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## INVITATION TO COMMENT

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| Title   | Action Requested  |
| Criminal Jury Instructions (CALCRIM)<br>Revisions   | Review and submit comments by Friday,<br>June 20, 2014          |
| Proposed Revisions                                  | Proposed Effective Date   |
| Revise Jury Instructions                            | August 22, 2014   |
| Recommended by                                      | Contact   |
| Advisory Committee on Criminal Jury<br>Instructions | Robin Seeley, Attorney, 415-865-7710<br>robin.seeley@jud.ca.gov |
| Hon. Sandy R Kriegler, Chair                        |   |

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### Summary

Revised jury instructions reflecting recent developments in the law.

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**CALCRIM Invitation to Comment**

**May/June 2014**

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

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**Our system of justice requires that trials be conducted in open court with the parties presenting evidence 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 and the parties will not have had the opportunity to examine and respond to it. Your verdict must be based only on the evidence 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 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.**

**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, either on your own or as a group. 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.**

**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.**

**I want to emphasize that you may not use any form of research or communication, including electronic or wireless research or communication, to research, share, communicate, or allow someone else to communicate with you regarding any subject of the trial. [If you violate this rule, you may be subject to jail time, a fine, or other 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.]**

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*New January 2006; Revised June 2007, April 2008, December 2008, April 2010, October 2010, April 2011, February 2012, August 2012, [\[insert date of council approval\]](#)*

## **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. When giving this instruction during the penalty phase of a capital case, the court has a **sua sponte** duty to delete the sentence which reads “Do not let bias, sympathy, prejudice, or public opinion influence your decision.” (*People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 545 [107 S.Ct. 837, 93 L.Ed.2d 934].) The court should also delete the following sentence: “You must reach your verdict without any consideration of punishment.”~~

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].
- Court’s Contempt Power for Violations of Admonitions ▶ Pen. Code, § 1122(a)(1); Code Civ. Proc. § 1209(a)(6) (effective 1/1/12).

## *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].)

## 760. Death Penalty: Introduction to Penalty Phase

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**This [phase of the] trial is to determine (the/each) defendant’s penalty. The law provides for two possible penalties: death or life in prison without the possibility of parole. You must decide which penalty (the/each) defendant will receive.**

**[You must disregard all of the instructions I gave you earlier. I will give you a set of instructions that apply only to this phase of the trial. Some of these instructions will be the same or similar to instructions you have heard before. However, you must follow only this new set of instructions in this phase of the trial.]**

**[The first step in this process is the opening statements.**

**Next, the People will offer evidence. Evidence usually includes witness testimony and exhibits. After the People’s case, the defense (will/may) also present evidence.**

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

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

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*New January 2006 [\[insert date of council approval\]](#)*

### BENCH NOTES

#### ***Instructional Duty***

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718 [248 Cal.Rptr. 69, 755 P.2d 253].) Because the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt, supra*, 45 Cal.3d at p. 718, fn. 26; *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].) The Supreme Court has stated that, in order to avoid confusion, the trial court should provide the jury with a completely new set of instructions for the penalty phase. (*People v. Weaver, supra*, 26 Cal.4th at p. 982.)

The court has a **sua sponte** duty to give the bracketed paragraph instructing the jury to disregard all previous instructions unless the current jury did not hear the guilt phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171 [51 Cal.Rptr.2d 770, 913 P.2d 980], cert. den. sub nom. *Arias v. California* (1997) 520 U.S. 1251 [117 S.Ct. 2408, 138 L.Ed.2d 175].)

This instruction should be followed by any other introductory instructions the court deems appropriate prior to the presentation of penalty phase evidence. The committee recommends that the court give CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before or After Jury Is Selected)*. The court may also consider giving CALCRIM No. 102, *Note-Taking*; CALCRIM No. 104, *Evidence*; and CALCRIM No. 105, *Witnesses*.

When CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before or After Jury Is Selected)*, is given, the court has a **sua sponte** duty to delete the sentence which reads “Do not let bias, sympathy, prejudice, or public opinion influence your decision.” (*People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 545 [107 S.Ct. 837, 93 L.Ed.2d 934].) The court should also delete the following sentence: “You must reach your verdict without any consideration of punishment.”

If the current jury did not hear the previous phases of the case, the court should give the bracketed paragraphs that begin with “The first step in this process.”

## AUTHORITY

- Death Penalty Statute ▶ Pen. Code, § 190.3.
- Must Tell Jury Which Instructions Apply ▶ *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26 [248 Cal.Rptr. 69, 755 P.2d 253].
- Should Give Jury New Set of Instructions ▶ *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].
- Error to Instruct Not to Consider Sympathy ▶ *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813]; *People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934].

## Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, § 464.



4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.20–87.26 (Matthew Bender).

## 320. Exercise of Privilege by Witness

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<Alternative A – Valid Exercise of Privilege>

**[A witness may refuse to answer questions that call for privileged information. Under the law, \_\_\_\_\_ <insert name of witness> was justified in refusing to answer certain questions. Do not consider (his/her) refusal to answer for any reason at all and do not guess what (his/her) answer would have been.]**

<Alternative B – >

**[\_\_\_\_\_ <insert name of witness> did not have have the right to refuse to answer questions in this case. You may consider that refusal during your deliberations.]**

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New January 2006, revised [insert date of council approval]

### BENCH NOTES

#### *Instructional Duty*

The court has no sua sponte duty to give an instruction on the exercise of privilege by witnesses; however, it must be given on request. (Evid. Code, § 913(b); see also *People v. Mincey* (1992) 2 Cal.4th 408, 440–441 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Give Alternative A when the court has sustained the exercise of privilege. Give Alternative B when the witness’s exercise of privilege is invalid. If the witness was not justified in refusing to answer a question, the jury may draw reasonable inferences regarding why the witness refused to testify. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 468 [99 Cal.Rptr.3d 301]; *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554 [84 Cal.Rptr.2d 655].)

#### *Related Instructions*

See CALCRIM No. 355, *Defendant’s Right Not to Testify*.

### AUTHORITY

- Instructional Requirements ▶ Evid. Code, § 913(b); *People v. Mincey* (1992) 2 Cal.4th 408, 440–441 [6 Cal.Rptr.2d 822, 827 P.2d 388].

