotional or volitional capacity and predisposing that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.]~~

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 there is sufficient evidence to raise a reasonable doubt as to whether confinement in a secure facility is necessary, the court has a sua sponte duty to instruct on this issue. If sufficient evidence is presented 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].) Give bracketed element 4.~~

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, (2004) 31 Cal.4th 757, 776-777.

## 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.
- Amenability to Voluntary Treatment ▶ *People v. Cooley* (2002) 29 Cal.4th 228, 256

### *Secondary Sources*

| 35 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 193.

| 4-5 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.)

**3517. Deliberations and Completion of Verdict Forms:  
Lesser Offenses or Degrees without Stone Instruction  
(Non-Homicide)**

---

If all of you find that the defendant is not guilty of a charged crime, you may convict (him/her) of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime.

Now I will explain to you which crimes 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 \_\_\_\_.]

You must consider each of these (charged/greater) crimes and decide whether the defendant is guilty or not guilty of each one.

It is up to you to decide the order in which you consider each crime and the relevant evidence.

I can only accept a guilty verdict on a lesser crime if you all agree that the defendant is not guilty of the (charged/greater) crime and give me a signed verdict form of not guilty for the (charged/greater) crime.

You will receive verdict forms for (all of these charged crimes and lesser crimes/the charged crime and lesser crime[s]). If all of you are convinced beyond a reasonable doubt that the defendant is guilty of a greater crime, do not fill out or sign a verdict form for the crimes that are lesser than that crime. Give the unused forms back to me unsigned.

If all of you find the defendant not guilty of a greater crime, but conclude that (he/she) is guilty of a lesser crime, indicate your verdict for that lesser crime on the appropriate verdict form and give the form for that lesser crime to me after the foreperson has signed it.

**If all of you cannot agree about whether the defendant is guilty or not guilty of a greater crime, inform me about your disagreement and do not fill out any verdict form.**

~~Give the following paragraph if required by Penal Code 1097>~~

~~[If all of you find that the defendant is guilty of \_\_\_\_\_ <insert crime>  
but you have a reasonable doubt about whether the crime was of the first or  
second degree, then you must find (him/her) guilty of that crime in the second  
degree.]~~

If all of you agree that the People have not proved that the defendant  
committed a greater or lesser crime, then complete the verdict form stating  
that (he/she) is not guilty of that crime.

## BENCH NOTES

### *Instructional Duty*

In all non-homicide cases where one or more lesser included offenses is submitted to the jury, whether charged or not, the court has a **sua sponte** duty to give either this instruction or CALCRIM No. 3518, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With Stone Instruction (Non-Homicide)*. (*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]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)

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 this instruction. If the jury later declares that it is unable to reach a verdict on a lesser included offense, then the court must provide the jury with an opportunity to acquit on the greater offense. (*People v. Marshall, supra*, 13 Cal.4th at p. 826; *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519.)

**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 not accept a guilty verdict on a lesser included offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser included offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, retrial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If, despite the court’s instructions, the jury has returned a guilty verdict on the lesser included offense without explicitly acquitting on the greater offense, the court must 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. (*People v. Fields, supra*, 13 Cal.4th at p. 310.) 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, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser included offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser included offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields, supra*, 13 Cal.4th at p. 311.)

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 852].

- 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 Absent Finding 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].)

### ***Standard for Determining Lesser Offense***

“Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that

the greater cannot be committed without also committing the lesser.” (*People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].)

***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:  
Lesser Offenses or Degrees—With Stone Instruction (Non-Homicide)**

---

*<The court may give the bracketed paragraph below if the jury has failed to reach a verdict and the court wishes to instruct pursuant to Stone>*

**[Because of your disagreement on Count[s] \_\_\_\_\_, it is necessary to follow a different procedure for using verdict forms for (that/those) count[s]. Now you must disregard the instructions that I gave you earlier about using verdict forms [for Count[s] \_\_\_\_].]**

**If all of you find that the defendant is not guilty of a charged crime, you may convict (him/her) of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime.**

**Now you (will receive/have received) guilty and not guilty verdict forms for Count[s] \_\_\_\_\_ and the lesser crime[s] to (that/those) crime[s] [charged in Count[s] \_\_\_\_].**

\_\_\_\_\_  
\_\_\_\_\_ *<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.**

**Follow these directions before you give me any signed, final verdict form:**

- 1. If all of you agree that the defendant is guilty of the crime[s] charged [in Count[s] \_\_\_\_ *<insert counts in which greater crimes are charged>*], have the foreperson sign and date the verdict form for (that/those) crime[s]. Do not sign any other verdict forms [for Counts[s] \_\_\_\_].**
- 2. If all of you cannot agree on a verdict for the crime charged [in Count[s] \_\_\_\_ *<insert counts in which greater crimes are charged>*], do not sign any verdict forms for (that/those) crime[s] and let me know that you cannot agree.**

3. I can only accept a verdict of guilty on a lesser crime if all of you have agreed on and given me a signed verdict form of not guilty for the (charged/greater) crime.
4. [Apply these directions when you decide whether a defendant is guilty or not guilty of \_\_\_\_\_ <insert crime> , which is a lesser crime than \_\_\_\_\_ <insert crime>.]

**If all of you agree that the People have not proved that the defendant committed a greater or lesser crime, then complete the verdict form stating that (he/she) is not guilty of that crime.**

*Give the following paragraph if required by Penal Code 1097>*

~~[If you find that the defendant is guilty of \_\_\_\_\_ <insert crime> but you have a reasonable doubt about whether the crime was of the first or second degree, then you must find (him/her) guilty of that crime in the second degree.]~~

---

## BENCH NOTES

### *Instructional Duty*

In all non-homicide cases in which one or more lesser included offenses is submitted to the jury, whether charged or not, the court has a **sua sponte** duty to give either this instruction or CALCRIM No. 3517, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees (Non-Homicide)*. (*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]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)

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. 3519 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 not accept a guilty verdict on a lesser included offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser included offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, retrial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If, despite the court’s instructions, the jury has returned a guilty verdict on the lesser included offense without explicitly acquitting on the greater offense, the court must again instruct the jury that in may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra*, 13 Cal.4th at p. 310.) 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, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser included offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser included offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields, supra*, 13 Cal.4th at p. 311.)

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 Absent Finding 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**

See the Related Issues section of CALCRIM No. 3517, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees (Non-Homicide)*.

**3519–3529. Reserved for Future Use**

**Agenda Item 2: Supplement to Report regarding Jury Instructions:  
Approve Publication of Revisions and Additions to Criminal Jury Instructions  
(Cal. Rules of Court, rule 855(d)) (Action Required)**

This report supplements the report in Tab 2 of the binder containing Reports and Recommendations for the August 25, 2006 Judicial Council meeting. After this binder was sent to the council, the council's official jury instruction publisher, LexisNexis, and staff to the council's Advisory Committee on Criminal Jury Instructions became aware of further desirable changes to the instructions. The Advisory Committee on Criminal Jury Instructions recommends that the council approve for publication these further changes to the criminal jury instructions.

The changes can be categorized as follows: (1) conforming changes and corrections to 14 of the instructions currently before the council; (2) conforming changes and corrections to seven additional instructions; and (3) minor nonsubstantive typographical and style corrections to a total of 244 jury instructions.

Categories One and Two: Conforming Changes and Corrections

A chart summarizing the changes to the first two categories of instructions is attached to this supplement. In the first column is the number of the affected CALCRIM instruction. The second column identifies the part of the instruction that is affected by the change. The third column gives the full text of the change and the fourth column summarizes the reason for the change. These changes have been reviewed and approved by the committee chair on behalf of the committee [and by RUPRO].

As indicated in the chart, the changes to the first two categories are conforming changes, changes made to correct an inaccuracy in the text, and citation updates. "Conforming changes" are those that are required in instructions (usually in the same set) to "conform" the wording or style of that instruction to the other instructions. Examples of conforming changes include "the/a" instead of just "the," changing "anyone" to "someone," and changing a definition in an instruction in the same set to match a newly revised definition.

The seven additional instructions, which make up category two, are attached to this supplement. These seven additional instructions are: Nos. 730, 821, 1015, 2040, 2140, 2182, and 2304. With the exception of CALCRIM 2040 and 2140, the changes to these instructions were not circulated for comment because the changes are minor substantive changes needed for accuracy or consistency among the instructions and unlikely to lead to controversy. The proposed changes to CALCRIM 2040 and 2140 were circulated for comment.<sup>1</sup>

---

<sup>1</sup> Any comments received on these instructions are summarized on pages 16-17 of the comment chart attached to the July 12, 2006 report to the Judicial Council in Tab 2 of the council binder. These two instructions were inadvertently omitted from the instructions attached to the council report.

### Category Three: Minor Typographical and Style Corrections

The official publisher has copyedited and cite checked all of the CALCRIM instructions. Many of the instructions require minor nonsubstantive changes to correct typographical errors, improve formatting, and update citations. These minor nonsubstantive changes include: adding spaces, changing a short dash to a long dash, correcting misspellings, adding forward slashes where necessary, and correcting any citations not in conformity with the California Style Manual (e.g., deleting the first name of a defendant in a criminal case citation, changing "subd. #" in a statutory citation to "(#)" to indicate subdivisions of a code section, and including a parallel citation). No changes have been made to the text of the instructions. The committee further recommends that the council approve these minor typographical and style corrections to 244 instructions as well.

Because the edited pages are voluminous, a representative cross section of ten of the instructions with minor changes is attached to this supplemental report. In addition, a full set of these instructions will be made available for inspection on both days of the August council meeting.

