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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 29, 2011

Title
Jury Instructions: Additions and Revisions to Criminal Jury Instructions

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Criminal Jury Instructions (*CALCRIM*)

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Sandra L. Margulies, Chair

Agenda Item Type
Action Required

Effective Date
April 29, 2011

Date of Report
March 4, 2011

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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approval of the proposed additions and revisions to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. These changes will keep *CALCRIM* current with statutory and case authority.

Recommendation

The advisory committee recommends that the Judicial Council, effective April 29, 2011, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be published in the 2011 supplement of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

A table of contents and the proposed additions and revisions to the criminal jury instructions are attached at pages 6–96.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted rule 6.59 of the California Rules of Court (subsequently renumbered as rule 10.59), which established the advisory committee's charge.[1] At its August 2003 meeting, the council voted to approve the *CALCRIM* instructions pursuant to rule 855 (subsequently renumbered as rule 2.1050). Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM*.

The council approved the 2011 edition of CALCRIM at its October 29, 2010, meeting.

Rationale for Recommendation

The committee recommends the proposed additions and revisions to *CALCRIM* in compliance with its charge in rule 10.59.

The advisory committee drafted the new and revised instructions in this report and then circulated them for public comment. Once the council approves the release, the official publisher, LexisNexis, will publish print, HotDocs document assembly, and online versions of the new and revised instructions on receiving council approval.

The following 21 instructions are included in this proposal: 101, 225, 250, 252, 507–508, 560, 580–581, 593, 600, 767, 1110–1111, 1202, 2410, 3454, 3454A, 3471, 3516, and 3550. Of these, 20 are revised and one is newly drafted. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved 9 additional revised instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys, proposals by staff and committee members, and recent developments in the law.

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[1] Rule 10.59(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes to jury instructions and corrections and minor substantive changes unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 9 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

The committee revised CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before, During or After Jury Is Selected),* in response to comments from two Supreme Court Justices. Justice Carlos Moreno in his former role as chair of the State-Federal Judicial Council's Jury Improvements Recommendations Subcommittee voiced concerns about juror communication and research via the Internet. Former Chief Justice Ronald M. George, as the then co-chair of the State-Federal Judicial Council, asked that "a sense of urgency" be conveyed on the need to admonish jurors about improper Internet communication and research. CALCRIM No. 101 already contained admonitions to that effect, but the committee amplified those admonitions in response to these concerns.

In the same vein, it is noteworthy that the council supports Assembly Bill 141, which would expressly give judges the power to hold jurors in contempt when they violate a judge's admonitions about Internet use. Office of Governmental Affairs senior attorney June Clark's January 28, 2011, letter to bill author Assembly Member Felipe Fuentes explained:

> The council is extremely concerned that jurors' use of electronic devices during the course of a trial is becoming an increasingly significant threat to the integrity of the justice system. While existing law may indeed cover the improper use of electronic communications by jurors, the council believes a clear statutory directive that the admonishments include modern technological means of communication is needed. In addition, given the importance of the admonition, the statutory clarification that violators may be held in contempt of court is also important, and would provide the court with necessary enforcement tools for use in appropriate cases.

The committee amended the bench notes of CALCRIM No. 560, *Provocative Act Murder,* to clarify how to use the instruction when the provocative act is the same as the underlying felony. The committee also revised the "Degree of Murder" section of the instruction to encompass all forms of murder with the appropriate cross-references to CALCRIM No. 521: *Murder: Degrees.*

CALCRIM No. 593, *Misdemeanor Vehicular Manslaughter.* The committee concluded that a recent case, *People v. Butler* (2010) 187 Cal.App.4th 998, sufficiently bolstered the weight of authority to require criminal negligence for all forms of misdemeanor vehicular manslaughter. The committee therefore revised CALCRIM No. 593 accordingly. Although the *Butler* case considered a violation of Penal Code section 192(b), involuntary manslaughter, and CALCRIM No. 593 describes violations of section 192(c), the statutory language for the mens rea of both offenses is virtually identical and calls for conformity.

A recent Supreme Court case, *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204-207 changed the law on responding to juror inquiries about commutation of sentence in death penalty cases by disfavoring admonitions that jurors should assume that whatever sentence they choose will be carried out. The *Letner and Tobin* opinion providently provided suggested language for implementing the change. Accordingly, the committee revised CALCRIM No. 767, *Response to*

Juror Inquiry About Commutation of Sentence in Death Penalty Case, by following the Supreme Court's helpful suggestion.

In a very recent case, *People v. Soto* (2011) 51 Cal.4th 229, the Supreme Court held that a victim's consent is not a defense to committing either lewd or aggravated lewd acts on a child under the age of 14. The committee revised CALCRIM Nos. 1110 and 1111, *Lewd or Lascivious Act: Child Under 14 Years, Lewd or Lascivious Act: By Force or Fear* accordingly.

In *People v. Eid* (2010) 187 Cal.App.4th 859, the Fourth Appellate District, in a case of first impression, held that Penal Code section 209(a) does not expressly require the use of force or fear by the perpetrator, or any particular mental state of the victim. As a result, the committee modified CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion* to comport with this holding.

The committee had intended to update CALCRIM No. 1400, *Active Participation in Criminal Street Gang,* to add the requirement that a defendant must act in concert with at least one other member of the criminal street gang in accordance with the Third Appellate District's holding in *People v. Rodriguez* (2010) 188 Cal.App.4th 722734, fn. 9. Shortly before the committee's last meeting, however, the Supreme Court granted review in *Rodriguez*, so the committee will continue to watch for further developments.

In response to a suggestion from a senior attorney for the Second Appellate District and from Appellate Defenders, Inc., which submitted a proposed draft, the committee prepared a new instruction, CALCRIM No. 3454A, *Hearing to Determine Current Status Under Sexually Violent Predator Act.* This instruction is designed for use in subsequent hearings to determine whether the committed person still falls under the requirements of Welfare and Institutions Code section 6605 of the Sexually Violent Predator Act.

The committee added the word "Initial" to the title of the related instruction, CALCRIM No. 3454, *Initial Commitment as Sexually Violent Predator,* to clearly distinguish it from CALCRIM No. 3454A, along with a clarifying bench note.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for comment from January 24 to February 23, 2011. The committee evaluated all comments and revised some of the instructions as a result. Ten different commentators submitted comments. A chart of all comments received and the committee's responses is attached at pages 97–125.

Of the comments received, no particular proposal was the subject of a particularly large number of comments. Several comments went beyond the scope of the proposed revisions that circulated for comment. The committee will consider them at its next meeting.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CALCRIM* on a regular basis and submit its recommendations to the council for approval. The proposed new and revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No significant implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new supplement and pay royalties to the Administrative Office of the Courts (AOC). The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. 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 noncommercial use and reproduction.

Attachments

1. Full text of new and revised *CALCRIM* instructions at pp. 6–96
2. Comment chart at pp. 97–125

Table of Contents for 2011 CALCRIM revisions

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

~~**I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial.**~~ **Our system of justice requires that trials be conducted in open court with the parties deciding what evidence is presented and the judge deciding the law that applies to the case. It is unfair to the parties if you receive additional information from any other source because that information may be unreliable or irrelevant. Your verdict must be based only on the facts presented during trial in this court and the law as I provide it to you.**

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication. You must not talk about these things with ~~the~~ other jurors, either, until you begin deliberating.

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

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

~~**For these reasons, do not do any research on your own or as a group regarding this case. Do not use a dictionary(,/or) the Internet(./)[, or** _____ *<insert other relevant means of communication>* **]. Do not investigate the facts or law.**~~ **Do not use the Internet (, a dictionary/) ([,or** _____ ***<insert other relevant source of information or means of communication>)*** **in any way in connection with this case. Do not investigate the facts or the law or do any research regarding this case. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.**

[If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom and during jury deliberations. An electronic device includes any data storage device. If someone needs to contact you in an

emergency, the court can receive messages that it will deliver to you without delay.]

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

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

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

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

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

You must reach your verdict without any consideration of punishment.

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

New January 2006; Revised June 2007, April 2008, December 2008, April 2010, October 2010

BENCH NOTES

Instructional Duty

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

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880 [196 Cal.Rptr. 309, 671 P.2d 813].) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.

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

AUTHORITY

- Statutory Admonitions ▸ Pen. Code, § 1122.
- Avoid Discussing the Case ▸ *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports ▸ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research ▸ *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].

Secondary Sources

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

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

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

(*Id.* at p. 306, fn. 11.)

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

Jury Misconduct

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

225. Circumstantial Evidence: Intent or Mental State

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

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

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

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

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

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

Give this instruction when the defendant's intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial

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

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

AUTHORITY

- Instructional Requirements ▸ *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 481–482 [268 Cal.Rptr. 262] [when both specific intent and mental state are elements].
- Intent Manifested by Circumstances ▸ Pen. Code, § 21(a).
- Accept Reasonable Interpretation of Circumstantial Evidence That Points Against Specific Intent ▸ *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254 [302 P.2d 406], disapproved on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86].
- Circumstantial Evidence Must Be Entirely Consistent With Existence of Specific Intent ▸ *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254 [302 P.2d 406], disapproved on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86].
- Reject Unreasonable Interpretations ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1049–1050 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- This Instruction Upheld ▸ *People v. Golde* (2008) 163 Cal.App.4th 101, 118 [77 Cal.Rptr.3d 120].

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*.

250. Union of Act and Intent: General Intent

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

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

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

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

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

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

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for

aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt, supra,* 222 Cal.App.2d at pp. 586–587.)

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

Defenses—Instructional Duty

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

AUTHORITY

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

Secondary Sources

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

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

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

RELATED ISSUES

Sex Registration and Knowledge of Legal Duty

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

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

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The crime[s] [(and/or) other allegation[s]] charged in Count[s] __ require[s] proof of the union, or joint operation, of act and wrongful intent.

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

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

<Repeat next paragraph as needed>

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

New January 2006; Revised June 2007, April 2010

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the joint union of act and intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) The

court may give this instruction in cases involving both offenses requiring a specific intent or mental state and offenses that do not, rather than giving both CALCRIM No. 250 and CALCRIM No. 251.

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

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

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

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

Defenses—Instructional Duty

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

AUTHORITY

- Statutory Authority ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.

- Instructional Requirements ‣ *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement ‣ *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed. 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- This Instruction Upheld ‣ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].

Secondary Sources

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

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

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

RELATED ISSUES

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

507. Justifiable Homicide: By Public Officer

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (attempted to kill/killed) someone while (acting as a public officer/obeying a public officer's command for aid and assistance). Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant was (a public officer/obeying a public officer's command for aid and assistance);**

2. **The [attempted] killing was committed while (taking back into custody a convicted felon [or felons] who had escaped from prison or confinement[,]/ arresting a person [or persons] charged with a felony who (was/were) resisting arrest or fleeing from justice[,]/ overcoming actual resistance to some legal process[,]/ [or] while performing any [other] legal duty);**

3. **The [attempted] killing was necessary to accomplish (one of those/that) lawful purpose[s];**

AND

4. **The defendant had probable cause to believe that _____** *<insert name of decedent>* **[posed a threat of death or serious ~~physical~~ bodily harm, either to the defendant or to others~~]~~ -/[or] [that _____** *<insert name of decedent>* **had committed (_____***<insert forcible and atrocious crime>*/_____**<insert crime decedenat was suspected of committing, e.g., burglary>, and that crime threatened the defendant or others with death or serious bodily harm].~~an offense that (posed a threat of serious physical harm either to the defendant or others/ _____ <insert forcible and atrocious crime>~~].** *<See Bench Note discussing this element.>*

A person has *probable cause* to believe that someone poses a threat of death or serious ~~physical~~ bodily harm when facts known to the person would persuade someone of reasonable caution that the other person is going to cause death or serious ~~physical~~ bodily harm to another.

[An officer or employee of _____ *<insert name of state or local government agency that employs public officer>* **is a *public officer*.]**

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

In element 2, select the phrase appropriate for the facts of the case.

It is unclear whether the officer must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the officer has probable cause to believe that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is, when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371-375 [132 Cal.Rptr. 348] [also stating the rule as "either" but quoting police regulations, which require that the officer always believe there is a risk of future harm.]) The committee has provided both options in element 4, but see *People v. Ceballos* (1974) 12 Cal.3d 470, 478-479. The court should review relevant case law before giving the bracketed language.

As with a peace officer, the jury must determine whether the defendant was a public 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 in the appropriate definition of "public officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are public officers"). *(Ibid.)* However, the court may not instruct the jury that the defendant was a public officer as a matter of law (e.g., "Officer Reed was a public officer"). *(Ibid.)*

Related Instructions
CALCRIM No. 508, *Justifiable Homicide: Citizen Arrest (Non-Peace Officer).*

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace.*

AUTHORITY

- Justifiable Homicide by Public Officer ▸ Pen. Code, §§ 196, 199.
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217]; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Public Officer ▸ See Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567 fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 82, 85, 243.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.15[1], [2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.04[1][c] (Matthew Bender).

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

RELATED ISSUES

Killing Committed in Obedience to Judgment
A homicide is also justifiable when committed by a public officer "in obedience to any judgment of a competent court." (Pen. Code, § 196, subd. 1.) There are no reported cases construing this subdivision. This provision appears to apply exclusively to lawful executions.