#### *Secondary Sources*

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 80, *Defendant's Trial Rights*, § 80.06, Ch. 83, *Evidence*, § 83.09[2], [17], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

**321–329. Reserved for Future Use**

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

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

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

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

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

1. The defendant is guilty of \_\_\_\_\_ <insert target offense>;
2. During the commission of \_\_\_\_\_ <insert target offense> a coparticipant in that \_\_\_\_\_ <insert target offense> committed the crime of \_\_\_\_\_ <insert non-target offense>;

AND

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

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

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

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

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

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*New January 2006; Revised June 2007, April 2010, February 2013*

## BENCH NOTES

### ***Instructional Duty***

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

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

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

### ***Related Instructions***

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

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

## AUTHORITY

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

## Secondary Sources

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

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

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

## COMMENTARY

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

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

## RELATED ISSUES

### *Lesser Included Offenses*

- The court has a duty to instruct on lesser included offenses that could be the natural and probable consequence of the intended offense when the evidence raises a question whether the greater offense is a natural and probable consequence of the original,

intended criminal act. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1588 [11 Cal.Rptr.2d 231] [aider and abettor may be found guilty of second degree murder under doctrine of natural and probable consequences although the principal was convicted of first degree murder].)

### ***Specific Intent—Non-Target Crimes***

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

### ***Target and Non-Target Offense May Consist of Same Act***

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

### ***Target Offense Not Committed***

The Supreme Court has left open the question whether a person may be liable under the natural and probable consequences doctrine for a non-target offense, if the target offense was not committed. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. 4 [58 Cal.Rptr.2d 827, 926 P.2d 1013] but see *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1452 [105 Cal.Rptr.3d 575]; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1464-1465 [61 Cal.Rptr.2d 680].)

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

## 548. Murder: Alternative Theories

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**The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.**

**Each theory of murder has different requirements, and I will instruct you on both.**

**You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory.**

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*New January 2006* [\*\[insert date of council approval\]\*](#)

### BENCH NOTES

#### *Instructional Duty*

This instruction is designed to be given when murder is charged on theories of malice and felony murder to help the jury distinguish between the two theories. This instruction should be given after the court has given any applicable instructions on defenses to homicide and **before** CALCRIM No. 520, *Murder With Malice Aforethought*.

[The court may need to modify the final sentence of this instruction if the prosecution relies on mutually exclusive theories of homicide that support different degrees of murder. \(\*People v. Sanchez\* \(2013\) 221 Cal.App.4th 1012, 1025 \[164 Cal.Rptr.3d. 880\].\)](#)

If there is evidence of multiple acts from which the jury might conclude that the defendant killed the decedent, the court may be required to give CALCRIM No. 3500, *Unanimity*. (See *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300–302 [209 Cal.Rpt. 503] [error not to instruct on unanimity where evidence that the victim was killed either by blunt force or by injection of cocaine].) Review the Bench Notes for CALCRIM No. 3500 discussing when a unanimity instruction is required.

### AUTHORITY

- [Unanimity on Degrees of Crime and Lesser Included Offenses](#) ▶ *People v. Aiken* (2013) 19 Cal.App.3d 685, 704 [97 Cal.Rptr. 251].



- Alternate Theories May Support Different Degrees of Murder ▶ *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880].

## 561. Homicide: Provocative Act by Accomplice

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[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. The defendant was an accomplice of \_\_\_\_\_ <insert name[s] or description[s] of alleged provocateur[s]> in (committing/ [or] attempting to commit) \_\_\_\_\_ <insert underlying crime>;
2. In (committing/ [or] attempting to commit) \_\_\_\_\_ <insert underlying crime>, \_\_\_\_\_ <insert name[s] or description[s] of alleged provocateur[s]> intentionally did a provocative act;
3. \_\_\_\_\_ <insert name[s] or description[s] of alleged provocateur[s]> knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;
4. In response to \_\_\_\_\_'s <insert name[s] or description[s] of alleged provocateur[s]> provocative act, \_\_\_\_\_ <insert name or description of third party> killed \_\_\_\_\_ <insert name of decedent>;

AND

5. \_\_\_\_\_'s <insert name of decedent> death was the natural and probable consequence of \_\_\_\_\_'s <insert name[s] or description[s] of alleged provocateur[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.

The defendant is an *accomplice* of \_\_\_\_\_ *<insert name[s] or description[s] of alleged provocateur[s]>* if the defendant is subject to prosecution for the identical offense that you conclude \_\_\_\_\_ *<insert name[s] or description[s] of alleged provocateur[s]>* (committed/ [or] attempted to commit). The defendant is subject to prosecution if (he/she) (committed/ [or] attempted to commit) the crime or if:

1. (He/She) knew of \_\_\_\_\_'s *<insert name[s] or description[s] of alleged provocateur[s]>* **criminal purpose to commit** \_\_\_\_\_ *<insert underlying crime>*;

**AND**

2. The defendant intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of \_\_\_\_\_ *<insert underlying crime>*/ [or] participate in a criminal conspiracy to commit \_\_\_\_\_ *<insert underlying crime>*).

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

In order to prove that \_\_\_\_\_'s *<insert name of decedent>* death was the *natural and probable consequence* of \_\_\_\_\_'s *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, the People must prove that:**

1. A reasonable person in \_\_\_\_\_'s *<insert name[s] or description[s] of alleged provocateur[s]>* **position would have foreseen that there was a high probability that (his/her/their) act could begin a chain of events resulting in someone's death;**
2. \_\_\_\_\_'s *<insert name[s] or description[s] of alleged provocateur[s]>* **act was a direct and substantial factor in causing** \_\_\_\_\_'s *<insert name of decedent>* **death;**

**AND**

3. \_\_\_\_\_'s *<insert name or description of decedent>* **death would not have happened if** \_\_\_\_\_ *<insert name[s] or description[s] of alleged provocateur[s]>* **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 the following provocative acts: \_\_\_\_\_ *<insert acts alleged>*. You may not find the defendant guilty unless you all agree that the People have proved that:**

1. \_\_\_\_\_ *<insert name[s] or description[s] of alleged provocateur[s]>* **committed at least one provocative act;**

**AND**

2. **At least one of the provocative acts committed by \_\_\_\_\_ *<insert name[s] or description[s] of alleged provocateur[s]>* was a direct and substantial factor that caused the killing.**