## CATEGORY ONE CHANGES

Inst. #	Location	Change	Note
415, 416 and 563	Element 3 and 4 and paragraph following elements	<p><b>3. (The/One of the) defendant[s][,] [or _____ &lt;insert name[s] or description[s] of coparticipant[s]&gt;][,] [or (both/all) of them] committed [at least one of] the following alleged overt act[s] to accomplish _____ &lt;insert alleged crime[s]&gt;: _____ &lt;insert the alleged overt acts&gt;;</b></p> <p><b>AND</b></p> <p><b>4. [At least one of these/This] overt act[s] was committed in California.</b></p> <p><b>To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the act[s].</b></p>	Conforming changes necessary to implement the change that was already approved by RUPRO in July (shown in the last two lines of this section).
415	Introductory paragraph of instruction	<p><b>[I have explained that (the/a) defendant may be guilty of a crime if (he/she) either commits the crime or aids and abets the crime. (He/She) may also be guilty if (he/she) is a member of a conspiracy.]</b></p>	Conforming changes necessary for consistency in instruction format regarding multiple defendants.
415, 416	Instruction text	<p><b>To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit _____ &lt;insert alleged crime[s]&gt;, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].</b></p>	Conforming changes necessary for consistency in instruction format regarding multiple defendants.

Inst. #	Location	Change	Note
415, 416	Instruction text	<b>[The People allege that the defendant[s] conspired to commit the following crimes: _____ &lt;insert alleged crime[s]&gt;. You may not find (the/a) defendant guilty of conspiracy unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.] [You must also all agree on the degree of the crime.]</b>	Conforming changes necessary for consistency in instruction format regarding multiple defendants.
563	Instruction text	<b>To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit murder, please refer to Instructions __, which define that crime.</b>	Conforming changes necessary for consistency in instruction format regarding multiple defendants.
602	Text paragraph defining "custodial officer"	<b>[A <i>custodial officer</i> 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/_____ &lt;insert other detention facility&gt;) is a local detention facility.] [A custodial officer is not a peace officer.]</b>	Addition of "an" because "other detention facility" might start with vowel.
736, 1400, 1401, 2542	Text: Pattern 1A and 1B	<p><i>&lt;Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25)&gt;</i></p> <p><b>1A. [any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes:]] _____ &lt;insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)&gt;;</b></p> <p><b>[OR]</b></p> <p><i>&lt;Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)&gt;</i></p> <p><b>1B. [at least one of the following crimes:] _____</b></p> <p><i>&lt;insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25)&gt;</i></p>	This is a refinement to clarify that a pattern may consist of either two or more different crimes, or multiple instances of the same crime.



Inst. #	Location	Change	Note
853	BENCH NOTES: Instructional Duty	The court must give this instruction on request when evidence of other domestic violence has been introduced. (See <i>People v. Falsetta</i> (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; <i>People v. Jennings</i> (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; <i>People v. Willoughby</i> (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)	CJER handbook is being revised to reference CALCRIM and not CALJIC.
1304	Alternative B; Element 1	<p>&lt;Alternative B - School Grounds&gt;</p> <ol style="list-style-type: none"> <li>1. The defendant burned or desecrated <b>a religious symbol on a the property of a primary school, junior high school, middle school, or high school;</b></li> <li>2. The defendant knew the object that he or she burned <b>or desecrated</b> was a religious symbol; and</li> <li>3. The defendant committed (this/these) act[s] with the intent to terrorize <b>someone</b> who attends the school, works at the school or is associated with the school.</li> </ol>	Conforming to similar language in another part of the instruction and making the list of choices consistent with other lists.
1304	Text of opening paragraph	<b>The defendant is charged [in Count __] with (terrorism by cross burning/terrorism by religious symbol desecration).</b>	Conforming change to lower case.
1401	Instructions for 1A and 1B in definition of “pattern of criminal gang activity”	<p>&lt;Give 1A if the <del>crime</del> or crimes are in Pen. Code, § 186.22(e)(1)-(25)&gt;</p> <p><b>1A. [any combination of two or more of the following crimes]:</b> _____ &lt;insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25)&gt;;</p> <p>[OR]</p> <p>&lt;Give 1B if one or more of the <del>crimes</del> are in Pen. Code, §</p>	Word “alleged” removed from italicized instructions to match CALCRIM 1400.

**Deleted:** ; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.112(f) [included without comment within sua sponte instructions]

**Deleted:** *alleged*

**Deleted:** *alleged*

Inst. #	Location	Change	Note
		<p>186.22(e)(26)–(30)&gt;  <b>1B. any combination of</b> _____ &lt;insert crime or crimes in Pen. Code, § 186.22(e)(26)–(30)&gt; <b>and</b> _____ &lt;insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25)&gt;;</p>	
1750	RELATED ISSUES Dual Convictions Prohibited	A person may not be convicted of stealing and of receiving the same property. ( <i>People v. Jaramillo</i> (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706] <b>superseded by statute on related grounds, as stated in <i>People v. Hinks</i> (1997) 58 Cal.App.4th 1157 [68 Cal.Rptr.2d 440]</b> ; see <i>People v. Tatum</i> (1962) 209 Cal.App.2d 179, 183 [25 Cal.Rptr. 832].) See CALCRIM No. 3516, <i>Multiple Counts: Alternative Charges For One Event</i> .	Relevant case added; statement is still good law.
2040	Text: “person” defined	<b>[As used here, the term “person” means a human being, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity.]</b>	Definition was added to be consistent with statutory amendment.
2500	Bench Notes: Instructional Duty	<p>Select alternative 3B if the object “has no conceivable innocent function” (<i>People v. Fannin</i> (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in Penal Code section 12020(c) (see <i>People v. Gaitan</i> (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).</p> <p>Give element 4 only if the defendant is charged with offering or exposing for sale. (See <i>People v. Jackson</i> (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)</p>	<p>Conforming bench notes to deleted language in instruction:  <b>[The People do not have to prove that the defendant used the object as a weapon.]</b>  Two references to this sentence in the Bench Notes were deleted.</p>

Deleted: alleged

Inst. #	Location	Change	Note
2800	Text: Element 3	<p style="text-align: center;"><b>AND</b></p> <p><b>3. The defendant's failure to (file the return/ [or] supply required information) resulted in an estimated delinquent tax liability of at least fifteen thousand dollars.</b></p>	Took the "[s]" off of "return" to make consistent with other elements.

## CATEGORY TWO CHANGES

Inst. #	Location	Change	Note
730	Bench Notes: Instructional Duty	If the evidence raises the potential for accomplice liability, the court has a <b>sua sponte</b> duty to instruct on that issue. Give CALCRIM No. 703, <i>Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)</i> . If the homicide occurred <b>on or before</b> June 5, 1990, give CALCRIM No. 701, <i>Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990</i> .	Correction of inaccuracy in original text.
821	Text: Alternative D	<Alternative D—while having custody, caused or permitted to be placed in danger> <b>[1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child’s person or health might have been endangered;]</b>	Conforming to language of other instructions with similar language.
1015	Text: Alternative 3A	<Alternative 3A—force or fear> <b>[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone.]</b>	Conforming change, i.e., when a statute says “anyone” the referenced person in the instruction should be “someone.”
2140	Text:	<b>[AND]</b>  <b>(d) When requested, to show (his/her) driver’s license to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident(;/.)</b>  <Give element 4(e) if accident caused death.>	Order of elements changed to improve flow, “or” changed to “and” for accuracy.

Inst. #	Location	Change	Note
		<p style="text-align: center;"><b>[AND</b></p> <p style="text-align: center;"><b>(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]</b></p>	
2182	Text: "distinctively marked"	<p><b>A vehicle is <i>distinctively marked</i> if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.</b></p>	To conform to CALCRIM 2180 and CALCRIM 2181.
2182	Bench Notes	<p style="text-align: center;"><b>AUTHORITY</b></p> <ul style="list-style-type: none"> <li>• Elements ▶ Veh. Code, § 2800.1(a).</li> <li>• Distinctively Marked Vehicle ▶ <i>People v. Hudson (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168]</i>.</li> <li>• Distinctive Uniform ▶ <i>People v. Estrella (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]</i>; <i>People v. Mathews (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289]</i>.</li> <li>• Jury Must Determine If Peace Officers ▶ <i>People v. Flood (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869]</i>.</li> <li>• Red Lamp, Siren, <b>Additional Distinctive Feature of Car</b>, and Distinctive Uniform Must Be Proved ▶ <i>People v. Hudson (2006) 38 Cal.4th 1002, 1013 [44 Cal.Rptr.3d 632, 136 P.3d 168]</i>; <i>People v. Acevedo (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]</i>; <i>People v. Brown (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 906]</i>.</li> </ul>	To conform to CALCRIM 2180 and CALCRIM 2181.

Inst. #	Location	Change	Note
2304	Text: Defense: Prescription	<p data-bbox="537 172 842 204">&lt;Defense: Prescription&gt;</p> <p data-bbox="537 237 1413 505"><b>[The defendant is not guilty of possessing _____ &lt;insert type of controlled substance&gt; if (he/she) had a valid, written prescription for that substance from a physician, dentist, podiatrist, <b>[naturopathic doctor]</b>, or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]</b></p>	To conform to CALCRIM 2400.
2304	Bench Notes	<p data-bbox="537 545 1413 675">A recent amendment to section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.</p>	To conform to CALCRIM 2400.

**730. Special Circumstances: Murder in Commission of Felony,  
Pen. Code, § 190.2(a)(17)**

---

**The defendant is charged with the special circumstance of murder committed while engaged in the commission of \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>.**

**To prove that this special circumstance is true, 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, § 190.2(a)(17)>;**
- 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, § 190.2(a)(17)>;**

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

**[3. If the defendant did not personally commit [or attempt to commit] \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>, 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, § 190.2(a)(17)>;]**

**(3/4). (The defendant/ \_\_\_\_\_ <insert name or description of person causing death if not defendant>) did an act that caused the death of another person;**

**[AND]**

**(4/5). The act causing the death and the \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> [or attempted \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>] were part of one continuous transaction(;/.)**

*<Give element 5/6 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>*

**[AND]**

**(5/6). There was a logical connection between the act causing the death and the \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> [or attempted \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>]. The connection between the fatal act and the \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> [or attempted \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>] must involve more than just their occurrence at the same time and place.]**

**To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>, 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 this special circumstance.**

*<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] aided and abetted/ [or] been a member of a conspiracy to commit) the (felony/felonies) of \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> before or at the time of the act causing the death.]**

**[In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> independent of the killing. If you find that the defendant only intended to commit murder and the commission of \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.]**

---

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d

573, 941 P.2d 752].) The court also has a **sua sponte** duty to instruct on the elements of any felonies alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If the evidence raises the potential for accomplice liability, the court has a **sua sponte** duty to instruct on that issue. Give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder*, Pen. Code, § 190.2(a)(17). If the homicide occurred on or before June 5, 1990, give CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990*.

