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INVITATION TO COMMENT

Title	Action Requested
Criminal Jury Instructions (CALCRIM) Revisions	Review and submit comments by January 2, 2013
Proposed Revisions	Proposed Effective Date
Add and revise jury instructions	February 26, 2013
Recommended by	Contact
Advisory Committee on Criminal Jury Instructions	Robin Seeley, Attorney, 415-865-7710
Hon. Sandy R Kriegler, Chair	robin.seeley@jud.ca.gov

Summary

New and revised instructions reflecting recent developments in the law.

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220. Reasonable Doubt

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

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

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

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

New January 2006; Revised August 2006 [\[insert date of council approval\]](#)

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

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

Nebraska (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583];
Lisenbee v. Henry (9th Cir. 1999) 166 F.3d 997, 999.

- This Instruction Upheld ▶ *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088–1089 [78 Cal.Rptr.3d 186].
- This Instruction Does Not Suggest That Bias Against Defendant Is Permissible ▶ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1185–1186 [67 Cal.Rptr.3d 871].
- Cited With Approval ▶ *People v. Aranda* (2012) 55 Cal.4th 342, [145 Cal.Rptr.3d 855].

Secondary Sources

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

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

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Garcia* (1975) 54 Cal.App.3d 61, 63 [126 Cal.Rptr. 275].) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language. For an alternate view of instructing on reasonable doubt, see Committee on Standard Jury Instructions—Criminal, Minority Report to CALJIC "Reasonable Doubt" Report, in *Alternative Definitions of Reasonable Doubt: A Report to the California Legislature* (May 22, 1987; repr., San Francisco: Daily Journal, 1987) pp. 51–53.

RELATED ISSUES

Pinpoint Instruction on Reasonable Doubt

A defendant is entitled, on request, to a nonargumentative instruction that directs attention to the defense’s theory of the case and relates it to the state’s burden of proof. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [84 Cal.Rptr. 711, 465 P.2d 847] [error to deny requested instruction relating defense evidence to the element of premeditation and deliberation].) Such an instruction is sometimes called a pinpoint instruction. “What is pinpointed is not specific evidence as such, but the theory of the defendant’s case. It is the specific evidence on which the theory of the defense ‘focuses’ which is related to reasonable doubt.” (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338 [185 Cal.Rptr. 506] [court erred in refusing to give requested instruction relating self-defense to burden of proof]; see also *People v. Granados* (1957) 49 Cal.2d 490, 496 [319 P.2d 346] [error to refuse instruction relating reasonable doubt to commission of felony in felony-murder case]; *People v. Brown* (1984) 152 Cal.App.3d 674, 677–678 [199 Cal.Rptr. 680] [error to refuse instruction relating reasonable doubt to identification].)

Homicide

520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)

The defendant is charged [in Count ___] with murder [in violation of Penal Code section 187].

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

1. The defendant committed an act that caused the death of (another person/ [or] a fetus);

[AND]

2. When the defendant acted, (he/she) had a state of mind called malice aforethought(;/.)

<Give element 3 when instructing on justifiable or excusable homicide.>

[AND]

3. (He/She) killed without lawful (excuse/[or] justification).]

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill.

The defendant acted with *implied malice* if:

1. (He/She) intentionally committed an act;
2. The natural and probable consequences of the act were dangerous to human life;
3. At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life;

AND

4. (He/She) deliberately acted with conscious disregard for (human/ [or] fetal) life.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

[It is not necessary that the defendant be aware of the existence of a fetus to be guilty of murdering that fetus.]

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

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

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

[(A/An) _____ <insert description of person owing duty> has a legal duty to (help/care for/rescue/warn/maintain the property of/ _____ <insert other required action[s]>) _____ <insert description of decedent/person to whom duty is owed>.

If you conclude that the defendant owed a duty to _____ <insert name of decedent>, and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act.]

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

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

<Give the following bracketed paragraph if there is substantial evidence of first degree murder>

[If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. <insert number of appropriate first degree murder instruction>.]

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

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

If the prosecution’s theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give the bracketed portion that begins, “(A/An) _____ <insert description of person owing duty> has a legal duty to.” Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *First Degree Murder*. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first or second degree felony murder, instruct on those crimes and give CALCRIM No. 548, *Murder: Alternative Theories*.