508. Justifiable Homicide: Citizen Arrest (Non-Peace Officer)

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) someone while trying to arrest him or her for a violent felony. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant committed the [attempted] killing while lawfully trying to arrest or detain** _____ *<insert name of decedent>* **for committing (the crime of** _____*<insert forcible and atrocious crime, i.e., ~~or~~ felony that threatened death or ~~great~~ serious bodily harm>/*_____*<insert crime decedent was suspected of committing, e.g., burglary>***, and that crime threatened the defendant or others with death or serious bodily harm);**

2. _____ *<insert name of decedent>* **actually committed (the crime of** _____*<insert forcible and atrocious crime, i.e., felony that threatened death or serious bodily harm ~~or felony~~>/*_____*<insert crime decedent was suspected of committing, e.g., burglary>* **, and that crime threatened the defendant or others with death or serious bodily harm);~~>].~~**

3. **The defendant *had reason to believe* that** _____ *<insert name of decedent>* **had committed (the crime of** _____*<insert forcible and atrocious crime, i.e., felony that threatened death or serious bodily harm / _____>/_____<insert crime decedent was suspected of committing, e.g., burglary>* **, and that crime threatened the defendant or others with death or serious bodily harm);~~.~~**

4. ~~[~~**The defendant *had reason to believe* that** _____ ***<ins****ert name of decedent>* **posed a threat of death or serious physical harm, either to the defendant or to others ~~*[for knew that _____ <insert name of decedent> had committed _____ <insert forcible and atrocious crime>*~~];**

AND

5. **The [attempted] killing was necessary to prevent** _____**’*s*** *<insert name of dece****dent****>* **escape.**

A person has *reason to believe* that someone [poses a threat of death or serious ~~physical~~ bodily harm or] committed (the crime of _____ *<insert forcible and atrocious crime, i.e., felony that threatened death or serious bodily harm /* **_____** *>/* **_____** *<insert crime decedent was suspected of committing, e.g., burglary>* **, and that crime threatened the defendant or others with death or serious bodily harm) when facts known to the person would persuade someone of reasonable caution to have (that/those) belief[s].~~that the other person is going to cause serious physical harm to another.~~**

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

It is unclear whether the defendant must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the defendant knows that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used by a law enforcement officer to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is either when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371–375 [132 Cal.Rptr. 348] [also stating the rule as "either" but

quoting police regulations, which require that the officer always believe there is a risk of future harm].) The committee has provided both options in element 4, but see *People v. Ceballos* (1974) 12 Cal.3d 470, 478-479. The court should review relevant case law before giving the bracketed language.

Related Instructions
CALCRIM No. 507, *Justifiable Homicide: By Public Officer*.

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace*.

AUTHORITY

- Justifiable Homicide to Preserve the Peace ▸ Pen. Code, §§ 197, subd. 4, 199.
- Lawful Resistance to Commission of Offense ▸ Pen. Code, §§ 692–694.
- Private Persons, Authority to Arrest ▸ Pen. Code, § 837.
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Felony Must Threaten Death or Great Bodily Injury ▸ *People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 80–86

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.15[1], [3] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.04[1][c] (Matthew Bender).

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

RELATED ISSUES

Felony Must Actually Be Committed

A private citizen may use deadly force to apprehend a fleeing felon only if the suspect in fact committed the felony and the person using deadly force had reasonable cause to believe so. (*People v. Lillard* (1912) 18 Cal.App. 343, 345 [123 P. 221].)

Felony Committed Must Threaten Death or Great Bodily Injury

Deadly force is permissible to apprehend a felon if "the felony committed is one which threatens death or great bodily injury. . . ." (*People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830]).

560. Homicide: Provocative Act by Defendant

[The defendant is charged [in Count __] with _____ <*insert underlying crime*>**.] The defendant is [also] charged [in Count __] with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.**

To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

1. **In (committing/ [or] attempting to commit) _____** <*insert underlying crime*>**, the defendant intentionally did a provocative act;**

2. **The defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;**

3. **In response to the defendant's provocative act, _____** <*insert name or description of third party*> **killed _____** <*insert name of decedent*>**;**

AND

4. **_____'s** <*insert name of decedent*> **death was the natural and probable consequence of the defendant's provocative act.**

A *provocative act* is an act:

1. [That goes beyond what is necessary to accomplish the _____ <*insert underlying crime*>**;]**

[AND

2.] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

In order to prove that _____'s <*insert name of decedent*> **death was the *natural and probable consequence* of the defendant's provocative act, the People must prove that:**

1. **A reasonable person in the defendant's position would have foreseen that there was a high probability that his or her act could begin a chain of events resulting in someone's death;**

2. **The defendant's act was a direct and substantial factor in causing _____'s** *<insert name of decedent>* **death;**

AND

3. **_____'s** *<insert name of decedent>* **death would not have happened if the defendant had not committed the provocative act.**

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

<Multiple Provocative Acts>
[The People alleged that the defendant committed the following provocative acts:_____*<insert acts alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts. However, you do not all need to agree on which act.]**

<Independent Criminal Act>
[A defendant is not guilty of murder if the killing of _____ *<insert name of decedent>* **was caused solely by the independent criminal act of someone else. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]**

<Degree of Murder>
[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.

<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 during the defendant's perpetration of an enumerated felony>* **[_____** *<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[s] 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. Enumerated Felony>

[To prove that the defendant is guilty of first degree murder, the People must prove that:

1. As a result of the defendant's provocative act, _____ <*insert name of decedent*> was killed during the commission of _____ <*insert Pen. Code, § 189 felony*>;

AND

2. Defendant intended to commit _____ <*insert Pen. Code, § 189 felony*> when (he/she) did the provocative act.

In deciding whether the defendant intended to commit _____ *<insert Pen. Code, § 189 felony>* **and whether the death occurred during the commission of _____** *<insert Pen. Code, § 189 felony>***, you should refer to the instructions I have given you on _____** *<insert Pen. Code, § 189 felony>***.]**

<C. If there is another theory, see Bench Note below and modify and use CALCRIM No. 521>

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.]

~~*<Degree of Murder>*~~
~~[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.~~

~~To prove that the defendant is guilty of first degree murder, the People must prove that:~~

1. **~~As a result of the defendant's provocative act,~~** ~~_____~~ ~~*<insert name of decedent>*~~ **~~was killed during the commission of~~** ~~_____~~ ~~*<insert Pen. Code, § 189 felony>*~~**~~;~~**

   ~~AND~~

2. **~~Defendant intended to commit~~** ~~_____~~ ~~*<insert Pen. Code, § 189 felony>*~~ **~~when (he/she) did the provocative act.~~**

~~In deciding whether the defendant intended to commit~~ ~~_____~~ ~~*<insert Pen. Code, § 189 felony>*~~ **~~and whether the death occurred during the commission of~~** ~~_____~~ ~~*<insert Pen. Code, § 189 felony>*~~**~~, you should refer to the instructions I have given you on~~** ~~_____~~ ~~*<insert Pen. Code, § 189 felony>.*~~

Any murder that does not meet these requirements for first degree murder is second degree murder.]

[If you decide that the defendant committed murder, that crime is murder in the second degree.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the provocative act doctrine is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].) If the prosecution relies on a first degree murder theory based on a Penal Code section 189 felony, the court has a **sua sponte** duty to give instructions relating to the underlying felony, whether or not it is separately charged.

If the defendant is an accomplice, aider and abettor, or coconspirator of the person who did the provocative act, give CALCRIM No. 561, *Homicide: Provocative Act by Accomplice*, instead of this instruction.

The first bracketed sentence of this instruction should only be given if the underlying felony is separately charged.

In the definition of "provocative act," the court should always give the bracketed phrase that begins, **"**that goes beyond what is necessary," unless the court determines that this element is not required because the underlying felony includes malice as an element. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60 [212 Cal.Rptr. 868]; see also *People v. Briscoe* (2001) 92 Cal.App.4th 568, 582 [112 Cal.Rptr.2d 401]; *People v. Gonzalez* (2010) 190 Cal.App.4th 968 [118 Cal.Rptr.3d 637].) See discussion in the Related Issues section below.

If the evidence suggests that there is more than one provocative act, give the bracketed paragraph on "multiple provocative acts," which instructs the jury that they need not unanimously agree about which provocative act caused the killing. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the bracketed paragraph that begins with "A defendant is not guilty of murder if . . . ." (See *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].)

If the prosecution is not seeking a first degree murder conviction, omit those bracketed paragraphs relating to first degree murder and simply give the last bracketed sentence of the instruction. As an alternative, the court may omit all instructions relating to the degree and secure a stipulation that if a guilty verdict is returned, the degree of murder is set at second degree. If the prosecution is seeking a first degree murder conviction, give the bracketed section on "degree of murder."

If there is a theory of first degree murder other than *A. Deliberation and Premeditation* or *B. Enumerated Felony*, e.g., torture, insert relevant portions of CALCRIM No. 521. That instruction must be modified to reflect the circumstances of the case. For example, if the defendant's provocative act is the torture of A, which causes B to shoot and kill C, the defendant will not have inflicted the required pain on "the person killed," C, but on "the person tortured," *People v. Concha I* (2010) 47 Cal.4th 653, 666 [101 Cal.Rptr.3d 141, 218 P.3d 660].

AUTHORITY

- Provocative Act Doctrine ▸ *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461 [63 Cal.Rptr.2d 382].
- Felony-Murder Rule Invoked to Determine Degree ▸ *People v. Gilbert* (1965) 63 Cal.2d 690, 705 [47 Cal.Rptr. 909, 408 P.2d 365]; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 139, fn. 4 [145 Cal.Rptr. 524, 577 P.2d 659]; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2 [203 Cal.Rptr. 433, 681 P.2d 274].
- Independent Intervening Act by Third Person ▸ *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Natural and Probable Consequences Doctrine ▸ *People v. Gardner* (1995) 37 Cal.App.4th 473, 479 [43 Cal.Rptr.2d 603].
- Response of Third Party Need Not Be Reasonable ▸ *People v. Gardner* (1995) 37 Cal.App.4th 473, 482 [43 Cal.Rptr.2d 603].
- Unanimity on Which Act Constitutes Provocative Act is Not Required ▸ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401] [multiple provocative acts].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 147–155.

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

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

RELATED ISSUES

Act "Beyond What is Necessary"

The general rule that has arisen in the context of robbery cases is that the provocative act must be one that goes beyond what is necessary to accomplish the underlying felony. However, more recent cases make clear that this requirement is not universal. In attempted murder or assault with a deadly weapon cases, the crime itself may be a provocative act because it demonstrates either express or implied malice. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60 [212 Cal.Rptr. 868]; see *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659].)

Death of a Fetus

The California Supreme Court has declined to decide whether the felony-murder doctrine could constitutionally apply to the death of a fetus that did not result from a direct attack on the mother. (*People v. Davis* (1994) 7 Cal.4th 797, 810, fn. 2 [30 Cal.Rptr.2d 50, 872 P.2d 591].) That ambiguity could extend to the provocative act doctrine as well.

580. Involuntary Manslaughter: Lesser Included Offense (Pen. Code, § 192(b))

When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.

The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.

The defendant committed involuntary manslaughter if:

1. **The defendant (committed a crime/ [or] a lawful act in an unlawful manner);~~(committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed/ [or] committed a lawful act, but acted with criminal negligence);~~**

~~1.~~**2. The defendant committed the (crime/ [or] act) with criminal negligence;**

AND

~~2.~~**3. The defendant's acts unlawfully caused the death of another person.**

[The People allege that the defendant committed the following crime[s]: _____ *<insert misdemeanor[s]/infraction[s])/noninherently dangerous (felony/felonies)>***.**

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant committed _____ *<insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/felonies)>***.]**

[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence: _____ *<insert act[s] alleged>***.]**

[*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 injury;**

AND

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

In other words, a person acts with 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.]

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

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

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

[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____ *<insert alleged predicate acts when multiple acts alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved.]**

In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have

not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on involuntary manslaughter as a lesser included offense of murder when there is sufficient evidence that the defendant lacked malice. (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465–1467 [280 Cal.Rptr. 609], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

When instructing on involuntary manslaughter as a lesser offense, the court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 2, instruct on either or both of theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr.2d 54].) See also CALCRIM No. 620, *Causation: Special Issues*.

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on 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], 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].) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

AUTHORITY

- Involuntary Manslaughter Defined ▸ Pen. Code, § 192(b).
- Due Caution and Circumspection ▸ *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Criminal Negligence Requirement; This Instruction Upheld ▸ *People v. Butler* (2010) 187 Cal.App.4th 998.
- Unlawful Act Not Amounting to a Felony ▸ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission ▸ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life ▸ *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 220–234.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person*, §§ 142.01[3][d.1], [e], 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

Involuntary manslaughter is a lesser included offense of both degrees of murder, but it is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].) ~~This holds true even for killings committed in the driving of a vehicle, despite the express exclusion of acts committed in a vehicle in Pen. Code, § 192(b). (*People v. Watson* (1983) 150 Cal.App.3d 313, 320–33).~~

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798]; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 [142 Cal.Rptr. 664].)