Deleted: prior to

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 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.

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 requirement in element 2. Give bracketed element 3. 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.

Bracketed element 6 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.) The court should give bracketed element 6 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 6. (See discussion of conspiracy liability in the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.)

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.” For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 399, 789 P.2d 127].

In addition, the court must give the final bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Kimble* (1988) 44 Cal.3d 480, 501 [244 Cal.Rptr. 148, 749 p.2d 803]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].)

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*.

Proposition 115 added Penal Code section 190.41, eliminating the corpus delicti rule for the felony-murder special circumstance. (Pen. Code, § 190.41; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].) If, however, the alleged homicide predates the effective date of the statute (June 6, 1990), then the court must modify this instruction to require proof of the corpus delicti of the underlying felony independent of the defendant’s extrajudicial statements. (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 298.)

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 [197 Cal.Rptr. 79, 672 P.2d 862] and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr.

585, 742 P.2d 1306]), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127 Cal.Rptr.2d 802, 58 P.3d 931]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].) The court should then modify this instruction to specify intent to kill as an element.

## AUTHORITY

- Special Circumstance ▶ Pen. Code, § 190.2(a)(17).
- Specific Intent to Commit Felony Required ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Valdez* (2004) 32 Cal.4th 73, 105 [8 Cal.Rptr.3d 271, 82 P.3d 296].
- Continuous Transaction Requirement ▶ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 88 [17 Cal.Rptr.3d 710, 96 P.3d 30] [applying rule to special circumstance]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026 [248 Cal.Rptr. 568, 755 P.2d 1017].
- 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].
- Provocative Act Murder ▶ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].
- Concurrent Intent ▶ *People v. Mendoza* (2000) 24 Cal.4th 130, 183 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Clark* (1990) 50 Cal.3d 583, 608–609 [268 Cal.Rptr. 399, 789 P.2d 127].
- Felony Cannot Be Incidental to Murder ▶ *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]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].
- Instruction on Felony as Incidental to Murder ▶ *People v. Kimble* (1988) 44 Cal.3d 480, 501 [244 Cal.Rptr. 148, 749 P.2d 803]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].
- Proposition 115 Amendments to Special Circumstance ▶ *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].

Deleted: . 348

## *Secondary Sources*

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, §§ 450, 451, 452, 453.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.13[17] (Matthew Bender).

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

## RELATED ISSUES

### ***Applies to Felony Murder and Provocative Act Murder***

“The fact that the defendant is convicted of murder under the application of the provocative act murder doctrine rather than pursuant to the felony-murder doctrine is irrelevant to the question of whether the murder qualified as a special-circumstances murder under former section 190.2, subdivision (a)(17). The statute requires only that the murder be committed while the defendant was engaged in the commission of an enumerated felony.” (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].)

### ***Concurrent Intent to Kill and Commit Felony***

“Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance.” (*People v. Mendoza* (2000) 24 Cal.4th 130, 183 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Clark* (1990) 50 Cal.3d 583, 608–609 [268 Cal.Rptr. 399, 789 P.2d 127].)

### ***Multiple Special Circumstances May Be Alleged***

The defendant may be charged with multiple felony-related special circumstances based on multiple felonies committed against one victim or multiple victims of one felony. (*People v. Holt* (1997) 15 Cal.4th 619, 682 [63 Cal.Rptr.2d 782, 937 P.2d 213]; *People v. Andrews* (1989) 49 Cal.3d 200, 225–226 [260 Cal.Rptr. 583, 776 P.2d 286].)

(*New January 2006*)

## 821. Child Abuse Likely to Produce Great Bodily Harm or Death

---

The defendant is charged [in Count \_\_\_] with child abuse likely to produce (great bodily harm/ [or] death).

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

*<Alternative A—inflicted pain>*

**[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on a child;]**

*<Alternative B—caused or permitted to suffer pain>*

**[1. The defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering;]**

*<Alternative C—while having custody, caused or permitted to suffer injury>*

**[1. The defendant, while having care or custody of a child, willfully caused or permitted the child’s person or health to be injured;]**

*<Alternative D—while having custody, caused or permitted to be placed in danger>*

**[1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child’s person or health might have been endangered;]**

Deleted: was

**[AND]**

**2. The defendant (inflicted pain or suffering on the child/ [or] caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce (great bodily harm/ [or] death)(;/.)**

*<Give element 3 when giving alternatives 1B, 1C or 1D>*

**[AND]**

**[3. The defendant was criminally negligent when (he/she) caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)(;/.)]**

<Give element 4 when instructing on parental right to discipline>  
[AND

**4. The defendant did not act while reasonably disciplining a child.]**

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

A *child* is any 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.]

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

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

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

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 criminal 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.]

[A child does not need to actually suffer great bodily harm. But if a child does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

## 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, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 CR2d 33].) Give bracketed element 4 and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted a child to suffer. If it is alleged that the defendant had care or custody of a child and caused or permitted the child's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of a child and endangered the child's person or health. (See Pen. Code, § 273a(a).)

Give bracketed element 3 and the bracketed definition of "criminally negligent" if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (See *People v. Valdez* (2002) 27 Cal.4th 778, 788–789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780].)

Give on request the bracketed definition of "unjustifiable" physical pain or mental suffering if there is a question about the necessity or degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

Give on request the bracketed paragraph stating that a child need not actually suffer great bodily harm. (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [159 Cal.Rptr. 771].)

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, § 273a(a); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].
- Child Defined ▶ See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [in context of Pen. Code, § 273d].
- Great Bodily Harm or Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519].
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct ▶ *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926] [criminal negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135 [253 Cal.Rptr. 1, 763 P.2d 852].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering ▶ *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409]; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 361 [125 Cal.Rptr. 855]; *People v. Wright* (1976) 60 Cal.App.3d 6, 14 [131 Cal.Rptr. 311].

### Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–163.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][a][v], 142.23[7] (Matthew Bender).

## COMMENTARY

Any violation of Penal Code section 273a(a) must be willful. (*People v. Smith* (1984) 35 Cal.3d 798, 806 [678 P.2d 886]; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; but see *People v. Valdez* (2002) 27 Cal.4th 778, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511] [the prong punishing a *direct infliction* of unjustifiable physical pain or mental suffering does not expressly

*Copyright 2005 Judicial Council of California*

require that the conduct be willful[.]) Following *Smith* and *Cortes*, the committee has included “willfully” in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

### LESSER INCLUDED OFFENSES

- Attempted Child Abuse ▶ Pen. Code, §§ 664, 273a(a).
- Misdemeanor Child Abuse ▶ Pen. Code, § 273a(b).

### RELATED ISSUES

#### *Care or Custody*

“The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (*People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [90 Cal.Rptr.2d 578] [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257]].)

#### *Prenatal Conduct*

Penal Code section 273a does not apply to prenatal conduct endangering an unborn child. (*Reyes v. Superior Court* (1977) 75 Cal.App.3d 214, 217–218, 219 [141 Cal.Rptr. 912].)

#### *Unanimity*

The court has a sua sponte duty to instruct on unanimity when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].) However, the court does not have to instruct on unanimity if the offense constitutes a “continuous course of conduct.” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777].) Child abuse may be a continuous course of conduct or a single, isolated incident. (*Ibid.*) The court should carefully examine the statute charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (*Ibid.*) See generally CALCRIM No. 3500, *Unanimity*.

| (Revised August 2006)

Deleted: New January

## 1015. Oral Copulation by Force, Fear, or Threats

---

The defendant is charged [in Count \_\_\_] with oral copulation by force.

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

1. The defendant committed an act of oral copulation with someone else;
2. The other person did not consent to the act;

AND

3. The defendant accomplished the act by

<Alternative 3A—force or fear>

[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone.]

Deleted: anyone

<Alternative 3B—future threats of bodily harm>

[threatening to retaliate against someone when there was a reasonable possibility that the threat would be carried out. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 3C—threat of official action>

[threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has the authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

*Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

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

[Evidence that the defendant and the person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.]

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

[The defendant is not guilty of forcible oral copulation if he or she actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the person consented. If the People have not met this burden, you must find the defendant not guilty.]

---

## BENCH NOTES

### *Instructional Duty*

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

Select the appropriate alternative in element 3 to instruct how the act was allegedly accomplished.

## AUTHORITY

- Elements ▶ Pen. Code, § 288a(c)(2) & (3), (k).

- Consent Defined ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined ▶ *People v. Leal* (2004) 33 Cal.4th 999, ~~1004–1010~~ [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined ▶ Pen. Code, § 261(c) [in context of rape].
- Oral Copulation Defined ▶ Pen. Code, § 288a(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Threatening to Retaliate Defined ▶ Pen. Code, § 288a(l).
- Fear Defined ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826].

Deleted: 1001–1002

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [2] (Matthew Bender).

### **COMMENTARY**

Penal Code section 288a requires that the oral copulation be “against the will” of the other person. (Pen. Code, § 288a(c)(2) & (3), (k).) “Against the will” has been defined as “without consent.” (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of “fear” because that term has meaning in the context of forcible oral copulation that is technical and may not be readily apparent to jurors. (See *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 288a does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional

definitions are provided for the court to use at its discretion. The definition of “duress” is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of “menace” is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra*, 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of “duress” contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of “menace.” The court should consider the *Leal* opinion before giving the definition of “menace.”