AUTHORITY

- Elements ▶ Pen. Code, § 187.
- Malice ▶ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- Causation ▶ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Fetus Defined ▶ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice ▶ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- This Instruction Upheld ▶ *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 91–97.

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

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter ▶ Pen. Code, § 192(a).
- Involuntary Manslaughter ▶ Pen. Code, § 192(b).
- Attempted Murder ▶ Pen. Code, §§ 663, 189.

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: “[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant’s act”].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [error to instruct a jury that when deciding causation it “[w]as immaterial that the defendant could not reasonably have foreseen the harmful result”].)

Second Degree Murder of a Fetus

The defendant does not need to know a woman is pregnant to be convicted of second degree murder of her fetus. (*People v. Taylor* (2004) 32 Cal.4th 863, 868 [11 Cal.Rptr.3d 510, 86 P.3d 881] [“[t]here is no requirement that the defendant specifically know of the existence of each victim.”]) “[B]y engaging in the conduct he did, the defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct.” (*Id.* at p. 870.)

521. First Degree Murder (Pen. Code, § 189)

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

<Give if multiple theories alleged.>

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

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

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

<A. Deliberation and Premeditation>

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

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

<B. Torture>

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

- 1. (He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;**
- 2. (He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**
- 3. The acts causing death involved a high degree of probability of death;**

AND

- 4. The torture was a cause of death.]**

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

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

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

<C. Lying in Wait>

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

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

AND

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

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

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

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

<D. Destructive Device or Explosive>

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

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

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

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

[A *destructive device* is _____ <insert definition supported by evidence from Pen. Code, § 16460>.]

[_____ <insert type of destructive device from Pen. Code, § 16460> is a *destructive device*.]

<E. Weapon of Mass Destruction>

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

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

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

<F. Penetrating Ammunition>

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

<G. Discharge From Vehicle>

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

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

AND

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

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

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

<H. Poison>

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

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

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

[The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.]

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

New January 2006; Revised August 2006; June 2007, April 2010, October 2010, February 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. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final paragraph in every case.

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

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

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

AUTHORITY

- Types of Statutory First Degree Murder ▶ Pen. Code, § 189.
- Armor Piercing Ammunition Defined ▶ Pen. Code, § 16660.
- Destructive Device Defined ▶ Pen. Code, § 16460.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death ▶ *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22, 139 P.3d 492].
- Mental State Required for Implied Malice ▶ *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- Explosive Defined ▶ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined ▶ Pen. Code, § 11417.
- Discharge From Vehicle ▶ *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements ▶ *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 582–585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined ▶ *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined ▶ *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements ▶ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Premeditation and Deliberation—Anderson Factors

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

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, “leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but

without premeditation and deliberation”]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

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

Torture—Instruction on Voluntary Intoxication

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

Torture—Pain Not an Element

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

Torture—Premeditated Intent to Inflict Pain

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

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

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

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

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

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

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

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

The defendant committed involuntary manslaughter if:

- 1. The defendant committed (a crime/ [or] a lawful act in an unlawful manner);**
- 2. The defendant committed the (crime/ [or] act) with criminal negligence;**

AND

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

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

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

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

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

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

AND

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

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

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

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

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

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

In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.

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

BENCH NOTES

Instructional Duty

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

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

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

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

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is

included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

AUTHORITY

- Involuntary Manslaughter Defined ▶ Pen. Code, § 192(b).
- Due Caution and Circumspection ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Criminal Negligence Requirement; This Instruction Upheld ▶ *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Not Amounting to a Felony ▶ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause ▶ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life ▶ *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

Secondary Sources

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

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

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

LESSER INCLUDED OFFENSES

Involuntary manslaughter is a lesser included offense of both degrees of murder,

but it is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].)

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

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

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

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

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

601. Attempted Murder: Deliberation and Premeditation (Pen. Code, §§ 21a, 189, 664(a))

If you find the defendant guilty of attempted murder [under Count __], you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation.

(The defendant/ _____ <insert name or description of principal if not defendant>) acted willfully if (he/she) intended to kill when (he/she) acted. (The defendant/ _____ <insert name or description of principal if not defendant>) deliberated if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. (The defendant/ _____ <insert name or description of principal if not defendant>) premeditated if (he/she) decided to kill before acting.