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

Imperfect self-defense is a "mitigating circumstance" that "reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide." (*People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal.Rptr.2d 512, 2 P.3d 1066] [citations omitted, emphasis in original].) However, evidence of imperfect self-defense may support a finding of *involuntary* manslaughter, where the evidence demonstrates *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675] [discussing dissenting opinion of Mosk, J.].) Nevertheless, a court should not instruct on involuntary manslaughter unless there is evidence supporting the statutory elements of that crime.

See also the Related Issues section to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*.

581. Involuntary Manslaughter: Murder Not Charged (Pen. Code, § 192(b))

The defendant is charged [in Count ____] with involuntary manslaughter [in violation of Penal Code section 192(b)].

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

1. **The defendant (committed a crime/ [or] a lawful act in an unlawful manner);~~(committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed/ [or] committed a lawful act, but acted with criminal negligence);~~**
2. **~~1.~~2. The defendant committed the (crime/ [or] act) with criminal negligence;**

AND

~~2.~~3. The defendant's acts caused the death of another person.

[The People allege that the defendant committed the following crime[s]: _____ *<insert misdemeanor[s]/infraction[s])/noninherently dangerous (felony/felonies)>***.**

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant committed _____ *<insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/felonies)>***.]**

[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence: _____ *<insert act[s] alleged>***.]**

[*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 injury;**

AND

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

In other words, a person acts with 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.]

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

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

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

[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____ *<insert alleged predicate acts when multiple acts alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree on which act (he/she) committed.]**

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the offense.

The court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 1, instruct on either or both theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

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

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on 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], 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].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

AUTHORITY

- Involuntary Manslaughter Defined ▸ Pen. Code, § 192(b).
- Due Caution and Circumspection ▸ *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unlawful Act Not Amounting to a Felony ▸ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Criminal Negligence Requirement ▸ *People v. Butler* (2010) 187 Cal.App.4th 998.
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission ▸ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647,

2 P.3d 1189].

- Proximate Cause ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life ▸ *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 220–234.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person*, § 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798].)

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

RELATED ISSUES

Due Caution and Circumspection

"The words lack of 'due caution and circumspection' have been heretofore held to be the equivalent of 'criminal negligence.' " (*People v. Penny* (1955) 44 Cal.2d 861, 879[285 P.2d 926].)

Felonies as Predicate "Unlawful Act"

"[T]he only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that

felony is committed without due caution and circumspection." (*People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675] [practicing medicine without a license cannot be predicate offense for second degree murder because not inherently dangerous but can be for involuntary manslaughter even though Penal Code section 192 specifies an "unlawful act, not amounting to a felony"].)

No Inherently Dangerous Requirement for Predicate Misdemeanor/Infraction

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

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.'" (*Ibid*.)

593. Misdemeanor Vehicular Manslaughter (Pen. Code § 192(c)(2))

<If misdemeanor vehicular manslaughter—ordinary negligence is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>
[The defendant is charged [in Count __] with vehicular manslaughter [in violation of Penal Code section 192(c)(2)].]

<Introductory Sentence: Alternative B—Lesser Included Offense>
[Vehicular manslaughter with ordinary negligence is a lesser crime than (gross vehicular manslaughter while intoxicated/ [and] gross vehicular manslaughter/ [and] vehicular manslaughter with ordinary negligence while intoxicated.)]

To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence, the People must prove that:

~~*<If the court concludes that negligence must be established only for a "lawful act, committed in an unlawful manner," and not for a misdemeanor or infraction (see Bench Notes), give the following:>*~~

~~**1. While (driving a vehicle/operating a vessel), the defendant committed (a misdemeanor[,]/ [or] an infraction/ [or] a lawful act with ordinary negligence);**~~

~~**2. The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) was dangerous to human life under the circumstances of its commission;**~~

~~**AND**~~

~~**3. The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) caused the death of another person.**~~

~~*<If the court concludes that negligence must be established for a misdemeanor or infraction, as well as for a "lawful act, committed in an unlawful manner," give the following:>*~~

1. **While (driving a vehicle/operating a vessel), the defendant committed (a misdemeanor[,]/ [or] an infraction/ [or] a lawful act in an unlawful manner);**
2. **The (misdemeanor[,]/ [or] infraction/ [or] otherwise lawful act) was dangerous to human life under the circumstances of its commission;**

3. The defendant committed the (misdemeanor[,]/ [or] infraction/ [or] otherwise lawful act) with ordinary negligence;

AND

4. **The (misdemeanor[,]/ [or] infraction/ [or] otherwise lawful act) caused the death of another person.**

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

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

[The People [also] allege that the defendant committed the following otherwise lawful act[s] with ordinary negligence: _____ <*insert act[s] alleged*>**.]**

[The difference between this offense and the charged offense of gross vehicular manslaughter is the degree of negligence required. I have already defined gross negligence for you.]

***Ordinary negligence*[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent 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).**

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

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the

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

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

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

New January 2006; Revised December 2008, October 2010

BENCH NOTES

Instructional Duty

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

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court

should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion. In the definition of ordinary negligence, the court should use the entire phrase "harm to oneself or someone else" if the facts of the case show a failure by the defendant to prevent harm to him- or herself rather than solely harm to another.

~~Authority is ambiguous about whether the requirement of negligence applies only to the commission of an otherwise lawful act or also to an infraction or misdemeanor. (See *People v. Wells* (1996) 12 Cal.4th 979, 987 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr. 2d 451, 999 P.2d 675]; *In re Dennis B.* (1976) 18 Cal.3d 687, 696 [135 Cal.Rptr. 82, 557 P.2d 514]; *People v. Mitchell* (1946) 27 Cal.2d 678, 683-684 [166 P.2d 10]; *People v. Pearne* (1897) 118 Cal. 154 [50 P. 376]; *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr. 2d 803].) This instruction provides language for either alternative. The court must decide which one is legally correct.~~

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

AUTHORITY

- Vehicular Manslaughter Without Gross Negligence ▸ Pen. Code, § 192(c)(2).
- Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence ▸ Pen. Code, § 192.5(b).

- Unlawful Act Dangerous Under the Circumstances of Its Commission ‣ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act ‣ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act ‣ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction ‣ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481[76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence ‣ Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation ‣ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine ‣ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].
- Criminal Negligence Requirement ‣ *People v. Butler* (2010) 187 Cal.App.4th 998.

Secondary Sources

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

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

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

RELATED ISSUES

See the Related Issues section to CALCRIM No. 592, *Gross Vehicular Manslaughter*.

600. Attempted Murder (Pen. Code, §§ 21a, 663, 664)

The defendant is charged [in Count __] with attempted murder.

To prove that the defendant is guilty of attempted murder, the People must prove that:

1. **The defendant took at least one direct but ineffective step toward killing (another person/ [or] a fetus);**

AND

2. **The defendant intended to kill (that/a) (person/ [or] fetus).**

A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is 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 the murder, then that person is not guilty of attempted murder.]

[A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>***, the People must prove that the defendant not only intended to kill _____** *<insert name of primary target alleged>* **but also either intended to kill _____** *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>***, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill _____** *<insert name or description of victim charged in*

attempted murder count[s] on concurrent-intent theory> **or intended to kill** _____ *<insert name or description of primary target alleged>* **by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of** _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>***.]**

[The defendant may be guilty of attempted murder even if you conclude that murder was actually completed.]

[A *fetus* is an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which occurs at seven to eight weeks of development.]

New January 2006; Revised December 2008, August 2009

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the crime of attempted murder 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] [discussing duty to instruct on lesser included offenses in homicide generally].)

The second bracketed paragraph is provided for cases in which the prosecution theory is that the defendant created a "kill zone," harboring the specific and concurrent intent to kill others in the zone. (*People v. Bland* (2002) 28 Cal.4th 313, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107].) "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them." (*Id.* at p. 329.)

The *Bland* court stated that a special instruction on this issue was not required. (*Id*. at p. 331, fn.6.) The bracketed language is provided for the court to use at its discretion.

Give the next-to-last bracketed paragraph when the defendant has been charged only with attempt to commit murder, but the evidence at trial reveals that the murder was actually completed. (See Pen. Code, § 663.)

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

CALCRIM No. 601, *Attempted Murder: Deliberation and Premeditation.*

CALCRIM No. 602, *Attempted Murder: Peace Officer, Firefighter, Custodial Officer, or Custody Assistant.*

CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

CALCRIM No. 604, *Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

AUTHORITY

- Attempt Defined ▸ Pen. Code, §§ 21a, 663, 664.
- Murder Defined ▸ Pen. Code, § 187.
- Specific Intent to Kill Required ▸ *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Kill Zone Explained ▸ *People v. Stone* (2009) 46 Cal.4th 131, 137–138 [92 Cal.Rptr.3d 362, 205 P.3d 272].
- Killer Need Not Be Aware of Other Victims in Kill Zone ▸ *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 [86 Cal.Rptr.3d 915].

—This Instruction Correctly States the Law ▸ *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556-567

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 53–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02[3]; Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.20; Ch. 142, *Crimes Against the Person,* § 142.01[3][e] (Matthew Bender).

LESSER INCLUDED OFFENSES

Attempted voluntary manslaughter is a lesser included offense. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].)

RELATED ISSUES

Specific Intent Required

"[T]he crime of attempted murder requires a specific intent to kill . . . ." (*People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].)

> In instructing upon the crime of attempt to commit murder, there should never be any reference whatsoever to implied malice. Nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do.

(People v. Santascoy (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709].)

Solicitation

Attempted solicitation of murder is a crime. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 460 [94 Cal.Rptr.2d 910].)

Single Bullet, Two Victims

A shooter who fires a single bullet at two victims who are both in his line of fire can be found to have acted with express malice toward both victims. (*People v.* Smith) (2005) 37 Cal.4th 733, 744 [37 Cal.Rptr.3d 163, 124 P.3d 730].) See also *People v. Perez* (2010) 50 Cal.4th 222, 225 [112 Cal.Rptr.3d 310].

No Attempted Involuntary Manslaughter

"[T]here is no such crime as attempted involuntary manslaughter." (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798].)

Transferred and Concurrent Intent

"[T]he doctrine of transferred intent does not apply to attempted murder." (*People v. Bland* (2002) 28 Cal.4th 313, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107].) "[T]he defendant may be convicted of the attempted murders of any[one] within the kill zone, although on a concurrent, not transferred, intent theory." (*Id.*)

767. Response to Juror Inquiry During Deliberations About Commutation of Sentence in Death Penalty Case

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~~**The (governor/legislature/courts) (have/has) the power to reduce criminal sentences. This power applies equally to a death sentence or a sentence of life without the possibility of parole. In your deliberations, you must assume that whatever sentence you choose will be carried out. Do not consider the possibility of some future action by a (governor/legislature/court).**~~

It is your responsibility to decide which penalty is appropriate in this case. Base your decision on the evidence you have heard in court and on the instructions that I have given you. Do not speculate or consider anything other than the evidence and my instructions.

New April 2010

BENCH NOTES

Instructional Duty

This instruction should be given **only** in response to a jury question about commutation of sentence or at the request of the defendant. (*People v. Ramos* (1984) 37 Cal.3d 136, 159, fn. 12 [207 Cal.Rptr. 800, 689 P.2d 430]). "The key in *Ramos* is whether the jury raises the commutation issue so that it 'cannot be avoided.'" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1251 [96 Cal.Rptr.3d 574, 210 P.3d 1171] (conc. opn. of Moreno, J.)) Commutation instructions are proper, however, when the jury implicitly raises the issue of commutation. No direct question is necessary. (*People v. Beames* (2007) 40 Cal.4th 907, 932 [55 Cal.Rptr.3d 865, 153 P.3d 955].)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 190.3; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204-207 [112 Cal.Rptr.3d 746]. ~~*People v. Bramit* (2009) 46 Cal.4th 1221, 1247-1248 [96 Cal.Rptr.3d 574, 210 P.3d 1171]; *People v. Ramos* (1984) 37 Cal.3d 136, 153-159 [207 Cal.Rptr. 800, 689 P.2d 430].~~

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Secondary Sources

3 Witkin & Epstein, Califor*nia Criminal Law* (3d ed. 2000) Punishment, § 496.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.02 (Matthew Bender).

1110. Lewd or Lascivious Act: Child Under 14 Years (Pen. Code, § 288(a))

The defendant is charged [in Count __] with committing a lewd or lascivious act on a child under the age of 14 years [in violation of Penal Code section 288(a)].

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;

AND

3. The child was under the age of 14 years at the time of the act.

The touching need not be done in a lewd or sexual manner.

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.]

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

New January 2006

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.

In element 1, give alternative 1A if the prosecution alleges that the defendant touched the child. Give alternative 1B if the prosecution alleges that the defendant cause the child to do the touching.

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" on request, if there is evidence that the minor consented to the act. (*People v. Soto* (2011) ___ Cal.4th ___ ["the victim's consent is not a defense to the crime of lewd acts on a child under age 14 under any circumstances"] ~~See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].~~)

~~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 final 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, § 288(a).
- 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's Consent Not a Defense ‣ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].
- 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* 25 (1979) Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

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][i], [b]-[d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Child Under 14 ‣ Pen. Code, §§ 664, 288(a); *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.