**However, you do not all need to agree on which provocative act has been proved.]**

*<Accomplice Deceased>*

**[If you decide that the only provocative act that caused \_\_\_\_\_'s *<insert name of deceased accomplice>* death was committed by \_\_\_\_\_ *<insert name of deceased accomplice>*, then the defendant is not guilty of \_\_\_\_\_'s *<insert name of deceased accomplice>* murder.]**

*<Independent Criminal Act>*

**[A defendant is not guilty of murder if the killing of \_\_\_\_\_ *<insert name or description of decedent>* was caused solely by the independent criminal act of someone other than the defendant or \_\_\_\_\_ *<insert name[s] or description[s] of all alleged accomplice[s]>*. 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.**

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

1. As a result of \_\_\_\_\_'s <insert name[s] or description[s] of alleged provocateur[s]> **provocative act**, \_\_\_\_\_ <insert name of decedent> **was killed while** \_\_\_\_\_ <insert name[s] or description[s] of alleged provocateur[s]> **(was/were) committing** \_\_\_\_\_ <insert Pen. Code, § 189 felony>;

**AND**

2. \_\_\_\_\_ <insert name[s] or description[s] of alleged provocateur[s]> **specifically intended to commit** \_\_\_\_\_ <insert Pen. Code, § 189 felony> **when (he/she/they) did the provocative act.**

**In deciding whether** \_\_\_\_\_ <insert name[s] or description[s] of alleged provocateur[s]> **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.]**

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New January 2006 *[insert date of council approval]*

## **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.

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 discussion in the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

In the paragraph that begins with “An accomplice does not need to be present,” use the bracketed phrase “will be committed or” if appropriate under the facts of the case.

If a deceased accomplice participated in provocative acts leading to his or her own death, give the bracketed sentence that begins, “If you decide that the only provocative act that caused . . . .” (See *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1330 [82 Cal.Rptr.2d 254]; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 846 [68 Cal.Rptr.2d 388]; *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 583–584 [91 Cal.Rptr. 275, 477 P.2d 131]; *People v. Antick* (1975) 15 Cal.3d 79, 90 [123 Cal.Rptr. 475, 539 P.2d 43], disapproved on other grounds in *People v. McCoy* (20010 25 Cal.4th 1111, 1123 [108 Cal.Rptr.2d 188, 24 P.3d 1210].)

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the bracketed paragraph that begins, “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 evidence suggests that there is more than one provocative act, give the bracketed section on “Multiple Provocative Acts.” (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

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 murder 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.”

## 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].
- Implied Malice May Be Imputed to Absent Mastermind ▶ *People v. Johnson* (2013) 221 Cal.App.4th 623, 633 [164 Cal.Rptr.3d 505].

### *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, 140.10, Ch. 142, *Crimes Against the Person*, § 142.01[1][a], [2][c] (Matthew Bender).

### **RELATED ISSUES**

See the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

**625. Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 2229.4)**

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**You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,] [[or] the defendant was unconscious when (he/she) acted[,] [or the defendant \_\_\_\_\_ <insert other specific intent required in a homicide charge or other charged offense>.]**

**A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.**

**You may not consider evidence of voluntary intoxication for any other purpose.**

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*New January 2006* *insert date of council approval*

## **BENCH NOTES**

### ***Instructional Duty***

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [61 Cal.Rptr.2d 39]; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57 [5 Cal.Rptr.2d 495, 825 P.2d 388].) Such an instruction is a “pinpoint” instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra*, 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

If the defendant is charged with a homicide crime that has as an element an additional specific intent requirement other than intent to kill, include the required intent in the last bracketed portion of the second sentence. For example, if the



defendant is charged with torture murder, include “whether the defendant intended to inflict extreme and prolonged pain.” Or, if the defendant is charged with felony-murder, insert intent to commit the felony where indicated. Similarly, if the defendant is also charged with a nonhomicide crime with a specific intent requirement, include that intent requirement. For example, if the defendant is charged with murder and robbery, include “whether the defendant intended to take property by force or fear.”

## AUTHORITY

- Voluntary Intoxication Defined ▶ Pen. Code, § 22(c).
  - ~~This Instruction Correctly Instructs on Penal Code Requirements ▶ *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [60 Cal.Rptr.3d 677].~~
  - Unconsciousness Not Required ▶ *People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].
  - No Sua Sponte Duty to Instruct ▶ *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].
  - Evidence of Intoxication Inapplicable to Implied Malice ▶ Pen. Code, § 22(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].
  - Applies to Attempted Murder ▶ *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].
  - Voluntary Intoxication Relevant to Knowledge ▶ *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39].
  - ~~This Instruction Upheld ▶ *People v. Turk* (2008) 164 Cal.App.4th 1361, 1381 [80 Cal.Rptr.3d 473], *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [60 Cal.Rptr.3d 677].~~
- ~~This Instruction Upheld ▶ *People v. Turk* (2008) 164 Cal.App.4th 1361, 1381 [80 Cal.Rptr.3d 473]~~

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, §§ 26–30.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, §§ 73.01[4], 73.04 (Matthew Bender).

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

## RELATED ISSUES

### ***General Instruction on Voluntary Intoxication***

This instruction is a specific application of CALCRIM No. 3426, *Voluntary Intoxication*, to homicide.

### ***Unconsciousness***

Unconsciousness (as defined in CALCRIM No. 3425, *Unconsciousness*) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

### ***Not Applicable in Murder Cases Based Exclusively on Implied Malice***

This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice, because voluntary intoxication can only negate *express* malice. (Pen. Code, § 22(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

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

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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.**

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.]**

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## 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 caused d 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) 51 Cal.4th 229, 233 [119 Cal.Rptr.3d 775, 245 P.3d 410] [“the victim’s consent is not a defense to the crime of lewd acts on a child under age 14 under any circumstances”].)

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).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

## 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].
- Battery is not a lesser included offense of this crime. (*People v. Shockley* (2013) 58 Cal.4th 400, 403, 406 [165 Cal.Rptr.3d 497, 314 P.3d 798].)
- ~~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].) The mistake of fact defense can apply to attempted lewd acts on a child under 14 years of age. (*People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].)

### ***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))**

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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 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.]**

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*New January 2006; Revised April 2011* *[insert date of council approval]*

## **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) 51 Cal.4th 229, 232 [119 Cal.Rptr.3d 775, 245 P.3d 410].) The bracketed paragraph that begins “It is not a defense that the child” may be given on request if there is evidence of consent.