Deleted: 1001–1002

Deleted: 1001–1002

The term “force” as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826]). In *People v. Griffin, supra*, the Supreme Court further stated,

Nor is there anything in the common usage definitions of the term “force,” or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that “in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

(*People v. Griffin, supra*, 33 Cal.4th at pp. 1023–1024 [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826] [*Griffin* reasoning applies to violation of Pen. Code, § 288a(c)(2)].)

The committee has provided a bracketed definition of “force,” consistent with *People v. Griffin, supra*, that the court may give on request.

## LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.

- Assault With Intent to Commit Oral Copulation ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Oral Copulation ▶ Pen. Code, §§ 663, 288a.
- Battery ▶ Pen. Code, § 242.

## RELATED ISSUES

### ***Consent Obtained by Fraudulent Representation***

A person may also induce someone else to consent to engage in oral copulation by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant’s argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

### ***Consent Withdrawn***

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to oral copulation was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

### ***Multiple Acts of Oral Copulation***

An accused may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446–1447 [278 Cal.Rptr. 452] [defendant properly convicted of multiple violations of Pen. Code, § 288a where he interrupted the acts of copulation and forced victims to change positions].)

### ***Sexual Organ***

A man’s “sexual organ” for purposes of Penal Code section 288a includes the penis and the scrotum. (Pen. Code, § 288a; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448–1449 [278 Cal.Rptr. 452].)

| (*Revised August 2006*)

Deleted: New January

### 2040. Unauthorized Use of Personal Identifying Information

The defendant is charged [in Count \_\_\_] with the unauthorized use of someone else’s personal identifying information.

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

1. The defendant willfully obtained someone else’s personal identifying information;
2. The defendant willfully used that information for an unlawful purpose;

AND

3. The defendant used the information without the consent of the person whose identifying information (he/she) was using.

***Personal identifying information includes the (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver’s license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother’s maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) of an individual person.***

Deleted: ¶

Formatted: Font: Bold

**[As used here, the term “person” means a human being, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity.]**

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

44 An *unlawful purpose* includes unlawfully (obtaining/ [or] attempting to  
45 obtain) (credit[,]/ [or] goods[,]/ [or] services[,]/ [or] medical information) in  
46 the name of the other person.

Formatted: Numbering: Continuous

47  
48  
49  
50

### BENCH NOTES

#### *Instructional Duty*

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

54

55 In the definition of personal identifying information, give the relevant items based  
56 on the evidence presented.

57

58

59

### AUTHORITY

60

- 61 • Elements ▶ Pen. Code, § 530.5(a).
- 62 • Personal Identifying Information Defined ▶ Pen. Code, § 530.5(b).
- 63 • Person Defined ▶ Pen. Code, § 530.5(g).

64

#### *Secondary Sources*

66

67 2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against  
68 Property, § 209.

69

70 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143,  
71 *Crimes Against Property*, § 143.01[1], [4][h] (Matthew Bender).

72

73 *(Revised August 2006)*

Deleted: ¶  
¶

74

Deleted: New January

75 **2041–2099. Reserved for Future Use**

3 **2140. Failure to Perform Duty Following Accident: Death or Injury—**  
4 **Defendant Driver**  
5

---

6 **The defendant is charged [in Count \_\_\_] with failing to perform a legal duty**  
7 **following a vehicle accident that caused (death/ [or] [permanent] injury) to**  
8 **another person.**  
9

10 **To prove that the defendant is guilty of this crime, the People must prove**  
11 **that:**  
12

- 13 **1. While driving, the defendant was involved in a vehicle accident;**
- 14
- 15 **2. The accident caused (the death of/ [or] [permanent, serious] injury**  
16 **to) someone else;**
- 17
- 18 **3. The defendant knew that (he/she) had been involved in an accident**  
19 **that injured another person [or knew from the nature of the**  
20 **accident that it was probable that another person had been**  
21 **injured];**  
22

23 **AND**  
24

- 25 **4. The defendant willfully failed to perform one or more of the**  
26 **following duties:**  
27
- 28 **(a) To stop immediately at the scene of the accident;**
- 29
- 30 **(b) To provide reasonable assistance to any person injured in the**  
31 **accident;**  
32
- 33 **(c) To give to (the person struck/the driver or occupants of any**  
34 **vehicle collided with) or any peace officer at the scene of the**  
35 **accident all of the following information:**  
36
- 37 **• The defendant’s name and current residence address;**

38 **[AND]**  
39

- 40
- 41 **• The registration number of the vehicle (he/she) was**  
42 **driving(;/.)**

43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85

<Give following sentence if defendant not owner of vehicle.>  
[[AND]]

- The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]

<Give following sentence if occupants of defendant's vehicle were injured.>  
[AND

- The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident.]

[AND]

(d) When requested, to show (his/her) driver's license to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident(;/.)

<Give element 4(e) if accident caused death.>  
[AND]

- (e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

Deleted: (;/.)

Formatted: Indent: Left: 72 pt

Comment [RS1]: "And" instead of "or" reflects the language of the statute

Formatted: Indent: Left: 18 pt, First line: 36 pt

Deleted: or any other available identification,

Deleted: and

Deleted: any

Comment [RS2]: If the accident caused death, the driver must comply with 4(e), so the "or" is inappropriate.

Deleted: [OR

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 duty to *stop immediately* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the driver must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the driver or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The driver is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the

86 requirement that the driver provide assistance is not excused merely because  
87 bystanders are on the scene or could provide assistance.]

88  
89 **The driver of a vehicle must perform the duties listed regardless of who was  
90 injured and regardless of how or why the accident happened. It does not  
91 matter if someone else caused the accident or if the accident was unavoidable.**

92  
93 **You may not find the defendant guilty unless all of you agree that the People  
94 have proved that the defendant failed to perform at least one of the required  
95 duties. You must all agree on which duty the defendant failed to perform.**

96  
97 **[To be *involved in a vehicle accident* means to be connected with the accident  
98 in a natural or logical manner. It is not necessary for the driver's vehicle to  
99 collide with another vehicle or person.]**

100  
101 **[When providing his or her name and address, the driver is required to  
102 identify himself or herself as the driver of a vehicle involved in the accident.]**

103  
104 **[A *permanent, serious injury* is one that permanently impairs the function or  
105 causes the loss of any organ or body part.]**

106  
107 **[An accident causes (death/ [or] [permanent, serious] injury) if the (death/  
108 [or] injury) is the direct, natural, and probable consequence of the accident  
109 and the (death/ [or] injury) would not have happened without the accident. A  
110 natural and probable consequence is one that a reasonable person would  
111 know is likely to happen if nothing unusual intervenes. In deciding whether a  
112 consequence is natural and probable, consider all the circumstances  
113 established by the evidence.]**

114  
115 **[There may be more than one cause of (death/ [or] [permanent, serious]  
116 injury). An accident causes (death/ [or] injury) only if it is a substantial factor  
117 in causing the (death/ [or] injury). A *substantial factor* is more than a trivial  
118 or remote factor. However, it need not be the only factor that causes the  
119 (death/ [or] injury).]**

120  
121 **[If the accident caused the defendant to be unconscious or disabled so that  
122 (he/she) was not capable of performing the duties required by law, then  
123 (he/she) did not have to perform those duties at that time. [However, (he/she)  
124 was required to do so as soon as reasonably possible.]**

125 | 

---

 Formatted: Numbering: Continuous

## BENCH NOTES

126

127

### 128 *Instructional Duty*

129 The court has a **sua sponte** duty to give this instruction defining the elements of  
130 the crime. Give this instruction if the prosecution alleges that the defendant drove  
131 the vehicle. If the prosecution alleges that the defendant was a nondriving owner  
132 present in the vehicle or other passenger in control of the vehicle, give CALCRIM  
133 No. 2141, *Failure to Perform Duty Following Accident: Death or Injury—*  
134 *Defendant Nondriving Owner or Passenger in Control.*

135

136 If causation is at issue, the court has a **sua sponte** duty to instruct on proximate  
137 cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr.  
138 401].) If the evidence indicates that there was only one cause of death or injury,  
139 the court should give the “direct, natural, and probable” language in the first  
140 bracketed paragraph on causation. If there is evidence of multiple causes of death  
141 or injury, the court should also give the “substantial factor” instruction in the  
142 second bracketed paragraph on causation. (See *People v. Autry* (1995) 37  
143 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d  
144 732, 746–747 [243 Cal.Rptr. 54].)

145

146 If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving  
147 the scene of an accident causing injury, but not death or permanent, serious injury,  
148 delete the words “death” and “permanent, serious” from the instruction. If the  
149 defendant is charged under Vehicle Code section 20001(b)(2) with leaving the  
150 scene of an accident causing death or permanent, serious injury, use either or both  
151 of these options throughout the instruction, depending on the facts of the case.  
152 When instructing on both offenses, give this instruction using the words “death”  
153 and/or “permanent, serious injury,” and give CALCRIM No. 2142, *Failure to*  
154 *Perform Duty Following Accident: Lesser Included Offense.*

155

156 Give bracketed element 4(e) only if the accident caused a death.

157

158 Give the bracketed portion that begins with “The driver is not required to provide  
159 assistance” if there is an issue over whether assistance by the defendant to the  
160 injured person was necessary in light of aid provided by others. (See *People v.*  
161 *Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield*  
162 (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues  
163 section below.)

164

165 Give the bracketed paragraph defining “involved in a vehicle accident” if that is an  
166 issue in the case.

167

168 Give the bracketed paragraph stating that “the driver is required to identify himself  
169 or herself as the driver” if there is evidence that the defendant stopped and  
170 identified himself or herself but not in a way that made it apparent to the other  
171 parties that the defendant was the driver. (*People v. Kroncke* (1999) 70  
172 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].)

173

174 Give the bracketed paragraph that begins with “If the accident caused the  
175 defendant to be unconscious” if there is sufficient evidence that the defendant was  
176 unconscious or disabled at the scene of the accident.