Annoying or molesting a child under the age of 18 (Pen. Code, § 647.6) is not a lesser included offense of section 288(a). (*People v. Lopez* (1998) 19 Cal.4th 282, 290, 292 [79 Cal.Rptr.2d 195, 965 P.2d 713].)

RELATED ISSUES

Any Act That Constitutes Sexual Assault

A lewd or lascivious act includes any act that constitutes a crime against the person involving sexual assault as provided in title 9 of part 1 of the Penal Code (Pen. Code, §§ 261–368). (Pen. Code, § 288(a).) For example, unlawful sexual intercourse on the body of a child under 14 can be charged as a lewd act under section 288 and as a separate offense under section 261.5. However, these charges are in the alternative and, in such cases, the court has a **sua sponte** duty to give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*. (See Pen. Code, § 654(a); *People v. Nicholson* (1979) 98 Cal.App.3d 617, 625 [159 Cal.Rptr. 766].)

Calculating Age
The "birthday rule" of former Civil Code section 26 (now see Fam. Code, § 6500) applies so that a person attains a given age as soon as the first minute of his or her birthday has begun, not on the day before the birthday. (See *In re Harris* (1993) 5 Cal.4th 813, 844–845, 849 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Minor Perpetrator
A minor under age 14 may be convicted for violating Penal Code section 288(a) on clear proof of the minor's knowledge of wrongfulness and the minor's intent to arouse his or her own sexual desires. (See Pen. Code, § 26; *In re Randy S.* (1999) 76 Cal.App.4th 400, 406–408 [90 Cal.Rptr.2d 423]; see also *In re Paul C.* (1990) 221 Cal.App.3d 43, 49 [270 Cal.Rptr. 369] [in context of oral copulation].) The age of the minor is a factor to consider when determining if the conduct was sexually motivated. (*In re Randy S., supra,* 76 Cal.App.4th at pp. 405–406 [90 Cal.Rptr.2d 423].)

Solicitation to Violate Section 288
Asking a minor to engage in lewd conduct with the person making the request is not punishable as solicitation of a minor to commit a violation of Penal Code section 288. (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1379 [119 Cal.Rptr.2d 199] [conviction for solicitation under Penal Code section 653f(c) reversed].) "[A] minor cannot violate section 288 by engaging in lewd conduct with an adult." (*Id.* at p. 1379.)

Mistaken Belief About Victim's Age
A defendant charged with a lewd act on a child under Penal Code section 288(a) is not entitled to a mistake of fact instruction regarding the victim's age. (*People v. Olsen* (1984) 36 Cal.3d 638, 647 [205 Cal.Rptr. 492, 685 P.2d 52] [adult defendant]; *In re Donald R.* (1993) 14 Cal.App.4th 1627, 1629–1630 [18 Cal.Rptr.2d 442] [minor defendant].)

Multiple Lewd Acts
Each individual act that meets the requirements of section 288 can result in a new and separate statutory violation. (*People v. Scott* (1994) 9 Cal.4th 331, 346–347 [36 Cal.Rptr.2d 627, 885 P.2d 1040]; see *People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [256 Cal.Rptr. 401, 768 P.2d 1078] [in context of sexual penetration].) For example, if a defendant fondles one area of a victim's body with the requisite intent and then moves on to fondle a different area, one offense has ceased and another has begun. There is no requirement that the two be separated by a hiatus or period of reflection. (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456 [121 Cal.Rptr.2d 426].)

1111. Lewd or Lascivious Act: By Force or Fear (Pen. Code, § 288(b)(1))

The defendant is charged [in Count __] with a lewd or lascivious act by force or fear on a child under the age of 14 years [in violation of Penal Code section 288(b)(1)].

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. In committing the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the child or someone else;

3. 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;

AND

4. The child was under the age of 14 years at the time of the act.

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.]

The *force* used must be substantially different from or substantially greater than the force needed to accomplish the act itself.

[*Duress* means the use of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause ~~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 child 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 child 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].]

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

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

New January 2006

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 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

Lack of consent by a minor is not an element of lewd act or lascivious act against a child under 14 in violation of Penal Code section 288, subdivision (b), whether accomplished by force, duress, or otherwise. Likewise, consent by the child is not an affirmative defense to such a charge. (*People v. Soto* (2011) ___ Cal.4th ___ .) The bracketed paragraph that begins "It is not a defense that the child" may be given on request if there is evidence of consent.

~~***Defenses—Instructional Duty***~~

~~There is disagreement as to whether knowing consent by a minor is an affirmative defense to a lewd act accomplished by force. (See *People v. Cicero* (1984) 157 Cal.App.3d 465, 484–485 [204 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero*, *supra*, 157 Cal.App.3d at pp. 487–488 [204 Cal.Rptr. 582], dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].) The bracketed paragraph that begins with "It is not a defense that the child" may be given on request if there is evidence of consent and the court concludes that consent is not a defense to a charge under section 288(b)(1). If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.)~~

AUTHORITY

- Elements ▸ Pen. Code, § 288(b)(1).
- Duress Defined ▸ *People v. Soto* (2011) ___Cal.4th ___ ; 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]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Menace Defined ▸ Pen. Code, § 261(c) [in context of rape].
- 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].
- Fear Defined ‣ *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *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. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- 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].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–38.

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

COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [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 definition of "force" as used in Penal Code section 288(b)(1) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force

normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon, supra*, 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra*, 33 Cal.4th at pp. 1026–1028.)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 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 p. 1007, 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."

LESSER INCLUDED OFFENSES

- Attempted Lewd Act by Force With Child Under 14 ‣ Pen. Code, §§ 664, 288(b).
- Simple Assault ‣ Pen. Code, § 240.
- Simple Battery ‣ Pen. Code, § 242.

RELATED ISSUES

Evidence of Duress

In looking at the totality of the circumstances to determine if duress was used to commit forcible lewd acts on a child, "relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. . . . The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and her relationship to the defendant." (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 14.)

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

1202. Kidnapping: For Ransom, Reward, or Extortion (Pen. Code, § 209(a))

The defendant is charged [in Count __] with kidnapping for the purpose of (ransom[,]/ [or] reward[,]/ [or] extortion) [that resulted in (death[,]/ [or] bodily harm[,]/ [or] exposure to a substantial likelihood of death)] [in violation of Penal Code section 209(a)].

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

1. **The defendant (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed) ~~someone~~another person;**

<Alternative 2A—held or detained>

[2. The defendant held or detained ~~that~~ the other person;]

<Alternative 2B—intended to hold or detain that person>

[2. When the defendant acted, (he/she) intended to hold or detain the other person;]

~~**AND**~~

3. **The defendant did so (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get money or something valuable)~~.~~;**

   [AND]

4. **The other person did not consent to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed)(;/.)**

<Give element 5 if instructing on reasonable belief in consent>

[**AND**]

5. **The defendant did not actually and reasonably believe that the other person consented to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed).**

[It is not necessary that the person be moved for any distance.]

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

<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 mental capacity 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.]

[Someone intends to commit *extortion* if he or she intends to: (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone intends to commit *extortion* if he or she: (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act.] [An *official act* is an act that a person does in his or her official capacity using the authority of his or her public office.]

<Sentencing Factor>
[If you find the defendant guilty of kidnapping for (ransom [,]/ [or] reward[,]/ [or] extortion), you must then decide whether the People have proved the additional allegation that the defendant (caused the kidnapped person to

(die/suffer bodily harm)/ [or] intentionally confined the kidnapped person in a way that created a substantial risk of death).

[*Bodily harm* means any substantial physical injury resulting from the use of force that is more than the force necessary to commit kidnapping.]

[The defendant caused _____'s <*insert name of allegedly kidnapped person*> **(death/bodily harm) if:**

1. **A reasonable person in the defendant's position would have foreseen that the defendant's use of force or fear could begin a chain of events likely to result in _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm);**

2. **The defendant's use of force or fear was a direct and substantial factor in causing _____'s** <*insert name of allegedly kidnapped person*> (**death/bodily harm);**

AND

3. **_____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm) would not have happened if the defendant had not used force or fear to hold or detain _____** <*insert name of allegedly kidnapped person*>**.**

A *substantial factor* is more than a trivial or remote factor. However, it need not have been the only factor that caused _____'s <*insert name of allegedly kidnapped person*> **(death/bodily harm).]**

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 the allegation has not been proved.]

New January 2006

BENCH NOTES

Instructional Duty

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

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)),

the court has a **sua sponte** duty to instruct on the sentencing factor. (See *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762] [bodily harm defined]); see also *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318 [76 Cal.Rptr.2d 160] [court must instruct on general principles of law relevant to issues raised by the evidence].) The court must also give the jury a verdict form on which the jury can indicate whether this allegation has been proved. If causation is an issue, the court has a **sua sponte** duty to give the bracketed section that begins "The defendant caused." (See Pen. Code, § 209(a); *People v. Monk* (1961) 56 Cal.2d 288, 296 [14 Cal.Rptr. 633, 363 P.2d 865]; *People v. Reed* (1969) 270 Cal.App.2d 37, 48–49 [75 Cal.Rptr. 430].)

Give the bracketed definition of "consent" on request.

Give alternative 2A if the evidence supports the conclusion that the defendant actually held or detained the alleged victim. Otherwise, give alternative 2B. (See Pen. Code, § 209(a).)

"Extortion" is defined in Penal Code section 518. If the kidnapping was for purposes of extortion, give one of the bracketed definitions of extortion on request. Give the second definition if the defendant is charged with intending to extort an official act. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition].) It appears that this type of extortion rarely occurs in the context of kidnapping, so it is excluded from this instruction.

Defenses—Instructional Duty

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

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

Related Instructions

For the elements of extortion, see CALCRIM No. 1830, *Extortion by Threat or Force*.

AUTHORITY

- Elements ▸ Pen. Code, § 209(a).
- Requirement of Lack of Consent ▸ *People v. Eid* (2010) 187 Cal.App.4th 859.
- Extortion ▸ Pen. Code, § 518; *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382].
- Amount of Physical Force Required ▸ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59 [43 Cal.Rptr.2d 434]; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762].
- Bodily Injury Defined ▸ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686; see *People v. Reed* (1969) 270 Cal.App.2d 37, 48–50 [75 Cal.Rptr. 430] [injury reasonably foreseeable from defendant's act].
- Control Over Victim When Intent Formed ▸ *People v. Martinez* (1984) 150 Cal.App.3d 579, 600–602 [198 Cal.Rptr. 565] [disapproved on other ground in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376].]
- No Asportation Required ▸ *People v. Macinnes* (1973) 30 Cal.App.3d 838, 844 [106 Cal.Rptr. 589]; see *People v. Rayford* (1994) 9 Cal.4th 1, 11–12, fn. 8 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227 [277 Cal.Rptr. 382].
- Official Act Defined ▸ *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 266–273.

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

COMMENTARY

A trial court may refuse to define "reward." There is no need to instruct a jury on the meaning of terms in common usage. Reward means something given in return for good or evil done or received, and especially something that is offered or given for some service or attainment. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 367–368 [68 Cal.Rptr.2d 61].) In the absence of a request, there is also no duty to define "ransom." The word has no statutory definition and is commonly understood by those familiar with the English language. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628].)

LESSER INCLUDED OFFENSES

- False Imprisonment ▸ Pen. Code, §§ 236, 237; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65 [43 Cal.Rptr.2d 434]; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].
- Extortion ▸ Pen. Code, § 518.
- Attempted Extortion ▸ Pen. Code, §§ 664, 518.

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), then kidnapping for ransom without death or bodily harm is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the allegation has been proved.

Simple kidnapping under section 207 of the Penal Code is not a lesser and necessarily included offense of kidnapping for ransom, reward, or extortion. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 368, fn. 56 [68 Cal.Rptr.2d. 61] [kidnapping for ransom can be accomplished without asportation while simple kidnapping cannot]; see *People v. Macinnes* (1973) 30 Cal.App.3d 838, 843–844 [106 Cal.Rptr. 589]; *People v. Bigelow* (1984) 37 Cal.3d 731, 755, fn. 14 [209 Cal.Rptr. 328, 691 P.2d 994].)

RELATED ISSUES

Extortion Target

The kidnapped victim may also be the person from whom the defendant wishes to extort something. (*People v. Ibrahim* (1993) 19 Cal.App.4th 1692, 1696–1698 [24 Cal.Rptr.2d 269.)

No Good-Faith Exception

A good faith exception to extortion or kidnapping for ransom does not exist. Even actual debts cannot be collected by the reprehensible and dangerous means of abducting and holding a person to be ransomed by payment of the debt. (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305].)

2410. Possession of Controlled Substance Paraphernalia (Health & Saf. Code, § 11364)

The defendant is charged [in Count __] with possessing an object that can be used to unlawfully inject or smoke a controlled substance [in violation of Health and Safety Code section 11364].

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

1. **The defendant [unlawfully] possessed an object ~~that can be~~ used ~~to~~ for unlawfully inject~~ing~~ or smok~~inge~~ a controlled substance;**

2. **The defendant knew of the object's presence;**

   AND

3. **The defendant knew ~~that it was an object~~ it to be an object ~~that the object could be~~ used ~~to~~ for unlawfully inject~~ing~~ or smok~~eing~~ 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.]