## **AUTHORITY**

- Elements ▶ Pen. Code, § 288(b)(1).
- Duress Defined ▶ *People v. Soto* (2011) 51 Cal.4th 229, 232 [119 Cal.Rptr.3d 775, 245 P.3d 410] ; *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).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:16, 12:17 (The Rutter Group).

## 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*.

**1112. Lewd or Lascivious Act: Child 14 or 15 Years (Pen. Code, § 288(c)(1))**

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The defendant is charged [in Count \_\_] with a lewd or lascivious act on a 14- or 15-year-old child who was at least 10 years younger than the defendant [in violation of Penal Code section 288(c)(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. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child;**

**3. The child was (14/15) years old at the time of the act;**

**AND**

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

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.]

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

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

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New January 2006; Revised August 2012 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

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

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

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

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

## AUTHORITY

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

and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].

- Child Touching Own Body Parts at Defendant’s Instigation ▶ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] [“constructive” touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Lewd Defined ▶ *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Minor’s Consent Not a Defense ▶ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].
- Mistaken Belief About Victim’s Age Not a Defense ▶ *People v. Paz* (2000) 80 Cal.App.4th 293, 298 [95 Cal.Rptr.2d 166].
- Mistake of Fact Defense May Apply to Attempted Lewd Acts on a Child 14 or 15 ▶ *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

### *Secondary Sources*

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

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

## LESSER INCLUDED OFFENSES

- ~~Simple Assault ▶ Pen. Code, § 240.~~
- ~~Simple Battery ▶ Pen. Code, § 242.~~
- Attempted Lewd Act on a Child of 14 or 15 ▶ *In re Lesansky* (2001) 25 Cal.4th 11, 13 [104 Cal.Rptr.2d 409, 17 P.3d 764].

## **RELATED ISSUES**

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

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



## 1170. Failure to Register as Sex Offender (Pen. Code, § 290(b))

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The defendant is charged [in Count \_\_] with failing to register as a sex offender [in violation of Penal Code section 290(b)].

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

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

**AND**

<Alternative 4A—change of residence>

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

<Alternative 4B—birthday>

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

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

**[Residence means one or more addresses where someone regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address. A residence may include, but is not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.]**

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New January 2006; Revised August 2006, April 2010, October 2010, February 2013 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This instruction is based on the language of the statute effective January 1, 2006. The instruction may not be appropriate for offenses that occurred before that date. Note also that this is an area where case law is developing rapidly. The court should review recent decisions on Penal Code section 290 before instructing.

[In element 1, if the specific offense triggering the registration requirement is spousal rape, the instruction must include the requirement that the offense involved the use of “force or violence.” \(People v. Mason \(2013\) 218 Cal.App.4th 818, 822-827 \[160 Cal.Rptr.3d 516\].\)](#)

In element 3, choose the option “living at \_\_\_\_\_ <insert specific address in California> if there is an issue whether the defendant actually knew that a place where he or she spent time was a residence triggering the duty to register. (*People v. Cohens* (2009) 178 Cal.App.4th 1442, 1451 [101 Cal.Rptr.3d 289]; *People v. LeCorno* (2003) 109 Cal.App.3d 1058, 1068-1069 [135 Cal.Rptr.2d 775].

In element 4, give alternative 4A if the defendant is charged with failing to register within five working days of changing his or her residence or becoming homeless. (Pen. Code, § 290(b).) Give alternative 4B if the defendant is charged with failing to update his or her registration within five working days of his or her birthday. (Pen. Code, § 290.012.)

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

For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is “acting with general criminal intent, even though he may not know that his act or conduct is unlawful.” (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) The court should consider whether it is more appropriate to give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, or to give a modified version of CALCRIM No. 250, *Union of Act and Intent: General Intent*, as explained in the Related Issues section to CALCRIM No. 250.

## AUTHORITY

- Elements ▶ Pen. Code, §§ 290(b) [change in residence], 290.012 [birthday]; *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Spousal Rape Not Registerable Offense Absent Force or Violence ▶ *People v. Mason* (2013) 218 Cal.App.4th 818, 825-826 [160 Cal.Rptr.3d 516].
- Definition of Residence ▶ Pen. Code, § 290.011(g); *People v. Gonzales* (2010) 183 Cal.App.4th 24, 35 [107 Cal.Rptr.3d 11].
- Willfully Defined ▶ Pen. Code, § 7(1); see *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507].
- Actual Knowledge of Duty Required ▶ *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Continuing Offense ▶ *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527–528 [63 Cal.Rptr.2d 322, 936 P.2d 101].
- General Intent Crime ▶ *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Johnson* (1998) 67 Cal.App.4th 67, 72 [78 Cal.Rptr.2d 795].
- No Duty to Define Residence ▶ *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219 [64 Cal.Rptr.2d 545].
- Registration is Not Punishment ▶ *In re Alva* (2004) 33 Cal.4th 254, 262 [14 Cal.Rptr.3d 811, 92 P.3d 311].
- Jury May Consider Evidence That Significant Involuntary Condition Deprived Defendant of Actual Knowledge ▶ *People v. Sorden* (2005) 36 Cal.4th 65, 72 [29 Cal.Rptr.3d 777, 113 P.3d 565].

- People Must Prove Defendant Was California Resident at Time of Offense ▶ *People v Wallace* (2009) 176 Cal.App.4th 1088, 1102-1104 [.98 Cal.Rptr.3d 618].
- Defendant Must Have Actual Knowledge That Location is Residence for Purpose of Duty to Register ▶ (*People v. Aragon* (2012) 207 Cal.App.4th 504, 510 [143 Cal.Rptr.3d 476]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1067-1070 [135 Cal.Rptr.2d 775]).

### ***Secondary Sources***

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

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

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

## **RELATED ISSUES**

### ***Other Violations of Section 290***

This instruction applies to violations under Penal Code sections 290(b) and 290.012. Section 290 imposes numerous other duties on persons convicted of sex offenses. For example, a registered sex offender must:

1. Notify the agency where he or she was *last* registered of any new address or location, whether inside or outside California, or any name change. (See Pen. Code, §§ 290.013–290.014; *People v. Smith* (2004) 32 Cal.4th 792, 800–802 [11 Cal.Rptr.3d 290, 86 P.3d 348] [under former Pen. Code, § 290(f), which allowed notice of change of address in writing, there is sufficient notice if defendant mails change of address form even if agency does not receive it]; *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740 [10 Cal.Rptr.3d 712] [discussing meaning of “changed” residence]; *People v. Davis* (2002) 102 Cal.App.4th 377, 385 [125 Cal.Rptr.2d 519] [must instruct on requirement of actual knowledge of duty to notify law enforcement when moving out of

jurisdiction]; see also *People v. Franklin* (1999) 20 Cal.4th 249, 255–256 [84 Cal.Rptr.2d 241, 975 P.2d 30] [construing former Pen. Code, § 290(f), which did not specifically require registration when registrant moved outside California].)