177

178 On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

179

180

### AUTHORITY

181

182 • Elements ▶ Veh. Code, §§ 20001, 20003 & 20004.

183 • Sentence for Death or Permanent Injury ▶ Veh. Code, § 20001(b)(2).

184 • Sentence for Injury ▶ Veh. Code, § 20001(b)(1).

185 • Knowledge of Accident and Injury ▶ *People v. Holford* (1965) 63 Cal.2d 74,  
186 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243  
187 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80  
188 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].

189 • Willful Failure to Perform Duty ▶ *People v. Crouch* (1980) 108 Cal.App.3d  
190 Supp. 14, 21–22 [166 Cal.Rptr. 818].

191 • Duty Applies Regardless of Fault for Accident ▶ *People v. Scofield* (1928) 203  
192 Cal. 703, 708 [265 P. 914].

193 • Involved Defined ▶ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71  
194 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].

195 • Immediately Stopped Defined ▶ *People v. Odom* (1937) 19 Cal.App.2d 641,  
196 646–647 [66 P.2d 206].

197 • Duty to Render Assistance ▶ *People v. Scofield* (1928) 203 Cal. 703, 708 [265  
198 P. 914]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d  
199 676].

200 • Permanent, Serious Injury Defined ▶ Veh. Code, § 20001(d).

201 • Statute Does Not Violate Fifth Amendment Privilege ▶ *California v. Byers*  
202 (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].

203 • Must Identify Self as Driver ▶ *People v. Kroncke* (1999) 70 Cal.App.4th 1535,  
204 1546 [83 Cal.Rptr.2d 493].

- 205 • Unanimity Instruction Required ▶ *People v. Scofield* (1928) 203 Cal. 703, 710  
206 [265 P. 914].
- 207 • Unconscious Driver Unable to Comply at Scene ▶ *People v. Flores* (1996) 51  
208 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- 209 • Offense May Occur on Private Property ▶ *People v. Stansberry* (1966) 242  
210 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- 211 • Duty Applies to Injured Passenger in Defendant’s Vehicle ▶ *People v. Kroncke*  
212 (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

213  
214

215 ***Secondary Sources***

216

217 2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public  
218 Peace and Welfare, §§ 246–252.

219

220 5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91,  
221 *Sentencing*, §§ 91.60[2][b][ii], 91.81[1][d] (Matthew Bender).

222

223 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140,  
224 *Challenges to Crimes*, § 140.03, Ch. 145, *Narcotics and Alcohol Offenses*, §  
225 145.02[3A][a] (Matthew Bender).

226

227

228 **LESSER INCLUDED OFFENSES**

229

- 230 • Failure to Stop Following Accident—Injury ▶ Veh. Code, § 20001(b)(1).
- 231 • Misdemeanor Failure to Stop Following Accident—Property Damage ▶ Veh.  
232 Code, § 20002; *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52  
233 Cal.Rptr. 207].

234

235

236 **RELATED ISSUES**

237

238 ***Constructive Knowledge of Injury***

239 “[K]nowledge may be imputed to the driver of a vehicle where the fact of personal  
240 injury is visible and obvious or where the seriousness of the collision would lead a  
241 reasonable person to assume there must have been resulting injuries.” (*People v.*  
242 *Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207] [citations omitted].)

243 **Reasonable Assistance**  
244 Failure to render reasonable assistance to an injured person constitutes a violation  
245 of the statute. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr.  
246 448].) “In this connection it must be noted that the statute requires that *necessary*  
247 assistance be rendered.” (*People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]  
248 [emphasis in original].) In *People v. Scofield, supra*, the court held that where  
249 other people were caring for the injured person, the defendant’s “assistance was  
250 not *necessary*.” (*Id.* at p. 709 [emphasis in original].) An instruction limited to the  
251 statutory language on rendering assistance “is inappropriate where such assistance  
252 by the driver is unnecessary, as in the case where paramedics have responded  
253 within moments following the accident.” (*People v. Scheer* (1998) 68 Cal.App.4th  
254 1009, 1027 [80 Cal.Rptr.2d 676].) However, “the driver’s duty to render necessary  
255 assistance under Vehicle Code section 20003, at a minimum, requires that the  
256 driver first ascertain what assistance, if any, the injured person needs, and then the  
257 driver must make a reasonable effort to see that such assistance is provided,  
258 whether through himself or third parties.” (*Ibid.*) The presence of bystanders who  
259 offer assistance is not alone sufficient to relieve the defendant of the duty to render  
260 aid. (*Ibid.*) “[T]he ‘reasonable assistance’ referred to in the statute might be the  
261 summoning of aid,” rather than the direct provision of first aid by the defendant.  
262 (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].)  
263

264 | (Revised August 2006)

Deleted: New January

## 2182. Evading Peace Officer: Misdemeanor

---

The defendant is charged [in Count \_\_\_] with evading a peace officer.

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

1. A peace officer driving a motor vehicle was pursuing the defendant;
2. The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer;

AND

3. All of the following were true:
  - (a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;
  - (b) The defendant either saw or reasonably should have seen the lamp;
  - (c) The peace officer's vehicle was sounding a siren as reasonably necessary;
  - (d) The peace officer's vehicle was distinctively marked;

AND

- (e) The peace officer was wearing a distinctive uniform.

[A person 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">.]

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 vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.

**Deleted:** a red lamp and siren. [It may also have additional markings or devices that identify it as a peace officer's vehicle.] The vehicle's appearance must be such that a person would know or reasonably should know that it is a law enforcement vehicle.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

## BENCH NOTES

### *Instructional Duty*

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

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. (*Ibid.*) It is an error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].) If the witness is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the witness is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

**Deleted:** There is a split in authority over whether a law enforcement vehicle must have something more than a red lamp and siren to be "distinctively marked." (*People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723 [37 Cal.Rptr.2d 383] [something in addition to red lamp and siren required]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 490 [75 Cal.Rptr.2d 289] [following *Estrella*, vehicle sufficiently marked where it had red lamp, siren, and wigwag lights]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [84 Cal.Rptr.2d 1] [disagreeing with *Estrella*, finding that red lamp and siren may be sufficient if these markings alone were enough to put the defendant on notice that this was a police vehicle].) This issue is currently pending before the Supreme Court. (*People v. Hudson*, No. S122816 (Cal.Sup.Ct. rev. granted May 12, 2004) 2004 Cal. LEXIS 4030.) In the definition of "distinctively marked," the court may give the bracketed "in addition to the red lamp and siren" at its discretion, until the Supreme Court has resolved this issue.¶

On request, the court must give CALCRIM No. 3426, *Voluntary Intoxication*, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712 [168 Cal.Rptr. 80].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

## AUTHORITY

- Elements ▶ Veh. Code, § 2800.1(a).
- Distinctively Marked Vehicle ▶ *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].

**Deleted:** *People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 490 [75 Cal.Rptr.2d 289]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [84 Cal.Rptr.2d 383]

- Distinctive Uniform ▶ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine If Peace Officers ▶ *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Red Lamp, Siren, [Additional Distinctive Feature of Car](#), and Distinctive Uniform Must Be Proved ▶ [People v. Hudson \(2006\) 38 Cal.4th 1002, 1013 \[44 Cal.Rptr.3d 632, 136 P.3d 168\]](#); *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 906].

**Deleted:** *People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237–238 [11 Cal.Rptr.3d 590]

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 63, *Double Jeopardy*, § 63.21[2][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.22[1][a][iv] (Matthew Bender).

### **RELATED ISSUES**

#### ***Multiple Pursuing Officers Constitutes Only One Offense***

A defendant “may only be convicted of one count of section 2800.2 even though the pursuit involved multiple police officers in multiple police vehicles.” (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163 [132 Cal.Rptr.2d 694].)

([Revised August 2006](#))

**Deleted:** *New January*

**2183–2199. Reserved for Future Use**

### 2304. Simple Possession of Controlled Substance

---

The defendant is charged [in Count \_\_] with possessing \_\_\_\_\_ <insert type of controlled substance>, a controlled substance.

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 \_\_\_\_\_ <insert type of controlled substance>;

AND

5. The 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.

[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: Prescription>

[The defendant is not guilty of possessing \_\_\_\_\_ <insert type of controlled substance> if (he/she) had a valid, written prescription for that substance from a physician, dentist, podiatrist, [\[naturopathic doctor\]](#), or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]

---

## BENCH NOTES

### *Instructional Duty*

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

### *Defenses—Instructional Duty*

The prescription defense is codified in Health and Safety Code sections 11350 and 11377. It is not available as a defense to possession of all controlled substances. The defendant need only raise a reasonable doubt about whether his or her possession of the drug was lawful because of a valid prescription. (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 give the bracketed paragraph on the defense.

[A recent amendment to section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.](#)

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- 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].

Copyright 2005 Judicial Council of California

- Prescription ▶ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ▶ Health & Saf. Code, § 11150.

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 77–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[d], [2][b] (Matthew Bender).

| (*Revised August 2006*)

Deleted: New January

## 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 the \_\_\_\_\_ <insert target offense>, 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 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.”])

Deleted: p

Deleted: 248,

## 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

*Copyright 2005 Judicial Council of California*

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*.

(New January 2006)

## 460. Attempt Other Than Attempted Murder

---

[The defendant is charged [in Count \_\_] with attempted \_\_\_\_\_ <insert target offense>.]

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

1. The defendant took a direct but ineffective step toward committing \_\_\_\_\_ <insert target offense>;

AND

2. The defendant intended to commit \_\_\_\_\_ <insert target offense>.

A *direct step* requires more than merely planning or preparing to commit \_\_\_\_\_ <insert target offense> or obtaining or arranging for something needed to commit \_\_\_\_\_ <insert target offense>. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit \_\_\_\_\_ <insert target offense>. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to commit \_\_\_\_\_ <insert target offense> is guilty of attempted \_\_\_\_\_ <insert target offense> even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing \_\_\_\_\_ <insert target offense>, then that person is not guilty of attempted \_\_\_\_\_ <insert target offense>.]