[The People allege that the defendant possessed the following items: _____ *<insert each specific item of paraphernalia when multiple items alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]**

<Defense: Authorized Possession for Personal Use>
[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

1. **(He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use;**

   [AND]

2. (He/She) obtained (it/them) from an authorized source(;/.)

[AND

3. (He/She) possessed no more than 10 (needles/ [or] syringes).]

The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised October 2010

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 items, 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]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Defenses—Instructional Duty

In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 121285.) The purpose of this project is to evaluate "the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C." (Health & Saf. Code, § 121285(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) Similarly, in a city or county that has authorized participation in the project, Health and Safety Code section 11364(a) "shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source." (Health & Saf. Code, § 11364(c).) The defendant need only raise a reasonable doubt about whether his or her possession of these items was lawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on this

defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession of hypodermic is an affirmative defense]); *People v. Mower, ibid.* at pp. 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11364.
- Statute Constitutional ▸ *People v. Chambers* (1989) 209 Cal.App.3d Supp. 1, 4 [257 Cal.Rptr. 289].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Disease Prevention Demonstration Project ▸ Health & Saf. Code, § 121285; Bus. & Prof. Code, § 4145(a)(2).
- Possession Permitted Under Project ▸ Health & Saf. Code, § 11364(c).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 116.

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

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

RELATED ISSUES

Marijuana Paraphernalia Excluded

Possession of a device for smoking marijuana, without more, is not a crime. (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897 [132 Cal.Rptr.2d 471].)

3454. Initial Commitment as Sexually Violent Predator (Welf. & Inst. Code, §§ 6600, 6600.1)

The petition alleges that _____ <*insert name of respondent*> is a sexually violent predator.

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. **(He/She) has been convicted of committing sexually violent offenses against one or more victims;**

2. **(He/She) has a diagnosed mental disorder;**

[AND]

3. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 4 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community.>

[AND

4. **It is necessary to keep (him/her) in (custody in a secure facility/ a state-operated conditional release program) to ensure the health and safety of others.]**

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released in 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 or threatening to retaliate in the future against the victim or any other 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.]**

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 resulted in an indeterminate sentence.]

<C. Conviction in Another Jurisdiction>
[A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]

<D. Conviction Under Previous Statute>
[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

<E. Conviction With Probation>

[A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]

<F. Acquittal Based on Insanity Defense>
[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>
[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

<*H. Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5* **>**
[A prior conviction for one of the offenses that I have just described to you for which the respondent was committed to the Department of Youth Authority pursuant to Welfare and Institutions Code section 1731.5.]

You may not conclude that _____ *<insert name of respondent>* **is a sexually violent predator based solely on (his/her) alleged prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.**

In order to prove that _____ *<insert name of respondent>* **is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.**

New January 2006; Revised August 2006, June 2007, August 2009

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 evidence is presented about 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 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant post-trial instructions. These instructions may need to be modified.

Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776–777 [3 Cal.Rptr.3d 684, 74 P.3d 779] (interpreting Welfare and Institutions Code section 6600, the same statute at issue here).

But see *In re Howard N.* (2005) 35 Cal.4th 117, 137-138 [24 Cal.Rptr.3d 866, 106 P.3d 305], which found in a commitment proceeding under a different code section, i.e., Welfare and Institutions Code section 1800, that when evidence of inability to control behavior was insufficient, the absence of a specific "control" instruction was not harmless beyond a reasonable doubt. Moreover, *In re Howard N.* discusses *Williams* extensively without suggesting that it intended to overrule *Williams*. *Williams* therefore appears to be good law in proceedings under section 6600.

AUTHORITY

- Elements and Definitions ▸ Welf. & Inst. Code, §§ 6600, 6600.1.
- Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined ▸ Pen. Code, § 1170.
- Impairment of Control ▸ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].

- Amenability to Voluntary Treatment ▸ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same ▸ *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].
- State-Operated Conditional Release Program ▸ *People v. Superior Court (George)* (2008) 164 Cal.App.4th 183, 196-197.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 193.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole*, § 104.06 (Matthew Bender).

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings
Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064 [123 Cal.Rptr.2d 253].)

Masturbation Does Not Require Skin-to-Skin Contact
Substantial sexual conduct with a child under 14 years old includes masturbation when 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.)

3454A. Hearing to Determine Current Status Under Sexually Violent Predator Actor (Welf. & Inst. Code, § 6605)

The People allege that _____ *<insert name of petitioner>* **currently is a sexually violent predator.**

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. **_____***<insert name of petitioner>* **has a diagnosed mental disorder;**

[AND]

2. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 3 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community>

[AND

3. **It is necessary to keep (him/her) in (custody in a secure facility/a state-operated conditional release program) to ensure the health and safety of others.]**

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released in 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.

<Give the following paragraph if evidence of the petitioner's failure to participate in or complete treatment is offered as proof that petitioner's condition has not changed>

[You may consider evidence that _____<*insert name of petitioner*> **failed to participate in or complete the State Department of Mental Health Sex Offender Commitment Program as an indication that (his/her) condition as a sexually violent predator has not changed. The meaning and importance of that evidence is for you to decide.]**

Give the following paragraph if the jury has been told about the petitioner's underlying conviction>

[You may not conclude that _____<*insert name of petitioner*> **is currently a sexually violent predator based solely on (his/her) prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.]**

In order to prove that _____ <*insert name of petitioner*> **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.**

New [insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a petitioner is currently a sexually violent predator.

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 3. (*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 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant post-trial instructions. These instructions may need to be modified.

AUTHORITY

- Elements and Definitions ▸ Welf. & Inst. Code, §§ 6600, 6605.
- Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined ▸ Pen. Code, § 1170.
- Impairment of Control ▸ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment ▸ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same ▸ *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].
- State-Operated Conditional Release Program ▸ *People v. Superior Court (George)* (2008) 164 Cal.App.4th 183, 196-197.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 193.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole*, § 104.06 (Matthew Bender).

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

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

1. **(He/She) actually and in good faith tried to stop fighting;**

[AND]

2. **(He/She) indicate~~d~~, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) want~~ed~~ to stop fighting and that (he/she) ha~~d~~ stopped fighting(;/.)**

<Give element 3 in cases of mutual combat.>

[AND

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

If the defendant meets~~a person meets~~ these requirements, (he/she) then ha~~d~~ a right to self-defense ~~-~~if the opponent continue~~d~~ to fight.

~~[A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.]~~

[However, ~~i~~If ~~you decide that the~~ the defendant

> **~~-~~used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then ~~started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then~~ the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting(,/ or) communicate the desire to stop to the opponent[, or give the opponent a chance to stop fighting].]**

[A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose.]

New January 2006; Revised April 2008, December 2008

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

Give CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)* together with this instruction.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

Give bracketed element 3 if the person claiming self-defense was engaged in mutual combat.

If the defendant started the fight using non-deadly force and the opponent suddenly escalates to deadly force, the defendant may defend himself or herself using deadly force. (See *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307].) In such cases, give the bracketed sentence that begins with "If you decide that."

If the defendant was the initial aggressor and is charged with homicide, always give CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*, in conjunction with this instruction.

AUTHORITY

- Instructional Requirements ▸ See Pen. Code, § 197, subd. 3; *People v. Button* (1895) 106 Cal. 628, 633 [39 P. 1073]; *People v. Crandell* (1988) 46 Cal.3d 833, 871–872 [251 Cal.Rptr. 227, 760 P.2d 423]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749].
- Escalation to Deadly Force ▸ *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307]; *People v. Anderson* (1922) 57 Cal.App. 721, 727 [208 P. 204].
- Definition of Mutual Combat ▸ *People v. Ross* (2007) 155 Cal.App.4th 1033, 1045 [66 Cal.Rptr.3d 438].

Secondary Sources

1 Witkin & Epstein, California. Criminal Law (3d ed. 2000) Defenses, § 75.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[2][a] (Matthew Bender).

3516. Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited

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<Give this paragraph when the law does not specify which crime must be sustained or dismissed if the defendant is found guilty of both>

[The defendant is charged in Count __ with _____ *<insert name of alleged offense >* **and in Count __ with _____** *<insert name of alleged offense >***. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]**

<Give the following paragraph when the defendant is charged with both theft and receiving stolen property offenses based on the same incident>

[The defendant is charged in Count ___with _____*<insert theft offense >* **and in Count ___ with _____***<insert receiving stolen property offense>*.

You must first decide whether the defendant is guilty of _____*<insert name of theft offense>*. **If you find the defendant guilty of _____***<insert name of theft offense>*, **you must return the verdict form for _____***<insert name of receiving stolen property offense>* **unsigned. If you find the defendant not guilty of _____***<insert theft offense >* **you must then decide whether the defendant is guilty of _____***<insert name of receiving stolen property offense>***.]**

New January 2006; Revised June 2007, October 2010

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction where the defendant is charged in the alternative with multiple counts for a single event. (See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].) This instruction applies only to those cases in which the defendant may be legally convicted of only one of the alternative charges. See dual conviction list in *Related Issues* section below.

If the evidence raises the issue whether the same act or single event underlies both a theft conviction and a receiving stolen property conviction, this may be a question for the jury and the instruction should be modified accordingly.

If the defendant is charged with both theft and receiving stolen property, and the jury informs the court that it cannot reach a verdict on the theft count, the court may then instruct the jury to consider the receiving stolen property count.

If the defendant is charged with multiple counts for separate offenses, give CALCRIM No. 3515, *Multiple Counts: Separate Offenses*.

If the case involves separately charged greater and lesser offenses, the court should give CALCRIM No. 3519. Because the law is unclear in this area, the court must decide whether to give this instruction if the defendant is charged with specific sexual offenses and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss.

AUTHORITY

- Prohibition Against Dual Conviction ‣ *People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48]; *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Instructional Requirements ‣ See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Conviction of Receiving Stolen Property Not Possible if Defendant Convicted of Theft ‣ *People v. Ceja* (2010) 49 Cal.4th 1, 3-4 [108 Cal.Rptr.3d 568, 229 P.3d 995].

Secondary Sources

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

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

RELATED ISSUES

Dual Conviction May Not Be Based on Necessarily Included Offenses
"[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48] [emphasis in original, citations and internal quotation marks omitted]; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [16 Cal.Rptr.3d 902, 94 P.3d 1098].) "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether all the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense." (*People v. Montoya*, *supra*, 33 Cal.4th at p. 1034 [internal quotation marks and citation omitted].)

Dual Conviction—Examples of Offense Where Prohibited or Permitted
The courts have held that dual conviction is *prohibited* for the following offenses:

- Robbery and theft ‣ *People v. Ortega* (1998) 19 Cal.4th 686, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Robbery and receiving stolen property ‣ *People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587 [267 Cal.Rptr. 66].
- Theft and receiving stolen property ‣ *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Battery and assault ‣ See *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Forgery and check fraud ‣ *People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66].
- Forgery and credit card fraud ‣ *People v. Cobb* (1971) 15 Cal.App.3d 1, 4 [93 Cal.Rptr. 152].

The courts have held that dual conviction is *permitted* for the following offenses (although dual punishment is not):

- Burglary and theft ‣ *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [27 Cal.Rptr.2d 839].
- Burglary and receiving stolen property ‣ *People v. Allen* (1999) 21 Cal.4th 846, 866 [89 Cal.Rptr.2d 279, 984 P.2d 486].
- Carjacking and grand theft ‣ *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and robbery ‣ *People v. Ortega* (1998) 19 Cal.4th 686, 700 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and unlawful taking of a vehicle ‣ *People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].
- Murder and gross vehicular manslaughter while intoxicated ‣ *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118].
- Murder and child abuse resulting in death ‣ *People v. Malfavon* (2002) 102 Cal.App.4th 727, 743 [125 Cal.Rptr.2d 618].

Joy Riding and Receiving Stolen Property

A defendant cannot be convicted of both joy riding (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), unless the record clearly demonstrates that the joy riding conviction is based exclusively on the theory that the defendant drove the car, temporarily depriving the owner of possession, not on the theory that the defendant stole the car. (*People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 758–759 [129 Cal.Rptr. 306, 548 P.2d 706]; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252 [273 Cal.Rptr. 212].)

Accessory and Principal

In *People v. Prado* (1977) 67 Cal.App.3d 267, 273 [136 Cal.Rptr. 521], and *People v. Francis* (1982) 129 Cal.App.3d 241, 248 [180 Cal.Rptr. 873], the courts held that the defendant could not be convicted as both a principal and as an accessory after the fact for the same offense. However, later opinions have criticized these cases, concluding, “there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime.” (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324 [19 Cal.Rptr.2d 423]; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816 [25 Cal.Rptr.2d 676]; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536, fn. 6 [26 Cal.Rptr.2d 323].)

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone. Do not communicate using: _____ *<insert currently popular social media>* **during your deliberations.**

It is very important that you not use the Internet (, a dictionary/[,or _____*<insert other relevant source of information>)* in any way in connection with this case during your deliberations.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./ If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should

continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it. [Do not reach a decision by the flip of a coin or by any similar act.]

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You must reach your verdict without any consideration of punishment.