2. Register multiple residences wherever he or she regularly resides. (See Pen. Code, § 290.010; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222 [127 Cal.Rptr.2d 662] [court failed to instruct that jury must find that defendant actually knew of duty to register multiple residences; opinion cites former section 290(a)(1)(B)]; *People v. Vigil* (2001) 94 Cal.App.4th 485, 501 [114 Cal.Rptr.2d 331].)
3. Update his or her registration at least once every 30 days if he or she is “a transient.” (See Pen. Code, § 290.011.)

A sexually violent predator who is released from custody must verify his or her address at least once every 90 days and verify any place of employment. (See Pen. Code, § 290.012.) Other special requirements govern:

1. Residents of other states who must register in their home state but are working or attending school in California. (See Pen. Code, § 290.002.)
2. Sex offenders enrolled at, employed by, or carrying on a vocation at any university, college, community college, or other institution of higher learning. (See Pen. Code, § 290.01.)

In addition, providing false information on the registration form is a violation of section 290.018. (See also *People v. Chan* (2005) 128 Cal.App.4th 408 [26 Cal.Rptr.3d 878].)

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

If a person actually knows of his or her duty to register, “just forgetting” is not a defense. (*People v. Barker* (2004) 34 Cal.4th 345, 356–357 [18 Cal.Rptr.3d 260, 96 P.3d 507].) In reaching this conclusion, the court stated, “[w]e do not here express an opinion as to whether forgetfulness resulting from, for example, an *acute psychological condition*, or a *chronic deficit of memory or intelligence*, might negate the willfulness required for a section 290 violation.” (*Id.* at p. 358 [italics in original].)

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

Penal Code section 290 requires lifetime registration for a person convicted of consensual oral copulation with a minor but does not require such registration for a person convicted of consensual sexual intercourse with a minor. (Pen. Code, §

290(c).) The mandatory registration requirement for consensual oral copulation with a minor is unenforceable because this disparity denies equal protection of the laws. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1191, 1205–1206 [39 Cal.Rptr.3d 821, 129 P.3d 29].) A defendant convicted of consensual oral copulation with a minor might, however, be required to register pursuant to judicial discretion under [former] section 290(a)(2)(E) (after October 13, 2007 section 290.006). (*Id.* at p. 1208.)

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

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

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

No reported case has held that the technical notice requirements are elements of the offense, especially when the jury is told that they must find the defendant had actual knowledge. (See former Pen. Code, § 290(b), after October 13, 2007, section 290.017; *People v. Garcia* (2001) 25 Cal.4th 744, 754, 755–756 [107 Cal.Rptr.2d 355, 23 P.3d 590] [if defendant willfully and knowingly failed to register, *Buford* does not require reversal merely because authorities failed to comply with technical requirements]; see also *People v. Buford* (1974) 42 Cal.App.3d 975, 987 [117 Cal.Rptr. 333] [revoking probation for noncompliance with section 290, an abuse of discretion when court and jail officials also failed to comply].) The court in *Garcia* did state, however, that the “court’s instructions on ‘willfulness’ should have required proof that, in addition to being formally notified by the appropriate officers as required by section 290, in order to willfully violate section 290 the defendant must actually know of his duty to register.” (*People v. Garcia, supra*, 25 Cal.4th at p. 754.)

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

**1400. Active Participation in Criminal Street Gang (Pen. Code, § 186.22(a))**

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The defendant is charged [in Count \_\_] with participating in a criminal street gang [in violation of Penal Code section 186.22(a)].

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

1. The defendant actively participated in a criminal street gang;
2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

**AND**

3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:
  - a. directly and actively committing a felony offense;

**OR**

- b. aiding and abetting a felony offense.

At least two members of that same gang must have participated in committing the felony offense. The defendant may count as one of those members if you find that the defendant was a member of the gang.

*Active participation* means involvement with a criminal street gang in a way that is more than passive or in name only.

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

<If criminal street gang has already been defined.>

[A *criminal street gang* is defined in another instruction to which you should refer.]

*<If criminal street gang has not already been defined in another instruction.>*  
[A ***criminal street gang*** is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. That has a common name or common identifying sign or symbol;
2. That has, as one or more of its primary activities, the commission of \_\_\_\_\_ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

**AND**

3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

*<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>*

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of \_\_\_\_\_ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>* please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

**A pattern of criminal gang activity, as used here, means:**

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of):

*<Give Alternative 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33).>*

**1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)**

\_\_\_\_\_ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

**[OR]**



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

**1B. [at least one of the following crimes:] \_\_\_\_\_** *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;*

**AND**

**[at least one of the following crimes:] \_\_\_\_\_** *<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>;*

- 2. At least one of those crimes was committed after September 26, 1988;**
- 3. The most recent crime occurred within three years of one of the earlier crimes;**

**AND**

- 4. The crimes were committed on separate occasions or were personally committed by two or more persons.]**

*<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>*

**[To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_** *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>*  
**please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

**The People need not prove that every perpetrator involved in the pattern of criminal gang activity, if any, was a member of the alleged criminal street gang at the time when such activity was taking place.**

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

**[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group’s primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]**

**[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were**

committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

*Felonious criminal conduct* means committing or attempting to commit [any of] the following crime[s]: \_\_\_\_\_ <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, promoted or directly committed>.

[To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_ <insert felony or felonies listed immediately above>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that:

1. A member of the gang committed the crime;
2. The defendant knew that the gang member intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

4. The defendant's words or conduct did in fact aid and abet the commission of the crime.

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.]

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is

**present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]**

**[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:**

- 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

**AND**

- 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

**The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]**

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*New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013, February 2014, [insert date of council approval](#)*

## **BENCH NOTES**

### ***Instructional Duty***

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

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].)