To decide whether the defendant intended to commit \_\_\_\_\_ <insert target offense>, please refer to the separate instructions that I (will give/have given) you on that crime.

[The defendant may be guilty of attempt even if you conclude that \_\_\_\_\_ <insert target offense> was actually completed.]

---

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct on the elements of the crime of attempt when charged, or, if not charged, when the evidence raises a question whether all the elements of the charged offense are present. (*See People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

If an attempted crime is charged, give the first bracketed paragraph and choose the phrase “this crime” in the opening line of the second paragraph. If an attempted crime is not charged but is a lesser included offense, omit the first bracketed paragraph and insert the attempted target offense in the opening line of the second paragraph.

Give the bracketed paragraph that begins with “A person who attempts to commit” if abandonment is an issue.

If the attempted crime is murder, do not give this instruction; instead give the specific instruction on attempted murder. (*People v. Santascioy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709]; see CALCRIM No. 600, *Attempted Murder*.)

Do not give this instruction if the crime charged is assault. There can be no attempt to commit assault, since an assault is by definition an attempted battery. (*In re James M.* (1973) 9 Cal.3d 517, 522 [108 Cal.Rptr. 89, 510 P.2d 33].)

## AUTHORITY

- Attempt Defined ▶ Pen. Code, §§ 21a, 664; *People v. Toledo* (2001) 26 Cal.4th 221, 229–230 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Conviction for Charged Attempt Even If Crime Is Completed ▶ Pen. Code, § 663.

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 53–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.20 (Matthew Bender).

## RELATED ISSUES

### ***Insufficient Evidence of Attempt***

The court is not required to instruct on attempt as a lesser-included offense unless there is sufficient evidence that the crime charged was not completed. (*People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1436 [263 Cal.Rptr. 314]; *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1743–1744 [60 Cal.Rptr.2d 357]; *People v. Strunk* (1995) 31 Cal.App.4th 265, 271–272 [36 Cal.Rptr.2d 868].)

### ***Legal or Factual Impossibility***

Although legal impossibility is a defense to attempt, factual impossibility is not. (*People v. Cecil* (1982) 127 Cal.App.3d 769, 775–777 [179 Cal.Rptr. 736]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 504–505 [215 Cal.Rptr. 352].)

### ***Solicitation***

Some courts have concluded that a mere solicitation is not an attempt. (*People v. Adami* (1973) 36 Cal.App.3d 452, 457 [111 Cal.Rptr. 544]; *People v. La Fontaine* (1978) 79 Cal.App.3d 176, 183 [144 Cal.Rptr. 729], overruled on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292–293 [79 Cal.Rptr.2d 195, 965 P.2d 713].) At least one court disagrees, stating that simply because “an invitation to participate in the defendant’s commission of a crime consists only of words does not mean it cannot constitute an ‘act’ toward the completion of the crime, particularly where the offense by its nature consists of or requires the requested type of participation.” (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1387 [119 Cal.Rptr.2d 199] [attempted lewd acts on a child under Pen. Code, § 288(c)(1)]; see *People v. Delvalle* (1994) 26 Cal.App.4th 869, 877 [31 Cal.Rptr.2d 725].)

### ***Specific Intent Crime***

An attempted offense is a specific intent crime, even if the underlying crime requires only general intent. (See *People v. Martinez* (1980) 105 Cal.App.3d 938, 942 [165 Cal.Rptr. 11].) However, an attempt is not possible if the underlying crime can only be committed unintentionally. (See *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798] [no attempted involuntary manslaughter].)

(New January 2006)

**461–499. Reserved for Future Use**



## 525. Second Degree Murder: Discharge From Motor Vehicle

---

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 the murder was committed by shooting a firearm from a motor vehicle.

To prove this allegation, the People must prove that:

1. (The defendant/\_\_\_\_\_ <insert name or description of principal if not defendant>) killed a person by shooting a firearm from a motor vehicle;
2. (The defendant/\_\_\_\_\_ <insert name or description of principal if not defendant>) intentionally shot at a person who was outside the vehicle;

**AND**

3. When (the defendant/\_\_\_\_\_ <insert name or description of principal if not defendant>) shot a firearm, (the defendant/\_\_\_\_\_ <insert name or description of principal if not defendant>) intended to inflict great bodily injury on the person outside the vehicle.

[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>).]

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

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

**[The People must prove that the defendant intended that the person shot at suffer great bodily injury when (he/she/\_\_\_\_\_ <insert name or description of principal if not defendant>) shot from the vehicle. However, the People do not have to prove that the defendant intended to injure the specific person who was actually killed.]**

**The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that 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 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. 435].)

The statute does not specify whether the defendant must personally intend to inflict great bodily injury or whether accomplice liability may be based on a principal who intended to inflict great bodily injury even if the defendant did not. The instruction has been drafted to provide the court with both alternatives in element 3.

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.

Give the bracketed paragraph that begins with “The People must prove that the defendant intended,” if the evidence shows that the person killed was not the person the defendant intended to harm when shooting from the vehicle. (*People v. Sanchez* (2001) 26 Cal.4th 834, 851, fn. 10 [11 Cal.Rptr.2d 129, 29 P.3d 209].)

## **AUTHORITY**

- Second Degree Murder, Discharge From Vehicle ▶ Pen. Code, § 190(d).

### ***Secondary Sources***

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142,  
*Crimes Against the Person*, § 142.01[1][a], [2][a][vii], [4][c] (Matthew Bender).

*(New January 2006)*

**526–539. Reserved for Future Use**

**540B. Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act**

---

<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].

### *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).
- Attempted Murder ▶ Pen. Code, §§ 663, 189.

### **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*

Deleted: .

(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*.

*(New January 2006)*

*Copyright 2005 Judicial Council of California*

## 905. Assault on Juror

---

The defendant is charged [in Count \_\_\_] with assault on a juror.

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

1. The defendant was a party to a case for which a jury had been selected;
2. The defendant did an act that by its nature would directly and probably result in the application of force to someone who had been sworn as a juror [or alternate juror] to decide that case;
3. The defendant did that act willfully;
4. 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]

5. When the defendant acted, (he/she) had the present ability to apply force to a person(;/.)

<Give element 6 when instructing on self-defense or defense of another.>

[AND

6. 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.]

[It is not a defense that an assault was committed after the trial was completed.]

---

## 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 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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, 241.7.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

Deleted: , subd. 1

- 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, § 71.

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

### **COMMENTARY**

Unlike other statutes penalizing assault on a particular person, Penal Code section 241.7 does not state that the defendant must have known that the person assaulted was a juror. Thus, the committee has not included knowledge among the elements.

*(New January 2006)*

## 1150. Pimping

---

The defendant is charged [in Count \_\_\_] with pimping.

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

1. The defendant knew that \_\_\_\_\_ *<insert name>* was a prostitute;

[AND]

*<Alternative 2A—money earned by prostitute supported defendant>*

2. The (money/proceeds) that \_\_\_\_\_ *<insert name>* earned as a prostitute supported defendant, in whole or in part(;/.)]

*<Alternative 2B—money loaned by house manager supported defendant>*

2. Money that was (loaned to/advanced to/charged against) \_\_\_\_\_ *<insert name>* by a person who (kept/managed/was a prostitute at) the house or other place where the prostitution occurred, supported the defendant in whole or in part(;/.)]

*<Alternative 2C—defendant asked for payment>*

2. The defendant asked for payment or received payment for soliciting prostitution customers for \_\_\_\_\_ *<insert name>*(;/.)]

*<Give element 3 when defendant charged with pimping a minor>*

[AND]

3. \_\_\_\_\_ *<insert name>* was a minor (over the age of 16 years/under the age of 16 years) when (he/she) engaged in the prostitution.]

**A prostitute is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other compensation]. A lewd act means physical contact of 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, 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 2, use the appropriate alternative A–C depending on the evidence in the case.

Give element 3 if it is alleged that the prostitute was a minor. Punishment is enhanced if the minor is under the age of 16 years. (Pen. Code, § 266h(b).)

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. 373, 855 P.2d 391].)

### *Defenses—Instructional Duty*

If necessary for the jury's understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

## AUTHORITY

- Elements ▶ Pen. Code, § 266h.
- Prostitution Defined ▶ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *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].
- General Intent Crime ▶ *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22].
- Proof Person Is a Prostitute ▶ *People v. James* (1969) 274 Cal.App.2d 608, 613 [79 Cal.Rptr. 182].
- Solicitation Defined ▶ *People v. Smith* (1955) 44 Cal.2d 77, 78–80 [279 P.2d 33].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 67–69.

Copyright 2005 Judicial Council of California

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[2] (Matthew Bender).

## COMMENTARY

### *Solicitation*

In deciding there was sufficient evidence of solicitation, the court in *People v. Phillips* (1945) 70 Cal.App.2d 449, 453 [160 P.2d 872], quoted the following definitions:

“[S]olicit” is defined as: “To tempt . . . ; to lure on, esp. into evil, . . . to bring about . . . ; to seek to induce or elicit . . .” (Webster’s New International Dictionary (2d ed.)). “. . . to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; . . . to try to obtain. . . . While it does imply a serious request, it requires no particular degree of importunity, entreaty, imploration or supplication.” (58 C.J. 804–805.)

### *General Intent*

The three ways of violating Penal Code section 266h are all general intent crimes, as held in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22]:

[D]eriving support with knowledge that the other person is a prostitute is all that is required for violating the section in this manner. No specific intent is required. . . . Receiving compensation for soliciting with knowledge that the other person is a prostitute is the only requirement under the first alternative of violating section 266h by solicitation. Under the second alternative to pimping by soliciting (soliciting compensation), . . . if the accused has solicited for the prostitute and has solicited compensation even though he had not intended to receive compensation, he would nevertheless be guilty of pimping. Pimping in all its forms is not a specific intent crime.