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict form[s] and notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

New January 2006; Revised April 2008, October 2010

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with "These exhibits will be sent into the jury room." If not, give the bracketed phrase that begins with "You may examine whatever exhibits you think."

Give the bracketed sentence that begins with "Do not take anything I said or did during the trial" unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

AUTHORITY

- Exhibits ‣ Pen. Code, § 1137.
- Questions ‣ Pen. Code, § 1138.
- Verdict Forms ‣ Pen. Code, § 1140.
- Unanimous Verdict ‣ Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742].
- Duty to Deliberate ‣ *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Judge's Conduct as Indication of Verdict ‣ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- Keep an Open Mind ‣ *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426].
- Do Not Consider Punishment ‣ *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].
- Hung Jury ‣ *People v. Gainer* (1977) 19 Cal.3d 835, 850-852 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1121 [117 Cal.Rptr.2d 715].
- This Instruction Upheld ‣ *People v. Santiago* (2010) 178 Cal.App.4th 1471, 1475-1476 [101 Cal.Rptr.3d 257].

Secondary Sources

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

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

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

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

(*Id.* at p. 306, fn. 11.)

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

3551–3574. Reserved for Future Use

CALCRIM Winter 2011 Invitation to Comment
New and Revised CALCRIM Instructions

Instruction	Commentator	Summary of Comment	Response
N/A	Robert Hirth Chief Defense Attorney Madera Alternate Defense	I agree with the proposed changes. I do not see any need for further revision of the changes.	No response required.
N/A	Superior Court of California, County of San Diego Michael M. Roddy Chief Executive Officer	Agree with proposed changes	No response required.
Multiple	Orange County Public Defender's Office	We agree with the proposed changes to the following instructions: 101, 225, 250, 252, 507, 508, 580, 581, 593, 600, 1110, 1111, 1202, 2410, 3454, 3471, 3516, and 3550.	No response required.
101	Hon. Michael G. Bush Judge Superior Court of California, County of Kern	Just a quick comment on one proposed revision concerning CALCRIM 101. The proposal is to reword to: Our system of justice requires that trials be conducted in open court with the parties *deciding* what evidence is presented (emphasis added) and the judge deciding the law that applies to the case. It is unfair to the parties if you receive additional information from any other source because that information may be unreliable or irrelevant. Your verdict must be based only on the facts presented during trial in this court and the law as I provide it to you. I hope I am not being too technical. The parties decide what they would *like or hope* to present but the court may keep some of it out. A juror might think the court has no control. I would suggest the following language in place of the proposed language: Our system of justice requires that trials be conducted in open court with the parties *presenting* evidence (emphasis added) and the judge deciding the law that applies to that evidence and the case.	The committee agrees with this comment and has made a corresponding change.

CALCRIM Winter 2011 Invitation to Comment
New and Revised CALCRIM Instructions

Instruction	Commentator	Summary of Comment	Response
101	Hon. Charles B. Burch Judge Superior Court of California, County of Contra Costa	Sentence #1 should be modified to state "Our system of justice requires that trials be conducted in open court with the parties deciding what evidence they wish to present..." Explanation: The parties do not "decide" what evidence is presented, the court is the final arbiter of what evidence is presented not the parties. "Sentence #3 should read " Your verdict must be based only on the *evidence* presented during trial,. etc. Explanation: the parties do not present "facts," they present evidence. As explained elsewhere (CALCRIM 104), the jury decides what the facts are based on the evidence presented by the parties. The idea is that both sides may present one or more various versions of an event as their evidence and then the jury gets to decide what version (i.e. what fact) actually happened based on those different versions. My suggested change makes 101 consistent with the same language used in Instruction 104 covering the same concept.	The committee agrees with the comment on sentence # 1 and has made a corresponding change. The committee agrees with the comment on sentence # 3 and has made a corresponding change.
101	Hon. David B. Flinn Judge Superior Court of California, County of Contra Costa	I believe that it is unwise to remove from instruction 101 the language "on your own or as a group". It would seem that lay jurors might well assume that this restriction only applies to individual conduct and I can foresee a jury thinking that research is "ok" if done by the entire panel. Indeed, I would add that language to 3550 which speaks (just before deliberations) to the same topic.	The committee agrees to restore the deleted phrase. It will take up the suggestion to add that phrase to CALCRIM No. 3550 at its next meeting.
507-508	Three Appellate Projects of California: First District Appellate Project, California Appellate Project, San Francisco, California Appellate Project, Los Angeles	We agree with the committee that it is unclear whether *Tennessee v. Garner* (1985) 471 U.S. 1 forecloses the application of Penal Code section 197, subdivision 4 as a defense to homicide when the defendant had reason to believe the victim committed a crime involving death or serious bodily injury (as opposed to when the victim's conduct presented an immediate threat to life or safety). Consequently, we agree with the committee's decision to preserve the instruction's language extending the defense	No response required.

Instruction	Commentator	Summary of Comment	Response
		to individuals who killed/attempted to kill in order to prevent the victim from escaping and potentially harming others while at large. We also agree with the committee that whether a given crime was forcible and atrocious (i.e., posed a risk of death or serious bodily injury) is not necessarily a question of law (as presupposed by the current version of the instructions). Accordingly, the instructions should provide guidance in the event the issue must be submitted to the jury. Thus, we agree with the committee's decision to amend the instructions to add this language whenever the phrase "insert forcible and atrocious crime" appears: "____ <*insert crime decedent was suspected of committing, e.g., burglary*>, and that crime threatened the defendant or others with death or serious bodily harm," as an optional alternative to "____ <*insert forcible and atrocious crime*>." This option will give the court the opportunity to submit the matter to the jury easily whenever appropriate.	
507-508	Superior Court of Monterey County	The code uses the words "great bodily" – proposed changes do not comply with the wording of the code section.	The instructions and case law refer interchangeably to "serious physical harm," "serious bodily harm," and "great bodily harm." The committee concluded that it was important to be consistent in its terminology and that "serious bodily harm" was the best term and an appropriate plain language paraphrase of "great bodily harm."
508	Mark Peterson District Attorney	The instruction as written suggests that before a citizen may use deadly force against a person believed to be	This comment goes beyond the scope of changes that circulated

Instruction	Commentator	Summary of Comment	Response
	Contra Costa County District Attorney's Office	committing a forcible and atrocious crime, the decedent has to ***in fact*** be committing a forcible and atrocious crime. The use notes cite a 1912 case for that proposition. If a person honestly and reasonably believes someone is committing a forcible and atrocious crime, that belief is tantamount to believing everybody around the decedent is in imminent danger of death or great bodily injury. If a person honestly and reasonably believes someone is committing a forcible and atrocious crime and uses deadly force against that person as a consequence thereof, the killing is an accident. There is no *mens rea*.	for public comment. Therefore the committee will consider it at its next meeting.
560	Mark Peterson District Attorney Contra Costa County District Attorney's Office	The provocative act murder doctrine **only** applies when one of the accomplices to the underlying crime is killed. If it is a felony murder where someone other than an accomplice is killed, the defendant doesn't have to commit a provocative act to be liable for the death regardless of whether or not he is the actual killer. These instructions seem to suggest if someone other than the defendant killed someone in the commission of a felony, the defendant would have to commit a provocative act before he could be held liable for the murder. That is not a correct statement of the law. For example, if three men go into a liquor store to rob while the fourth waits outside behind the steering wheel of the getaway car, and one of the robbers kills the clerk, all 4 accomplices are guilty of 1st degree murder whether or not any of them committed a provocative act. On the other hand, if the clerk pulls out a gun and kills one of the robbers, the only way to hold any of the other accomplices accountable for the death is if that accomplice committed some provocative act independent of the elements of the crime. The current draft of the instruction creates additional elements to the felony murder doctrine.	The committee concluded that the changes made in response to the next comment addressed this issue.

Instruction	Commentator	Summary of Comment	Response
560	Three Appellate Projects of California: First District Appellate Project, California Appellate Project, San Francisco, California Appellate Project, Los Angeles	We agree with the committee's decision to put the instructions on degrees of murder directly in this instruction, instead of leaving it to the trial court to fashion language in each case. However, the language proposed seems to mirror almost exactly the provisions of CALCRIM No. 521 on first degree murder under Penal Code section 189, and in several places the language does not altogether fit the concept of provocative act murder. For example, some passages say or suggest that a provocative act murder is first degree if the "murder" is premeditated, committed by torture or lying in wait, etc. But for purposes of first degree murder under the provocative act doctrine, the killing itself is not committed by premeditation or other circumstances named in section 189; rather, the *provocative act* is murder or attempted murder in the first degree, as defined in section 189. For example, in *People v. Concha* (2010) 47 Cal.4th 653, the defendants and a cohort attempted to kill A, and A stabbed the cohort to death in self-defense. The court held the defendants could be found guilty of first degree murder of the cohort if the provocative act was the premeditated attempted murder of A. In addition, if there is more than one defendant who allegedly committed the provocative act, the jury must be instructed as to each defendant that he or she must be found to have acted *personally* with premeditation (or other Pen. Code, section 189 circumstance) to be found guilty of first degree murder. (*People v. Concha*, *supra*, 47 Cal.4th at p. 666; *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)	The committee agrees with this comment and has made corresponding changes.

Instruction	Commentator	Summary of Comment	Response
		We suggest the following modifications to help the jury keep in mind which murder (the one for which the defendant is being prosecuted or the provocative act) is being described: * * * <*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~~ provocative act was willful, deliberate, and premeditated (murder/attempted murder"*> [and] (2) _____ <*insert second theory, e.g., "the ~~murder~~ provocative act was committed during the defendant's perpetration of an enumerated felony*> [_____ <*insert additional theories*>"]. * * * <*A. Deliberation and Premeditation*> [The defendant is guilty of first degree murder if the People have proved that ~~(he/she) acted~~ (his/her) provocative act was (murder/attempted murder) committed willfully, deliberately, and with premeditation. The defendant acted willfully in committing this provocative act 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 provocative act[s] that (caused/(was/were)	

Instruction	Commentator	Summary of Comment	Response
		intended to cause) death. The length of time the person spends considering whether to kill does not alone determine whether the (killing/attempted killing) is deliberate and premeditated . . . . *<Give the following paragraph if more than one defendant was involved in the provocative act>* For a defendant to be found guilty of first degree murder, (he/she) personally must have acted willfully, deliberately, and with premeditation when the (murder/attempted murder) was committed.. Section B on killing during an enumerated felony seems adequately adapted to provocative act murder. Any charge based on torture, lying in wait, or other theories analogous to premeditation should be fashioned along the lines suggested in section A. For example: "The defendant is guilty of first degree murder if the People have proved that the provocative act was (a/an) (murder/attempted murder) committed by lying in wait or immediately thereafter."	
580	Three Appellate Projects of California: First District Appellate Project, California Appellate Project, San Francisco, California Appellate Project, Los Angeles	We agree with the first proposed amendment to CALCRIM 580, which deletes "(committed a crime that posed a high risk of death or great bodily injury [or] committed a lawful act, but acted with criminal negligence)" and replaces it with the following italicized language: The defendant committed involuntary manslaughter if:	No response required.

Instruction	Commentator	Summary of Comment	Response
		1. The defendant *(committed a crime/ [or] a lawful act in an unlawful manner);* 2. *The defendant committed the (crime/ [or] act) with criminal negligence;* AND 3. The defendant's acts unlawfully caused the death of another person.	
		The effect of this amendment, which is based on the holding of *People v. Butler* (2010) 187 Cal.App.4th 998, 1008, is to inform juries that criminal negligence is the *mens rea* requisite to involuntary manslaughter, regardless of whether the underlying act is a crime or a lawful act committed in an unlawful manner. The amendment equalizes the required *mens rea* for all potential acts underlying non-vehicular involuntary manslaughter.	No response required.
		The definition of criminal negligence remains unchanged under the proposed amendment, except that the brackets around it are removed. That definition includes a requirement that the defendant acted in a reckless way "that creates a high risk of death or great bodily injury" and also requires that a reasonable person would have known of that risk. The proposed amendment adheres to *People v. Butler*, *supra*, 187 Cal.App.4th at p. 1016, fn. 11: "[B]ecause the mens rea for involuntary manslaughter is criminal negligence regardless of the nature of the predicate act underlying the offense, expanded instructions on criminal negligence for all three types of predicate acts would be preferable."	The committee will consider the suggestions for expanded instructions or definitions on criminal negligence at its next meeting.

Instruction	Commentator	Summary of Comment	Response
		We agree with the second proposed amendment, which is a citation to *Butler* in the "Authority" section with the descriptor: "Criminal Negligence Requirement; This Instruction Upheld." As with CALCRIM 580, the committee proposes adding a citation to *People v. Butler*, *supra*, 187 Cal.App.4th 998 in the "Authority" section. We agree this is helpful.	No response required. No response required.
580-581	Superior Court, Monterey County	The instruction used the words "criminal negligence," however code section 192b states "without caution or circumspection."	This comment proposes changes that go beyond the scope of the material that circulated for public comment. The committee will consider it at its next meeting.
593	Three Appellate Projects of California: First District Appellate Project, California Appellate Project, San Francisco, California Appellate Project, Los Angeles	We agree the weight of authority is that ordinary negligence is an element of every vehicular manslaughter, whether based on commission of a misdemeanor, an infraction, or a lawful act committed in an unlawful manner. This is the view expressed in Supreme Court decisions from *People v. Pearne* (1897) 118 Cal.154, 158, to *In re Dennis B.* (1976) 18 Cal.3d 687, 696, to *People v. Wells* (1996) 12 Cal.4th 979, 987. Further, a contrary result would be anomalous, given that negligence is an element of involuntary manslaughter based on a misdemeanor or a noninherently dangerous *felony*, in violation of section 192, subdivision (*b*). This was the holding in *People v. Butler* (2010) 187 Cal.App.4th 998, 1012, and in *People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89. Although *Butler* was a case under Penal Code section 192, subdivision (b) rather than (c)(2), the Legislature used very similar language in subdivisions (b) and (c). "[T]he	No response required.