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more

specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].) Note that a defendant’s misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under section 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

The court should also give the appropriate instructions defining the elements of crimes inserted in the list of alleged “primary activities,” or the definition of “pattern of criminal gang activity” that have not been established by prior convictions or sustained juvenile petitions. The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of “felonious criminal conduct.”

On request, give the bracketed paragraph that begins with “The People do not need to prove that the defendant devoted all or a substantial part of . . . .” (See Pen. Code, § 186.22(i).)

On request, give the bracketed paragraph that begins with “If you find the defendant guilty of a crime in this case.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94

P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

### ***Defenses—Instructional Duty***

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with “If you conclude that defendant was present.” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

### ***Related Instructions***

This instruction should be used when a defendant is charged with a violation of Penal Code section 186.22(a) as a substantive offense. If the defendant is charged with an enhancement under 186.22(b), use CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor))*.

For additional instructions relating to liability as an aider and abettor, see the Aiding and Abetting series (CALCRIM No. 400 et seq.).

## **AUTHORITY**

- Elements ▶ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined ▶ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].

- Felonious Criminal Conduct Defined ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143]; *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].
- Temporal Connection Between Active Participation and Felonious Criminal Conduct ▶ *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464-1465 [119 Cal.Rptr.2d 272].
- Conspiracy to Commit This Crime ▶ *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].

### ***Secondary Sources***

2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 31-46.

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

## **COMMENTARY**

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more

specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran, supra*, 97 Cal.App.4th at 1458 [original italics].) The “felonious criminal conduct” need not be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062].)

## **LESSER INCLUDED OFFENSES**

### ***Predicate Offenses Not Lesser Included Offenses***

The predicate offenses that establish a pattern of criminal gang activity are not lesser included offenses of active participation in a criminal street gang. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944–945 [34 Cal.Rptr.3d 40].)

## **RELATED ISSUES**

### ***Conspiracy***

Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182 and CALCRIM No. 415, *Conspiracy*.)

### ***Labor Organizations or Mutual Aid Activities***

The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

### ***Related Gang Crimes***

Soliciting or recruiting others to participate in a criminal street gang, or threatening someone to coerce them to join or prevent them from leaving a gang, are separate crimes. (Pen. Code, § 186.26.) It is also a crime to supply a firearm to someone who commits a specified felony while participating in a criminal street gang. (Pen. Code, § 186.28.)

### ***Unanimity***

The “continuous-course-of-conduct exception” applies to the “pattern of criminal gang activity” element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of

criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758].)



**1600. Robbery (Pen. Code, § 211)**

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**The defendant is charged [in Count \_\_\_\_\_] with robbery [in violation of Penal Code section 211].**

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

- 1. The defendant took property that was not (his/her) own;**
- 2. The property was in the possession of another person;**
- 3. The property was taken from the other person or (his/her) immediate presence;**
- 4. The property was taken against that person's will;**
- 5. The defendant used force or fear to take the property or to prevent the person from resisting;**

**AND**

- 6. When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

**The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.**

*<Give the following bracketed paragraph if the second degree is the only possible degree of the charged crime for which the jury may return a verdict.>*

**[If you find the defendant guilty of robbery, it is robbery of the second degree.]**

**[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]**

[The property taken can be of any value, however slight.] [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.]

[A (store/ [or] business) (employee/ \_\_\_\_\_ <insert description>) who is on duty has possession of the (store/ [or] business) owner's property.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

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New January 2006; Revised August 2009, October 2010, April 2011, August 2013 [\[insert date of council approval\]](#)

## BENCH NOTES

### *Instructional Duty*

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

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms “possession,” “fear,” and “immediate presence.” (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d

1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees*.

Give the bracketed definition of “against a person’s will” on request.

If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*.

## AUTHORITY

- Elements ▶ Pen. Code, § 211.
- Fear Defined ▶ Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined ▶ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent ▶ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value ▶ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined ▶ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee ▶ *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].
- Constructive Possession by Subcontractor/Janitor ▶ *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].
- Constructive Possession by Person With Special Relationship ▶ *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369-1370 [109 Cal.Rptr.3d 479].

- [Felonious Taking Not Satisfied by Theft by False Pretense ▶ \*People v. Williams\* \(2013\) 57 Cal.4th 776, 784-789 \[161 Cal.Rptr.3d 81, 305 P.3d 1241\].](#)

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Property, § 85.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

### **COMMENTARY**

The instruction includes definitions of “possession,” “fear,” and “immediate presence” because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] [“force is a factual question to be determined by the jury using its own common sense”].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim’s ability to control the property. This definition may not be readily apparent to jurors.

## LESSER INCLUDED OFFENSES

- Attempted Robbery ▶ Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft ▶ Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile ▶ Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft ▶ Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior ▶ Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

## RELATED ISSUES

### *Asportation—Felonious Taking*

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

### *Claim of Right*

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

### ***Fear***

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

### ***Force—Amount***

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that force employed by pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

### ***Force—When Applied***

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

### ***Immediate Presence***

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate

presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

### ***Multiple Victims***

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

### ***Value***

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

**2300. Sale, Transportation for Sale, etc., of Controlled Substance  
(Health & Saf. Code, §§ 11352, 11379)**

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The defendant is charged [in Count \_\_] with  
(selling/furnishing/administering/giving away/transporting for  
sale/importing) \_\_\_\_\_ <insert type of controlled substance>, a controlled  
substance [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant (sold/furnished/administered/gave away/transported  
for sale/imported into California) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a  
controlled substance;

[AND]

<If the controlled substance is not listed in the schedules set forth in sections  
11054 through 11058 of the Health and Safety Code, give paragraph 4B and the  
definition of analog substance below instead of 4A>

**4A. The controlled substance was** \_\_\_\_\_ <insert type of controlled  
substance>(;/.)

**4B. The controlled substance was an analog of** \_\_\_\_\_ <insert type  
of controlled substance>(;/.)

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND]

5. The controlled substance was in a usable amount.]

[In order to prove that the defendant is guilty of this crime, the People must  
prove that \_\_\_\_\_ <insert name of analog drug> is an analog of  
\_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled  
substance:



1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported **for sale**/imported).]

[A person does not have to actually hold or touch something to (sell/furnish/administer/transport **it for sale**/import/give it away) [it]. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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*New January 2006; Revised October 2010, revised February 2014 [\[insert date of council approval\]](#)*

## BENCH NOTES

### *Instructional Duty*

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

Transportation of a controlled substance requires a “usable amount.” (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering ▶ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▶ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount ▶ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

## Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–102.