## LESSER INCLUDED OFFENSES

- Attempted Pimping ▶ Pen. Code, §§ 664, 266h; see *People v. Osuna* (1967) 251 Cal.App.2d 528, 531 [59 Cal.Rptr. 559].
- There is no crime of aiding and abetting prostitution. ▶ *People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].

Deleted: (

Deleted: )

Copyright 2005 Judicial Council of California

## RELATED ISSUES

### ***House of Prostitution***

One room of a building or other place is sufficient to constitute a house of prostitution, and one person may keep such a place to which others resort for purposes of prostitution. (*People v. Frey* (1964) 228 Cal.App.2d 33, 53 [39 Cal.Rptr. 49]; see *Aguilera v. Superior Court* (1969) 273 Cal.App.2d 848, 852 [78 Cal.Rptr. 736].)

### ***Receiving Support***

A conviction for living or deriving support from a prostitute's earnings does not require evidence that the defendant received money directly from the prostitute, or that the defendant used money received from the prostitution solely to pay his or her own living expenses. (*People v. Navarro* (1922) 60 Cal.App. 180, 182 [212 P. 403].)

### ***Unanimity Instruction Not Required***

Pimping is a crime "of a continuous ongoing nature and [is] therefore not subject to the requirement that the jury must agree on the specific act or acts constituting the offense." (*People v. Dell* (1991) 232 Cal.App.3d 248, 265–266 [283 Cal.Rptr. 361]; *People v. Lewis* (1978) 77 Cal.App.3d 455, 460–462 [143 Cal.Rptr. 587][living or deriving support from prostitute's earnings is an ongoing continuing offense].) Proof of an ongoing relationship between the defendant and the prostitute is not required. (*People v. Jackson* (1980) 114 Cal.App.3d 207, 209–210 [170 Cal.Rptr. 476].)

(New January 2006)

## 1215. Kidnapping

---

The defendant is charged [in Count \_\_] with kidnapping.

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

1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;
2. Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;

[AND]

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

<Give element 4 when instructing on reasonable belief in consent.>

[AND]

- [4. 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.]

[*Substantial distance* means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]

[The defendant is also charged in Count \_\_ with \_\_\_\_\_ <insert crime>. In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a distance beyond that merely incidental to the commission of \_\_\_\_\_ <insert crime>.]

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

*<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 an instruction defining the elements of the crime.

In the paragraph defining “substantial distance,” give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237.) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237 [83 Cal.Rptr.2d 533, 973 P.2d 512]; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

The bracketed paragraph that begins with “The defendant is also charged” must be given on request when an associated crime is charged. (See *People v. Martinez*,

*supra*, 20 Cal.4th at pp. 237–238.) See also Commentary to CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

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].) An optional paragraph is provided for this purpose, “Defense: Consent Given.”

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 court has a **sua sponte** duty to instruct on the defendant’s reasonable and actual belief in the victim’s consent to go with the defendant, if supported by the evidence. (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].) Give bracketed element 4 and the bracketed paragraph on the defense.

### ***Related Instructions***

If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*.

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to other defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*, and CALCRIM No. 1226, *Defense to Kidnapping: Citizen's Arrest*.

## AUTHORITY

- Elements ▶ Pen. Code, § 207(a).
- Punishment If Victim Under 14 Years of Age ▶ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not a defense].
- Asportation Requirement ▶ *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement ▶ See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119].
- Force or Fear Requirement ▶ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820]; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent ▶ Pen. Code, § 26(3) [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].
- Incidental Movement Test ▶ *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Intent Requirement ▶ *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Moya* (1992) 4 Cal.App.4th 912, 916 [6 Cal.Rptr.2d 323].
- Substantial Distance Requirement ▶ *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

## *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 246–255, 277.

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

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

## COMMENTARY

Penal Code section 207(a) uses the term “steals” in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses “take,” “hold,” or “detain” as the more inclusive terms, but includes in brackets the statutory terms “steal” and “arrest” if either one more closely matches the evidence.

## LESSER INCLUDED OFFENSES

- Attempted Kidnapping ▶ Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].
- False Imprisonment ▶ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

## RELATED ISSUES

### ***Victim Must Be Alive***

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

### ***Threat of Arrest***

“[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant’s conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim’s belief is objectively reasonable.” (*People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360].)

(New January 2006)

**1216–1224. Reserved for Future Use**

## 1700. Burglary

---

The defendant is charged [in Count \_\_\_] with burglary.

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

1. The defendant entered (a/an) (building/room within a building/locked vehicle/ \_\_\_\_\_ <insert other statutory target>);

Deleted:

AND

2. When (he/she) entered (a/an) (building/room within the building/locked vehicle/ \_\_\_\_\_ <insert other statutory target>), (he/she) intended to commit (theft/ [or] \_\_\_\_\_ <insert one or more felonies>).

Deleted:

To decide whether the defendant intended to commit (theft/ [or] \_\_\_\_\_ <insert one or more felonies>), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

A burglary was committed if the defendant entered with the intent to commit (theft/ [or] \_\_\_\_\_ <insert one or more felonies>). The defendant does not need to have actually committed (theft/ [or] \_\_\_\_\_ <insert one or more felonies>).as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/ [or] \_\_\_\_\_ <insert one or more felonies>).]

[Under the law of burglary, a person *enters a building* if some part of his or her body [or some object under his or her control] penetrates the area inside the building's outer boundary.]

[A building's *outer boundary* includes the area inside a window screen.]

[The People allege that the defendant intended to commit (theft/ [or] \_\_\_\_\_ <insert one or more felonies>). You may not find the defendant guilty of burglary unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes (he/she) intended.]

---

## BENCH NOTES

### *Instructional Duty*

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

Although actual commission of the underlying theft or felony is not an element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903]), the court has a **sua sponte** duty to instruct that the defendant must have intended to commit a felony and has a **sua sponte** duty to define the elements of the underlying felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706 [144 Cal.Rptr. 330]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432].) Give all appropriate instructions on theft or the felony alleged.

If the area alleged to have been entered is something other than a building or locked vehicle, insert the appropriate statutory target in the blanks in elements 1 and 2. Penal Code section 459 specifies the structures and places that may be the targets of burglary. The list includes a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home as defined in Health and Safety Code section 18075.55(d), railroad car, locked or sealed cargo container whether or not mounted on a vehicle, trailer coach as defined in Vehicle Code section 635, house car as defined in Vehicle Code section 362, inhabited camper as defined in Vehicle Code section 243, locked vehicle as defined by the Vehicle Code, aircraft as defined in Public Utilities Code section 21012, or mine or any underground portion thereof. (See Pen. Code, § 459.)

On request, give the bracketed paragraph that begins with “Under the law of burglary,” if there is evidence that only a portion of the defendant’s body, or an instrument, tool, or other object under his or control, entered the building. (See *People v. Valencia* (2002) 28 Cal.4th 1, 7–8 [120 Cal.Rptr.2d 131, 46 P.3d 920]; *People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083].)

On request, give the bracketed sentence defining “outer boundary” if there is evidence that the outer boundary of a building for purposes of burglary was a window screen. (See *People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].)

If multiple underlying felonies are charged, give the bracketed paragraph that begins with “The People allege that the defendant intended to commit either.” (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

If the defendant is charged with first degree burglary, give CALCRIM No. 1701, *Burglary: Degrees*.

### AUTHORITY

- Elements ▶ Pen. Code, § 459.
- Instructional Requirements ▶ *People v. Failla* (1966) 64 Cal.2d 560, 564, 568–569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Smith* (1978) 78 Cal.App.3d 698, 706–711 [144 Cal.Rptr. 330]; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 113, 115.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.10 (Matthew Bender).

### LESSER INCLUDED OFFENSES

- Attempted Burglary ▶ Pen. Code, §§ 663, 459.
- Tampering With a Vehicle ▶ Veh. Code, § 10852; *People v. Mooney* (1983) 145 Cal.App.3d 502, 504–507 [193 Cal.Rptr. 381] [if burglary of automobile charged].

### RELATED ISSUES

#### *Auto Burglary–Entry of Locked Vehicle*

Under Penal Code section 459, forced entry of a locked vehicle constitutes burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 863 [57 Cal.Rptr.2d 12].) However, there must be evidence of forced entry. (See *People v. Woods* (1980) 112 Cal.App.3d 226, 228–231 [169 Cal.Rptr. 179] [if entry occurs through window deliberately left open, some evidence of forced entry must exist for burglary conviction]; *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [pushing open broken wing lock on window, reaching one’s arm inside vehicle, and unlocking car door evidence of forced entry].) Opening an unlocked passenger door and lifting a trunk latch to gain access to the trunk is not an auto burglary. (*People v. Allen* (2001) 86 Cal.App.4th 909, 917–918 [103 Cal.Rptr.2d 626].)

### ***Auto Burglary–Definition of Locked***

To lock, for purposes of auto burglary, is “to make fast by interlinking or interlacing of parts ... [such that] some force [is] required to break the seal to permit entry . . . .” (*In re Lamont R.* (1988) 200 Cal.App.3d 244, 247 [245 Cal.Rptr. 870], quoting *People v. Massie* (1966) 241 Cal.App.2d 812, 817 [51 Cal.Rptr. 18] [vehicle was not locked where chains were wrapped around the doors and hooked together]; compare *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [vehicle with locked doors but broken wing lock that prevented window from being locked, was for all intents and purposes a locked vehicle].)

### ***Auto Burglary–Intent to Steal***

Breaking into a locked car with the intent to steal the vehicle constitutes auto burglary. (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461 [25 Cal.Rptr.2d 296]; see also *People v. Blalock* (1971) 20 Cal.App.3d 1078, 1082 [98 Cal.Rptr. 231] [auto burglary includes entry into locked trunk of vehicle].) However, breaking into the headlamp housings of an automobile with the intent to steal the headlamps is not auto burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 864 [57 Cal.Rptr.2d 12] [stealing headlamps, windshield wipers, or hubcaps are thefts, or attempted thefts, auto tampering, or acts of vandalism, not burglaries].)