Instruction	Commentator	Summary of Comment	Response
		use of the term 'in the commission of an unlawful act, not amounting to felony' in both section 192(b) and section 192(c)(1) reflects legislative intent that the same meaning be accorded the term in each subdivision." (*People v. Cox* (2000) 23 Cal.4th 665, 671; *People v. Wells*, *supra*, 12 Cal.4th at p. 984.) Subdivision (c)(2) also uses the quoted language. We further agree the existing instruction does not clearly state negligence is required where vehicular manslaughter is based on a misdemeanor or an infraction. We therefore support the proposed modification listing ordinary negligence as an element of every misdemeanor vehicular manslaughter.	
767	Orange County Public Defender's Office	We object to the proposed modification of CALCRIM 767. Although the language of the new instruction tracks that suggested by *People v. Letner and Tobin* (2010) 50 Cal.4th 99, and although the Supreme Court in that case certainly was not enthusiastic about instructional wording close to that in the current CALCRIM 767, we urge that the language remain as is in that instruction. First, *Letner and Tobin* did not hold it to be error to give the jury an instruction phrased as is the current CALCRIM 767. Second, there is precedent for instructing a jury on the ramifications of a verdict even though those ramifications are not to play a part in its deliberations. (CALCRIM 3450). Finally, it may well be more misleading to give the proposed new instruction, as a juror may recognize it as nonresponsive to a question regarding commutation of sentence, and may thus assume that the answer to the question asked is that a life sentence can be commuted. On the other hand, informing the jury that it is to approach its task with the assumption that whatever sentence it chooses will be carried out cannot possibly taint the	The committee decided to follow the Supreme Court's explicit suggestion in the *Letner and Tobin* case.

Instruction	Commentator	Summary of Comment	Response
		quality of its decision-making; it can only serve to focus its attention on the issue of which penalty is appropriate without that focus being warped by potentially false assumptions about the impact of its final decision. Therefore, the language of CALCRIM 767 should not be changed.	
767	Three Appellate Projects of California: First District Appellate Project, California Appellate Project, San Francisco, California Appellate Project, Los Angeles	We agree that the instruction must be modified to reflect the decision in *People v. Letner* (2010) 50 Cal.4th 99, 203-207. We suggest a few changes in wording to emphasize the jury's responsibility as outlined in that decision: It is your responsibility to decide which penalty is appropriate for the defendant in this case. You must ~~B~~ base your decision only on the evidence you have heard in court and on the instructions I have given you. You must ~~do~~ not speculate on or consider anything other than the evidence and my instructions. The addition of "only" and "must" provides emphasis and clarity, and thereby strengthens the anti-speculation point the trial court should be conveying to the jury, so that it will be less likely to go astray. The use of stronger, clearer language in the replacement paragraph seems particularly important in light of the deletion of the previous instruction. It also mirrors more closely the language suggested in *Letner* itself (50 Cal.4th at p. 206).	The committee agrees with this comment and has made the corresponding changes, with the exception of adding the word "must." The committee prefers the direct imperative to a form with a modal verb.
1110 and 1111	Three Appellate Projects of California, First District Appellate Project, California Appellate Project, San Francisco, California	The proposed amendments to the instructions for lewd or lascivious acts on a minor under 14 (CALCRIM 1110) and lewd acts by force, etc. (CALCRIM 1111) respond to *People v. Soto* (2011) 51 Cal.4th 229, which held that lack of consent is not an element of a violation of Penal Code	No response required.

Instruction	Commentator	Summary of Comment	Response
	Appellate Project, Los Angeles	section 288, subdivision (a) or (b) and that consent is not an affirmative defense to either charge. Currently, in both instructions, bracketed text already states that consent is not a defense. *Soto* upheld this provision. The proposed amendments do not amend the instruction itself, but instead recommend changes to the bench note on instructional duty. We agree with the proposals. In CALCRIM 1110, the direction in the bench note remains the same: "Give the bracketed paragraph that begins with 'it is not a defense that' on request, if there is evidence that the minor consented to the act." But the case citation is updated, replacing a 1934 case (*People v. Kemp* (1934) 139 Cal.App.3d 48, 51) with a very recent case: *People v. Soto* (2011) 51 Cal.4th 229. The new citation also includes a parenthetical quote from the case: "the victim's consent is not a defense to the crime of lewd acts on a child under 14 under any circumstances." In the current CALCRIM 1111, the bench note describes a split of authority on whether consent is a defense to the crime of lewd acts on a minor by force, etc. The proposed amendment deletes the current paragraph and replaces it with a new paragraph citing *Soto* and stating that lack of consent is not an element and consent is not an affirmative defense. This change appears to be consistent with the holding of *Soto*, which made clear that consent is not a defense to lewd or lascivious acts on a minor. Although *Soto* involved a subdivision (b) conviction, its reasoning and express statements make clear that consent is also not a defense to a subdivision (a) offense. (*People v. Soto*,	

Instruction	Commentator	Summary of Comment	Response
		supra, 51 Cal.4th 229, ___ [e.g., "Lack of consent by the child victim is not an element of either lewd act offense defined in section 288. Nor is willingness by the child a defense to either crime."].) We suggest the bare language in CALCRIM 1111 that "It is not a defense that the child may have consented to the act" can be improved to forestall possible confusion on the jury's part. Although *Soto* found that provision legally correct, three justices saw a serious potential for misunderstanding. They feared that many lay persons, unfamiliar with legislative history and the legal intricacies *Soto* unraveled, would view "consent" as inconsistent with the use of "force, violence, duress, menace or fear [of injury]." The majority in *Soto* employs an elaborate analysis of the statute's language and history to concluded that in fact consent and force are not mutually exclusive because the statute only requires the use of force, even if as a matter of causality the force was not what enabled the defendant to commit the act - i.e., even if the act was accomplished causally by what a lay person would consider to be "consent." Thus jurors might conclude that the fact consent is not a defense trumps or cancels out the requirement of force, violence, etc., for a violation of aggravated child sexual abuse under subdivision (b) of Penal Code section 288. The justices doubted jurors would reconcile this apparent contradiction correctly and recognize subdivision (b) requires only that force be used, even if as a matter of causality force was not what enabled the defendant to commit the act. They thus might conclude, inaccurately, that the defense being asserted (lack of the use of force, violence, etc.) is not a valid one.	The committee will consider this proposed change at its next meeting.

Instruction	Commentator	Summary of Comment	Response
		If three concurring and dissenting Supreme Court justices and Court of Appeal opinions such as *Cicero* could be confused by this apparent contradiction, it is highly optimistic to suppose lay jurors will never be similarly confused. While *Soto* concluded this instruction was legally correct and not so confusing as to be *erroneous*, this does not amount to a holding the instruction is incapable of improvement. We suggest that CALCRIM 1111 emphasize that the use of force, violence, etc., is still required and is consistent with the fact consent is not a defense by specifying: [If you find that in committing the act the defendant used force, violence, duress, menace or fear of immediate bodily injury to the child or someone else, it is not a defense that the child may have consented to the act.] The amendment to CALCRIM 1111 also includes two modifications to the definition of "duress" in the instruction. The amendment first adds the phrase "the use of," which does not appear to make any substantive change. And it also replaces "that causes a reasonable person to do ... something" with "sufficient to cause a reasonable person to do . . . something": *Duress* means *the use of* a direct or implied threat of force, violence, danger, hardship, or retribution *sufficient to cause* ~~that causes~~ a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When	

Instruction	Commentator	Summary of Comment	Response
		deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and (his/her) relationship to the defendant.] This proposal comes directly from *Soto* which stated that the definition of duress should be modified exactly as the committee proposes. (*People v. Soto*, *supra*, 51 Cal.4th 229, ___, fn. 9.) An anomaly, however, should be noted. In *Soto*, the court relied on its earlier decision in *People v. Leal* (2004) 33 Cal.4th 999, 1004, for its definition of duress. In *Leal*, the court described duress as something "'sufficient to coerce a reasonable person . . . .'" (*Leal*, 33 Cal.4th at 1004 (quoting *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50).) The amendment suggested by the Supreme Court in the *Soto* footnote uses the word "cause" instead of "coerce," but it is the latter language the court approved in *Leal*. Because "coerce" more clearly imparts the degree of influence the defendant must exert on the victim, we recommend the instruction and bench note retain this usage.	The committee will consider reverting to the language of Supreme Court's suggestion in *Leal* at its next meeting.
1202	Los Angeles County Public Defender	The instruction states that "[t]he defendant is not guilty of kidnapping if the other person consented to go with the defendant." A good faith belief in consent is a defense. When consent is an issue and the court instructs on reasonable belief in consent, the court must include the fifth element, which requires that "[t]o prove that the defendant is guilty of this crime, the People must prove that:... The defendant did not actually and reasonably believe that the other person consented.…"	Because the proposed changes would have an impact on other instructions that use the same language on consent, the committee will consider this comment at the next committee meeting.

Instruction	Commentator	Summary of Comment	Response
		The instruction also states that consent may be withdrawn and that the defendant is "guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it." This section of the instruction is incomplete. Because good faith belief in consent is a defense, it must be clear to the jury that the defendant knew that consent had been withdrawn. The section relating to withdrawal of consent should be amended to read as follows: 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 was aware that the consent had been withdrawn, but continued to commit the crime as I have defined it. The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement and was not aware that the consent had been withdrawn. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person had withdrawn his/her consent to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.	
1202	Deputy District Attorneys Sophia Roach and Frank Jackson, San Diego County	Several of the prosecutors in our office have reviewed the proposed changes to CALCRIM 1202 and have identified some flaws which need correction prior to publication. CALCRIM 1202 defines the elements required to prove	The proposed changes relate primarily to the original language of the instruction and not proposed revisions that

Instruction	Commentator	Summary of Comment	Response
		"kidnap" for "ransom, reward or extortion" under Penal Code § 209(a). Although the shorthand title of CALCRIM 1202 refers to "kidnapping" (as recognized in the text and "authorities" section of the instruction), § 209(a) applies whenever the defendant commits any one of a number of predicate acts against a primary victim. ["[S]eizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away"] Based on the holding of *People v. Eid* (2010) 187 Cal.App.4th 859, the Judicial Council proposes the addition of two optional elements related to the defenses of actual and reasonable belief in consent. These additions create three distinct problems which must be corrected: 1. The proposed instruction incorrectly requires a "predicate act" (hereinafter used to refer to the acts of seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away) accompany a holding or detaining that is committed for the purposes of ransom, reward, or extortion. Penal Code § 209(a) requires a predicate act with intent to hold and detain for purposes of ransom, reward, or extortion, while an actual holding or detaining for the purposes of ransom, reward, or extortion alone suffice to constitute the offense of kidnap for ransom. 2. The proposed "consent" elements and defenses are not appropriately limited to the holding of *Eid*, which specifically held that consent defenses were available to the predicate acts of seizure, confinement, enticement, abduction, concealment, kidnapping or carrying away. *Eid* implies that	circulated for public comment. Therefore the committee will consider these changes at its next meeting.