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

## LESSER INCLUDED OFFENSES

- ~~• Simple Possession of Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].~~
- ~~• Possession for Sale ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].~~
- ~~• Simple possession is not a lesser included offense of this crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984 [64 Cal.Rptr.3d 926]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)~~
- ~~• Possession for sale is not a lesser included offense of this crime. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)~~
- ~~•~~

Note: In reviewing the appropriateness of sentencing enhancements, *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

## RELATED ISSUES

### Transportation

~~Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also~~

does not require personal possession by the defendant. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129] [abrogated in part by statute on other grounds].) (*Ibid.*) “Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . .” (*Id.* at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved “from one location to another,” but the movement may be minimal. (*Id.* at p. 684.)

### ***Transportation for Personal Use***

~~A defendant convicted of transporting a controlled substance “for personal use” is entitled to be sentenced to probation with drug treatment pursuant to Penal Code section 1210(a); see *People v. Barasa* (2002) 103 Cal.App.4th 287, 295–297 [126 Cal.Rptr.2d 628].) Two cases have held that the judge, not the jury, may determine whether the defendant transported the drugs for personal use. (*People v. Barasa, supra*, 103 Cal.App.4th at pp. 294–295; *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1115 [7 Cal.Rptr.3d 4].)~~

**2301. Offering to Sell, Transport for Sale, etc., a Controlled Substance  
(Health & Saf. Code, §§ 11352, 11379)**

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The defendant is charged [in Count \_\_\_] with offering to  
(sell/furnish/administer/give away/transport for sale/import) \_\_\_\_\_  
<insert type of controlled substance>, a controlled substance [in violation of  
\_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant [unlawfully] offered to (sell/furnish/administer/give away/transport for sale/import into California) a controlled substance;

AND

2. When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away/transport for sale/import) the controlled substance.

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of 3A>*

**3A.** The controlled substance was \_\_\_\_\_ <insert type of controlled substance>.

**3B.** The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>.

[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

2. **Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

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New January 2006, Revised February 2014 [\[insert date of council approval\]](#)

## BENCH NOTES

### *Instructional Duty*

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering ▶ Health & Saf. Code, § 11002.
- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

## Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

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

## LESSER INCLUDED OFFENSES

- Simple Possession of Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included]; but see *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298][finding a lesser included offense on factual but not legal basis].
- Possession for Sale ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included] but see *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298][finding a lesser included offense on factual but not legal basis].
- ~~Simple Possession of Controlled Substance~~ ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- ~~Possession for Sale~~ ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

## RELATED ISSUES

### *No Requirement That Defendant Delivered or Possessed Drugs*

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

### *Transportation for Sale*

Effective January 1, 2014, the definition of “transportation” is limited to transportation for sale for the purposes of section 11352. Health & Saf. Code, § 11352(c).

**2350. Sale, Furnishing, etc., of Marijuana (Health & Saf. Code, § 11360(a))**

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The defendant is charged [in Count \_\_\_\_] with (selling/furnishing/administering/importing) marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. The defendant (sold/furnished/administered/imported into California) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;

[AND]

4. The controlled substance was marijuana(;/.)

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND]

5. The controlled substance was in a usable amount.]

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]



**[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]**

**[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/imported).]**

**[A person does not have to actually hold or touch something to (sell/furnish/administer/import) it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]**

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*New January 2006; Revised December 2008, October 2010* [\*\[insert date of council approval\]\*](#)

## **BENCH NOTES**

### ***Instructional Duty***

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

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not give element 5 or the bracketed definition of “usable amount.” There is no case law on whether furnishing, administering, or importing require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) Element 5 and the definition of usable amount are provided for the court to use at its discretion.

When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11360(a); *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering ▶ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▶ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally ▶ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[c], [g]–[i], [3][a], [a.1] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Simple possession is not a lesser included offense of this crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984 [64 Cal.Rptr.3d 926]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)
- Possession for sale is not a lesser included offense of this crime. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)
- ~~Simple Possession of Marijuana ▶ Health & Saf. Code, § 11357.~~
- ~~Possession for Sale of Marijuana ▶ Health & Saf. Code, § 11359.~~

**2651. Trying to Prevent an Executive Officer From Performing Duty  
(Pen. Code, § 69)**

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The defendant is charged [in Count \_\_] with trying to (prevent/ [or] deter) an executive officer from performing that officer's duty [in violation of Penal Code section 69].

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

1. The defendant willfully and unlawfully used (violence/ [or] a threat of violence) to try to (prevent/ [or] deter) an executive officer from performing the officer's lawful duty;

**AND**

2. When the defendant acted, (he/she) intended to (prevent/ [or] deter) the executive officer from performing the officer's lawful duty.

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

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) \_\_\_\_\_ <insert title, e.g., peace officer, commissioner, etc.> is an *executive officer*.]

The executive officer does not need to be performing his or her job duties at the time the threat is communicated.

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else. The defendant must, however, intend that (his/her) statement be taken as a threat by the intended victim.]

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

[A sworn member of \_\_\_\_\_ <insert name of agency that employs peace officer>, authorized by \_\_\_\_\_ <insert appropriate section from Pen. Code, § 830 et seq.> to \_\_\_\_\_ <describe statutory authority>, is a peace officer.]

[The duties of (a/an) \_\_\_\_\_ <insert title of officer specified in Pen. Code, § 830 et seq.> include \_\_\_\_\_ <insert job duties>.]

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

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

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New January 2006, revised [insert date of council approval]

## BENCH NOTES

### *Instructional Duty*

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

In order to be “performing a lawful duty,” an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant’s reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

For this offense, “the relevant factor is simply the lawfulness of the official conduct that the defendant (through threat or violence) has attempted to deter, and not the lawfulness (or official nature) of the conduct in which the officer is engaged at the time the threat is made.” (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 817.) Thus, if the evidence supports the conclusion that the defendant attempted to deter the officer’s current performance of a duty, the court should instruct on the lawfulness of that duty. (*Ibid.*) Where the evidences supports the conclusion that the defendant attempted to deter the officer from performing a duty in the future, the court should only instruct on the lawfulness of that future duty. (*Ibid.*)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

## AUTHORITY

- Elements ▶ Pen. Code, § 69.
- Specific Intent Required ▶ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Immediate Ability to Carry Out Threat Not Required ▶ *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Lawful Performance Element to Attempting to Deter ▶ *In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Statute Constitutional ▶ *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].