### ***Building***

A building has been defined for purposes of burglary as “any structure which has walls on all sides and is covered by a roof.” (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672].) Courts have construed “building” broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133 Cal.App.3d 200, 204–205 [183 Cal.Rptr. 773].) However, the definition of building is not without limits and courts have focused on “whether the nature of a structure’s composition is such that a reasonable person would expect some protection from unauthorized intrusions.” (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672] [open pole barn is not a building]; see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–1424 [252 Cal.Rptr. 17] [electric company’s “gang box,” a container large enough to hold people, is not a building; such property is protected by Penal Code sections governing theft].)

### ***Outer Boundary***

A building’s outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. Under this test, a window screen is part of the outer boundary of a building for purposes of burglary. (*People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].) Whether penetration into an area behind a window screen amounts to an entry of a building within the meaning

of the burglary statute is a question of law. The instructions must resolve such a legal issue for the jury. (*Id.* at p. 16.)

### ***Theft***

Any one of the different theories of theft will satisfy the larcenous intent required for burglary. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 29–30 [219 Cal.Rptr. 707] [entry into building to use person’s telephone fraudulently]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30–31 [46 Cal.Rptr.2d 840].)

### ***Burglarizing One’s Own Home—Possessory Interest***

A person cannot burglarize his or her own home as long as he or she has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [125 Cal.Rptr. 773, 542 P.2d 1365].) However, a family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she has no claim of a right to enter that residence. (*In re Richard M.* (1988) 205 Cal.App.3d 7, 15–16 [252 Cal.Rptr. 36] [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent’s home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–893 [268 Cal.Rptr. 501] [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People v. Sears* (1965) 62 Cal.2d 737, 746 [44 Cal.Rptr. 330, 401 P.2d 938], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 510 [20 Cal.Rptr.2d 582, 853 P.2d 1037] [burglary conviction proper where husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, 712–714 [170 Cal.Rptr. 292] [husband had unconditional possessory interest in jointly owned home; his access to the house was not limited and strictly permissive, as in *Sears*].)

### ***Consent***

While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [253 Cal.Rptr. 316] [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be buyers, no burglary occurred].) The consent must be express and clear; the owner/occupant must both expressly permit the person to enter and know of the felonious or larcenous intent of the invitee. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860].) A person who enters for a felonious purpose, however, may be found guilty of burglary even if he or she enters with the owner’s or occupant’s consent. (*People v. Frye* (1998) 18 Cal.4th 894, 954 [77 Cal.Rptr.2d 25, 959 P.2d 183] [no evidence of unconditional possessory right to enter].) A joint property owner/occupant cannot give consent to a third party to enter and commit a felony on the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 420–423 [76

Cal.Rptr.2d 536] [husband's consent did not preclude a burglary conviction based upon defendant's entry of premises with the intent to murder wife].)

### ***Entry by Instrument***

When an entry is made by an instrument, a burglary occurs if the instrument passes the boundary of the building and if the entry is the type that the burglary statute intended to prohibit. (*People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083] [placing forged check in chute of walk-up window of check-cashing facility was not entry for purposes of burglary] disapproving of *People v. Ravenscroft* (1988) 198 Cal.App.3d 639, 643–644 [243 Cal.Rptr. 827] [insertion of ATM card into machine was burglary].)

### ***Multiple Convictions***

Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–318 [256 Cal.Rptr. 64], the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099 [236 Cal.Rptr. 822] [multiple penetration case]: “ [W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by the defendant] is nevertheless renewed, a new and separate crime is committed.” (*In re William S.*, *supra*, 208 Cal.App.3d at p. 317.) The court in *In re William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce “absurd results.” The court gave this example: where “a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts.” (*Ibid.*) The *In re William S.* test has been called into serious doubt by *People v. Harrison* (1989) 48 Cal.3d 321, 332–334 [256 Cal.Rptr. 401, 768 P.2d 1078], which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison*, *supra*, 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568 [57 Cal.Rptr.2d 774], a burglary case, agreed with *In re William S.* to the extent that burglary is analogous to crimes of sexual penetration. Following *Harrison*, the court held that each separate entry into a building or structure with the requisite intent is a burglary even if multiple entries are made into the same building or as part of the same plan. (*People v. Washington*, *supra*, 50 Cal.App.4th at pp. 574–579; see also 2 Witkin and Epstein, Cal. Criminal Law (2d. ed. 1999 Supp.) “Multiple Entries,” § 662A, p. 38.) The court further stated that any “concern about absurd results are [sic] better resolved under [Penal Code] section 654, which limits the punishment for separate offenses committed during a single transaction, than by [adopting] a rule that, in effect, creates the new crime of continuous burglary.” (*People v. Washington*, *supra*, 50 Cal.App.4th at p. 578.)

### **Room**

Penal Code section 459 includes “room” as one of the areas that may be entered for purposes of burglary. (Pen. Code, § 459.) An area within a building or structure is considered a room if there is some designated boundary, such as a partition or counter, separating it from the rest of the building. It is not necessary for the walls or partition to touch the ceiling of the building. (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257–1258 [263 Cal.Rptr. 183] [office area set off by counters was a room for purposes of burglary].) Each unit within a structure may constitute a separate “room” for which a defendant can be convicted on separate counts of burglary. (*People v. O’Keefe* (1990) 222 Cal.App.3d 517, 521 [271 Cal.Rptr. 769] [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [264 Cal.Rptr. 49] [separate business offices in same building].)

Entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after entry into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289] [“the unadorned word ‘room’ in section 459 reasonably must be given its ordinary meaning”]; see *People v. McCormack* (1991) 234 Cal.App.3d 253, 255–257 [285 Cal.Rptr. 504]; *People v. Young* (1884) 65 Cal. 225, 226 [3 P. 813].) However, entry into multiple rooms within one apartment or house cannot support multiple burglary convictions unless it is established that each room is a separate dwelling space, whose occupant has a separate, reasonable expectation of privacy. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575 [11 Cal.Rptr.3d 802]; see also *People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2 [1 Cal.Rptr.2d 434].)

### **Temporal or Physical Proximity–Intent to Commit the Felony**

According to some cases, a burglary occurs “if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction.” (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [23 Cal.Rptr. 734] [defendant entered office with intent to steal tires from attached open-air shed].) This test was followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932 [102 Cal.Rptr. 266] [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–232 [214 Cal.Rptr. 82] [defendant entered lobby of apartment building, intending to burglarize one of the units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696 [14 Cal.Rptr.2d 246] [defendant entered a home to facilitate the crime of extortion].

However, in *People v. Kwok* (1998) 63 Cal.App.4th 1236 [75 Cal.Rptr.2d 40], the court applied a less restrictive test, focusing on just the facilitation factor. A burglary is committed if the defendant enters a building in order to facilitate commission of theft or a felony. The defendant need not intend to commit the

target crime in the same building or on the same occasion as the entry. (*People v. Kwok*, *supra*, 63 Cal.App.4th at pp. 1246–1248 [defendant entered building to copy a key in order to facilitate later assault on victim].) The court commented that “the ‘continuous transaction test’ and the ‘immediate vicinity test’ . . . are artifacts of the particular factual contexts of *Wright*, *Nance*, and *Nunley*.” (*Id.* at p. 1247.) With regards to the *Ortega* case, the *Kwok* court noted that even though the *Ortega* court “purported to rely on the ‘continuous transaction’ factor of *Wright*, [the decision] rested principally on the ‘facilitation’ factor.” (*Id.* at pp. 1247–1248.) While *Kwok* and *Ortega* dispensed with the elemental requirements of spatial and temporal proximity, they did so only where the subject entry is “closely connected” with, and is made in order to facilitate, the intended crime. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749 [109 Cal.Rptr.2d 273].)

(*New January 2006*)

## 2301. Offering to Sell, Transport, etc., a Controlled Substance

---

The defendant is charged [in Count \_\_\_\_] with offering to (sell/furnish/administer/give away/transport/import) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance.

Deleted:

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

1. The defendant [unlawfully] offered to (sell/furnish/administer/give away/transport/import into California) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance;

AND

2. When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away/transport/import) the controlled substance.

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

---

### BENCH NOTES

#### *Instructional Duty*

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

### AUTHORITY

*Copyright 2005 Judicial Council of California*

- Elements ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering ▶ Health & Saf. Code, § 11002.
- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

### ***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], [g]-[j] (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Simple Possession of Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

### **RELATED ISSUES**

#### ***No Requirement That Defendant Delivered or Possessed Drugs***

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

(*New January 2006*)

## 2331. Offering to Manufacture a Controlled Substance

---

The defendant is charged [in Count \_\_\_\_] with offering to (manufacture/compound/convert/produce/derive/process/prepare) \_\_\_\_\_ <insert controlled substance from Health & Saf. Code, §§ 11054, 11055, 11056, 11057, or 11058>, a controlled substance.

Deleted:

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

1. The defendant offered to (manufacture/compound/convert/produce/derive/process/prepare) a controlled substance, specifically \_\_\_\_\_ <insert controlled substance>, intending to use chemical extraction or independent chemical synthesis;

AND

2. When the defendant made the offer, (he/she) intended to (manufacture/compound/convert/produce/derive/process/prepare) the controlled substance.

[The intent to use chemical extraction or chemical synthesis includes the intent to use such methods directly or indirectly.]

[The People do not need to prove that the defendant knew which specific controlled substance was involved, only that (he/she) was aware that it was a controlled substance.]

---

### BENCH NOTES

#### *Instructional Duty*

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

### AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11379.6(a) & (c), 11054–11058.
- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

#### *Secondary Sources*

Copyright 2005 Judicial Council of California

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 112.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [b], [f] (Matthew Bender).

*(New January 2006)*

**2332–2334. Reserved for Future Use**

*Copyright 2005 Judicial Council of California*