Instruction	Commentator	Summary of Comment	Response
		each of these acts can be consented to by a primary victim. However, *Eid* recognized that a primary victim could not knowingly consent to a true act of inveiglement or decoy. 3. The proposed consent defense instructions are limited to "movement" during a kidnap. This limitation ignores the holding of *Eid* which expands the application of consent to seizure, confinement, enticement, abduction, concealment, kidnapping, carrying away, holding, or detaining. (*Eid* at p. 878.) Penal Code § 209(a) penalizes many different acts. Though often referred to as the crime of kidnapping for ransom, § 209(a) punishes conduct that "is broader than simple kidnapping, in that it covers situations where a primary victim is inveigled or decoyed" and does not require movement for completion of the crime (*Eid* at fn. 14. See also *People v. Macinnes* (1973) 30 Cal. App. 3d 383, 844.) As currently written, CALCRIM 1202 requires a perpetrator who holds or detains a primary victim for purposes of ransom, reward, or extortion *also* commit a predicate act of seizure, confinement, enticement, abduction, concealment, kidnapping or carrying away. This is inconsistent with the statutory scheme of § 209(a). § 209(a) is violated when *either* (1) any person seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or (2) any	

Instruction	Commentator	Summary of Comment	Response
		person holds or detains another person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing. (See text of §209(a).) To accurately set forth the elements of the crime of Kidnap for Ransom, we request that CALCRIM 1202 not graft on a requirement of a predicate act when a perpetrator has actually held or detained another person for the purposes of ransom, reward, or extortion. Our proposed CALCRIM 1202 following this memorandum illustrates this, as well as our additional requests. Secondly, the *Eid* holding, which the revision to CALCRIM 1202 is intended to address, does not apply when the prosecution is based on either inveiglement or decoy. In *Eid*, the prosecutor elected to remove those predicates from the instruction and the court specifically isolated them in its discussion of consent. (*Eid* at 871, and 869.) "The predicate acts 'inveigle' and 'decoy' connote deception, but not force or fear; they are however, inconsistent with the victim's knowing consent." (*Eid* at 875.) While the *Eid* case almost exclusively deals with the kidnapping and enticement predicate acts, it expands the defense of consent (derived from simple kidnap cases) to all of the predicate acts listed in § 209(a) except inveiglement and decoy. In other words, a defense exists when either a primary victim consents to holding, detention, or movement, or the perpetrator has a good faith belief in such consent, unless the consent is based on inveiglement or decoy. This principle is illustrated in *Eid* footnote 12 where the	

Instruction	Commentator	Summary of Comment	Response
		court engages in a hypothetical scenario wherein a primary victim is lured with refreshments and entertainment and unaware that they are being held or detained. Such circumstances would violate § 209(a) if the evidence showed that the perpetrator had the intent to use, if necessary, force or fear to accomplish the holding or detaining of the primary victim. In such a situation (inveiglement or decoy), consent would not be a defense, although the conduct of the perpetrator still constitutes a violation of § 209(a). For these reasons, we request that CALCRIM 1202 include a <bracket> instruction or use note that confines instruction on the defenses of consent, and the giving of elements 4 and 5 (our proposed 3 and 4), to circumstances where the facts support such a theory and where the prosecution proceeds on predicate acts including seizure, confinement, enticement, abduction, concealment, kidnapping or carrying away, but not where the predicate acts are inveiglement or decoy. Additionally, the words "inveigled or decoyed" should be eliminated from elements 4 and 5 (again our proposed 3 and 4). Addressing the third problem with the proposed revisions, the new "consent" bracketed paragraphs only cover whether the primary victim consented to be moved. (i.e., use of terms "movement" or "to go with" of "to go with or be moved by.") This "movement" language is misleading and inaccurate insofar as a violation of § 209(a) does not require any movement of the victim, except where the predicate act was kidnapping. Such language ignores the alternate manners in which § 209(a) may be violated, namely seizure, confinement, enticement, abduction, concealment, or carrying away. *Eid* holds that the jury	

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		must be instructed that consent applies to these other predicate acts. (*Eid* at p.878.) Accordingly, we request that the defense instructions be modified to include consent to the additional predicate acts of seizure, confinement, enticement, abduction, concealment, kidnapping or carrying away. Further, we request that the use note regarding the definition of consent be modified to suggest it be given whenever the consent elements or defenses are given. The definition of consent is a legal definition, not one of common understanding. To properly understand the defenses, consent should be defined for the jurors.	
3454	Los Angeles County Public Defender	The proposed revision of CALCRIM 3454 would: 1) Add the word "Initial" to the title of the instruction, 2) Modify paragraph 4's language *from* "It is necessary to keep (him/her) in custody in a secure facility to ensure the health and safety of other" *to* "It is necessary to keep (him/her) in (custody in a secure facility/a state-operated conditional release program) to endure the health and safety of others," and 3) Cite to the Court of Appeal decision in *George* as "Authority" for the proposed modification-i.e., "State-Operated Conditional Release Program > *People v. Superior Court (George)* (2008) 164 Cal.App.4th 183, 196-197." The proposed revision is unnecessary, misleading, and erroneous for the following reasons: 1) The proposed revision misapplies the holding in *People v Superior Court (George)*, supra, 164	The committee agrees in part with this comment and has made corresponding changes to the instruction. It decided to retain the word "initial" in the title for convenient reference and added a corresponding bench note to explain the circumstances under which the instruction should be used.

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		Cal.App.4th 183, which expressly limited its holding modifying CALCRIM 3454's language to include the phase "conditional release program" or "supervised release program" only in recommitment petitions filed under the Sexually Violent Predator Act, hereinafter "SVPA." (*Id.* at pp. 188, 195-196.) CALCRIM 3454's intended application is for petitions filed against individuals to bring them within the purview of the SVPA. Petitions to initially commit an individual as a Sexually Violent Predator, hereinafter "SVP," are not the same as recommitment petitions, or petitions to renew or extend a previously imposed commitment under the SVPA. 2) The law regarding commitments and recommitments under the SVPA has drastically changed. Prior to enactment of Proposition 83, commitments under SVPA were for two-year terms. Currently commitments under the SVPA are for an "indeterminate term." (Prop. 83, § 28, approved Nov. 7, 2006, eff. Nov. 8, 2006, amending Welf. & Inst. Code §§ 6604, 6604.1) Because new commitments under the SVPA are for an indeterminate term, the language contained in the proposed revision to CALCRIM 3454 as suggested by *George* is unnecessary because recommitment petitions are a relic of the past. 3) Upon commitment as an SVP, an individual must be confined "in a secure facility … located on the grounds of an institution under the jurisdiction of the Department of Corrections." (Welf. & Inst. Code § 6604.) An individual committed under the SVPA may be placed in a state-operated conditional release program only after his or her	

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		initial commitment to a secure facility and upon recommendation by the community program director of the Department of the Mental Health. (Welf. & Inst. Code § 6608, subd. (c).) Since an "initial" commitment to a "State-Operated Conditional Release Program" is not permitted pursuant to the SVPA, inclusion of such language in CALCRIM 3454 is not only misleading, it would be unlawful. 4) The proposed modification is also unnecessary because the unique fact situation presented in *George* is highly unlikely to be repeated. During George's second recommitment, he was found to qualify for placement in a conditional release program. However, his transition to a conditional release program was delayed due to the unavailability of a suitable placement within San Francisco. Meanwhile, because George's current two-year recommitment term was expiring, the District Attorney filed a petition requesting a third recommitment. *(People v. Superior Court (George), supra,* 164 Cal.App.4th 183, 188-192.) It was only the third recommitment proceeding that the issue arose as to whether CALCRIM 3453 should be modified to include the language "conditional release program" or "supervised release program." (*Id.* at pp 188, 195-196.) Therefore, the proposed modification to CALCRIM 3454 should be abandoned.	
3454-3454A	Superior Court of Monterey County	The instructions should clarify that "/"[in elements 3 and 4] is to be read as "or" as stated in *People v. Superior Court,* 164 Cal.App.4th 183, 196-197.	In response to the comment above the committee is withdrawing the proposed change to element 4 of

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			CALCRIM No. 3454. As for element 3 of CALCRIM No. 3454A, the case cited by the commentator is based on an unusual set of circumstances that is not likely to recur. Nevertheless, the committee has added an optional "or" in brackets to be used if the court deems it necessary.
3454	Three Appellate Projects of California: First District Appellate Project, California Appellate Project, San Francisco, California Appellate Project, Los Angeles	The first proposed amendment to CALCRIM 3454 adds the word "Initial" to the instruction title so that it reads: "Initial Commitment as Sexually Violent Predator." The change makes sense both in isolation and when considered in concert with the proposed new instruction, CALCRIM 3454A, which addresses subsequent commitment proceedings to determine whether the person remains an SVP. The second proposed amendment concerns the fourth bracketed element the prosecution must prove beyond a reasonable doubt at SVP commitment trials in certain circumstances (when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community). It reads: "It is necessary to keep (him/her) in (custody in a secure facility*/a state-operated conditional release program*) to ensure the health and safety of others." The committee proposes the addition of the italicized language in an effort to conform with *People v. Superior Court (George)* (2008) 164 Cal.App.4th 183, 198, which held: "the jury should be instructed that it is sufficient to find George to be an SVP if, all other conditions being established, George will constitute a danger to the public if not kept in custody in a secure	The committee agrees to retain the word "initial" in the title, but has decided to withdraw the proposed new language in the fourth bracketed element and the references to the *George* case in the bench notes because those would only properly apply to subsequent commitment proceedings as described in new proposed CALCRIM No. 3454A.

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		facility *or in a state-operated forensic conditional release program*." (Emphasis added.) *George* explained: "While some language in the SVPA and in many of the Supreme Court decisions upon which *Grassini* relied refers to whether the prior sex offender will pose a danger to others if released from 'custody,' [footnote] in context what is meant is not necessarily custody 'in a secure facility.' The references to the need for 'custody' to protect the public must be understood to include the constructive custody that exists when the individual is placed in a conditional release program under the department's supervision." (*Id*. at p. 196.) This amendment appears to be a correct statement of the law. The third proposed amendment simply adds *George* to the AUTHORITY section for the proposed second amendment described above. Again, this change seems reasonable.	
3454A	Three Appellate Projects of California: First District Appellate Project, California Appellate Project, San Francisco, California Appellate Project, Los Angeles	CALCRIM 3454A is a completely new proposed instruction entitled: "Hearing to Determine Current Status Under Sexually Violent Predator Act (Welf. & Inst. Code, ' 6605)." Under Welfare and Institutions Code section 6605, the State Department of Mental Health (DMH) must conduct annual evaluations of committed SVP's. If DMH determines either (1) the person no longer meets the commitment criteria or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the person may petition for conditional or unconditional release. If the court finds probable cause to believe either conditional or unconditional release is appropriate, the SVP is entitled a trial on his or her petition. The SVP may demand a jury trial, and the	The committee agrees with the three minor suggestions.

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		burden of proof is on the prosecution to establish by proof beyond a reasonable doubt the person remains an SVP. This proposed instruction addresses this type of trial. Although Welfare and Institutions Code section 6605 is not an entirely new statute, it has taken on somewhat greater significance in the wake of Proposition 83, which increased initial commitments to indeterminate terms. Presumably, it is the renewed focus on this code section (and mechanism for release) that triggered the committee to draft this overdue instruction. The proposed instruction properly omits the element found in CALCRIM 3454 that requires the prosecution to prove the person has a prior qualifying conviction and the other aspects of CALCRIM 3454 defining what constitutes a prior qualifying conviction. At a hearing under Welfare and Institutions Code section 6605, the person is collaterally estopped from relitigating the question of whether he or she has a prior qualifying conviction. The three remaining elements of CALCRIM 3454A track the language of CALCRIM 3454, which is consistent with the language found in Welfare and Institutions Code section 6605 that tracks the language set forth in the initial commitment statute. We have one minor suggestion regarding the first element of CALCRIM 3454A: In order to be consistent with CALCRIM 3454, element no. 1 should commence with "(He/She)" rather than "_____ <*insert name of petitioner*>"; alternatively, CALCRIM 3454 should be amended to add the person's name. When not compared against each other, there is nothing internally inconsistent	

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		or problematic with the way either instruction is drafted, and so we do not feel strongly about making the terminology uniform. If the committee decides to do so, we suggest it is a good idea to repeat the petitioner's name the first time the elements are enumerated, as in proposed CALCRIM 3454A.. The CALCRIM 3454 AUTHORITY contains the following language: Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776B777 [3 Cal.Rptr.3d 684, 74 P.3d 779] (interpreting Welfare and Institutions Code section 6600, the same statute at issue here). We see no principled reason why this language should not be included in CALCRIM 3454A as well. The California Supreme Court has held that "the constitutional principles set forth in those cases [holding that due process require an additional finding of serious difficulty in controlling a person's dangerous behavior] apply to all civil commitment schemes . . . ." (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 41, citing *In re Howard N.*) Therefore, we recommend this "control" element language found in CALCRIM 3454 be imported into the notes to CALCRIM 3454A. In addition, the AUTHORITY section contains the following language: "Impairment of Control - *In re Howard N.* (2005)	

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		35 Cal.4th 117, 128-130 [24 Cal.Rptr.3d 866, 106 P.3d 305]." The inclusion of this language would suggest the exclusion of the longer discussion of *Howard N.* found in CALCRIM 3454 from the AUTHORITY section of CALCRIM 3454A was an oversight. CALCRIM 3454A contains the following language not found in CALCRIM 3454: *<Give the following paragraph if evidence of the petitioner's failure to participate in or complete treatment is offered as proof that petitioner's condition has not changed>* [You may consider evidence that _____<insert name of petitioner> failed to participate in or complete the State Department of Mental Health Sex Offender Commitment Program as an indication that (his/her) condition as a sexually violent predator has not changed. The meaning and importance of that evidence is for you to decide.] This language is derived from the following statutory language contained in Welfare and Institutions Code section 6605, subdivision (d): Where the person's failure to participate in or complete treatment is relied upon as proof that the person's condition has not changed, and there is evidence to support that reliance, the jury shall be instructed substantially as follows: Thus, the proposed language appears to be a correct statement (and interpretation) of the law.	

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		The CALCRIM 3454A AUTHORITY section also includes the following language: "Determinate Sentence Defined Pen. Code, 1170." We do not see any reason for the instruction to include this language, as the instruction contains no prior reference to the determinate sentencing law. The inclusion of this language appears to be an accidental holdover from CALCRIM 3454, where the determinate sentencing law is relevant to the question of whether the person has a prior qualifying conviction.	