## *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, § 119.

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

## ~~LESSER INCLUDED OFFENSES~~

~~Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting to deter an officer. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400].)~~

## RELATED ISSUES

### *Resisting an Officer Not Lesser Included Offense*

Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting by force or violence to deter an officer. (*People v. Smith* (2013) 57 Cal.4th 232, 240-245 [159 Cal.Rptr.3d 57, 303 P.3d 368].)

### ***Statute as Written Is Overbroad***

The statute as written would prohibit lawful threatening conduct. To avoid overbreadth, this instruction requires that the defendant act both “willfully” and “unlawfully.” (*People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 895–896 [199 Cal.Rptr. 150].)

### ***State of Mind of Victim Irrelevant***

Unlike other threat crimes, the state of mind of the intended victim is irrelevant. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Hines* (1997) 15 Cal.4th 997, 1061, fn. 15 [64 Cal.Rptr.2d 594, 938 P.2d 388].)

### ***Immediate Ability to Carry Out Threat Not Required***

“As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. Thus, threats may be constitutionally prohibited even when there is no *immediate* danger that they will be carried out.” (*People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388] [quoting *In re M.S.* (1995) 10 Cal.4th 698, 714 [42 Cal.Rptr.2d 355, 896 P.2d 1365], citation and internal quotation marks removed, emphasis in original]; see also *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

**2652. Resisting an Executive Officer in Performance of Duty (Pen. Code, § 69)**

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**The defendant is charged [in Count \_\_] with resisting an executive officer in the performance of that officer's duty [in violation of Penal Code section 69].**

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

- 1. The defendant [unlawfully] used force [or violence] to resist an executive officer;**
- 2. When the defendant acted, the officer was performing (his/her) lawful duty;**

**AND**

- 3. When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.**

**An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) \_\_\_\_\_ <insert title, e.g., peace officer, commissioner, etc.> is an *executive officer*.]**

**[A sworn member of \_\_\_\_\_ <insert name of agency that employs peace officer>, authorized by \_\_\_\_\_ <insert appropriate section from Pen. Code, § 830 et seq.> to \_\_\_\_\_ <describe statutory authority>, is a *peace officer*.]**

**[The duties of (a/an) \_\_\_\_\_ <insert title of officer specified in Pen. Code, § 830 et seq.> include \_\_\_\_\_ <insert job duties>.]**

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

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

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*New January 2006, revised [insert date of council approval]*



## BENCH NOTES

### *Instructional Duty*

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

In order to be “performing a lawful duty,” an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant’s reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

## AUTHORITY

- Elements ▶ Pen. Code, § 69.
- General Intent Offense ▶ *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer ▶ *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, § 119.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.06[3] (Matthew Bender).

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

## LESSER INCLUDED OFFENSES

Penal Code section 148(a) has been held to be a lesser included offense of section 69 when knowing resistance is charged, under the accusatory pleading test. ~~may be a lesser included offense of this crime, see *People v. Lacefield* (2007) 157 Cal.App.4th 249, 259 [68 Cal.Rptr.3d 508], which found that the trial court had a *sua sponte* duty to instruct on the lesser included offense defined by Penal Code section 148(a)(1), disagreeing with *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] (*People v. Smith* (2013) 57 Cal.4th 232, 240-245 [159 Cal.Rptr.3d 57, 303 P.3d 368].) and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].~~

### 3406. Mistake of Fact

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The defendant is not guilty of \_\_\_\_\_ *<insert crime[s]>* if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit \_\_\_\_\_ *<insert crime[s]>*.

If you find that the defendant believed that \_\_\_\_\_ *<insert alleged mistaken facts>* [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for \_\_\_\_\_ *<insert crime[s]>*.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for \_\_\_\_\_ *<insert crime[s]>*, you must find (him/her) not guilty of (that crime/those crimes).

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*New January 2006; Revised April 2008, December 2008* *insert date of council approval*

### 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.

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].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant’s belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing marijuana to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 288a(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

## AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 26(3).
- Burden of Proof ▶ *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].
- [This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14 ▶ \*People v. Hanna\* \(2013\) 218 Cal.App.4th 455, 461 \[160 Cal.Rptr.3d 210\].](#)

## ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, § 39.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, Defenses and Justifications, § 73.06 (Matthew Bender).

## **RELATED ISSUES**

### ***Mistake of Fact Based on Involuntary Intoxication***

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

### ***Mistake of Fact Based on Mental Disease***

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra*, 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

**3456. Initial Commitment of Mentally Disordered Offender  
As Condition of Parole**

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The petition alleges that \_\_\_\_\_ <insert name of respondent> is a mentally disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. (He/She) was convicted of \_\_\_\_\_ <specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)> and received a prison sentence for a fixed period of time;
2. (He/She) had a severe mental disorder;
3. The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;
4. (He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;
5. The severe mental disorder either was not in remission, or could not be kept in remission without treatment;

**AND**

6. Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.

*A severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

**Remission** means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.

[A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on \_\_\_\_\_ <insert date of hearing, if desired>], the person:

<Give one or more alternatives, as applicable>

- [1. Was physically violent except in self-defense; [or]]
- [2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]
- [3. Intentionally caused property damage; [or]]
- [4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that \_\_\_\_\_ <insert name of respondent> is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

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*New December 2008*

## **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 mentally disordered offender.

Give this instruction for an initial commitment as a condition of parole. For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Mentally Disordered Offender*.

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

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that “the option of ‘cannot be kept in remission without treatment’ requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan.” (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

## AUTHORITY

- Elements and Definitions ▶ Pen. Code, §§ 2962, 2966(b); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof ▶ Pen. Code, § 2966(b); *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].
- Institutions That May Fulfill the 90-Day Treatment Requirement ▶ Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only ▶ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission ▶ Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act ▶ *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407 [32 Cal.Rptr.3d 729].
- Evidence of Later Improvement Not Relevant ▶ Pen. Code, § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678, 1683 [35 Cal.Rptr.2d 250].



- Board of Parole Hearings ▶ Pen. Code, § 5075.
- This Instruction Cited As Authority With Implicit Approval ▶ *People v. Harrison* (2013) 57 Cal.4th 1121, 1230 [164 Cal.Rptr.3d 167, 312 P.3d 88].

### *Secondary Sources*

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § ' 638, 639.