[The attempted murder was done willfully and with deliberation and premeditation if either the defendant or _____ <insert name or description of principal> or both of them acted with that state of mind.]

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

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

New January 2006 [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 sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; Pen. Code, § 664(a).) Give this

instruction when an enhancement for deliberation and premeditation is charged.

This instruction **must** be given with CALCRIM No. 600, *Attempted Murder*.

When a charged attempted murder also forms the basis for a charge of provocative act murder, the court must take care to distinguish the proof required to establish premeditation and deliberation. As described in CALCRIM No. 560, *Homicide: Provocative Act by Defendant*, the mental state for first degree murder under the provocative act murder doctrine requires that the defendant “personally premeditated and deliberated the attempted murder that provoked a lethal response.” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 662 [142 Cal.Rptr.3d 893, 278 P.3d 1242].)

AUTHORITY

- Willful, Deliberate, and Premeditated Murder ▶ Pen. Code, § 189.
- Willful, Deliberate, and Premeditated Attempted Murder ▶ Pen. Code, § 664(a).
- Premeditation and Deliberation Defined ▶ *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- [Attempted Premeditated Murder and the Natural and Probable Consequences Doctrine ▶ *People v. Favor* \(2012\) 54 Cal.4th 868, 879 \[143 Cal.Rptr.3d 659, 279 P.3d 1131\].](#)

Secondary Sources

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.02[3]; Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [g], [3][e] (Matthew Bender).

RELATED ISSUES

Accomplice Liability

An aider and abettor is subject to this penalty provision where the principal attempted a willful, deliberate, and premeditated murder even though the

accomplice did not personally deliberate or premeditate. (*People v. Lee* (2003) 31 Cal.4th 613, 622–623 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1473 [61 Cal.Rptr.2d 680].) The accomplice must still share the intent to kill. (*People v. Lee, supra*, 31 Cal.4th at pp. 623–624.)

See the Related Issues Section to CALCRIM No. 521, *Murder: Degrees* for discussion of “deliberate and premeditated.”

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

[AND]

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

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

[AND]

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

[A *semiautomatic pistol* extracts a fired cartridge and chambers a fresh cartridge with each single pull of the trigger.]

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

[An *assault weapon* includes _____ <insert names of appropriate designated assault weapons listed in Pen. Code, § 30510 or as defined by Pen. Code, § 30515>.]

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

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

AND

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

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

New January 2006; Revised June 2007, August 2009, October 2010, February 2012 [[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.

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

Give element 1A if it is alleged the assault was committed with a deadly weapon other than a firearm, firearm, semiautomatic firearm, machine gun, an assault weapon, or .50 BMG rifle. Give 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(a).)

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

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

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

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon ▶ *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- This Instruction Affirmed ▶ *People v. Golde* (2008) 163 Cal.App.4th 101, 122–123 [77 Cal.Rptr.3d 120].
- Assault Weapon Defined ▶ Pen. Code, §§ 30510, 30515.
- Semiautomatic Pistol Defined ▶ Pen. Code, § 17140.
- Firearm Defined ▶ Pen. Code, § 16520.
- Machine Gun Defined ▶ Pen. Code, § 16880.
- .50 BMG Rifle Defined ▶ Pen. Code, § 30530.
- Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ [People v. Brown \(2012\) 210 Cal.App.4th 1, 3-4 \[147 Cal.Rptr.3d 848\]](#); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.

[Assault with a firearm is a lesser included offense of assault with a semiautomatic firearm. \(*People v. Martinez* \(2012\) 208 Cal.App.4th 197.\)](#)

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

3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(43), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

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

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

[1.] Displays the weapon in a menacing manner(./;)

[OR]

[2. Hits someone with the weapon(./;)]

[OR]

(3/2). Fires the weapon.]

<If there is an issue in the case over whether the defendant used the weapon “in the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007 [\[insert date of council approval\]](#)

BENCH NOTES

Instructional Duty

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

Give all of the bracketed “or dangerous” phrases if the enhancement charged uses both the words “deadly” and “dangerous” to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word “deadly.” (Pen. Code, § 12022.3.)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

In the definition of “personally uses,” the court may give the bracketed item 3 if the case involves an object that may be “fired.”

If the case involves an issue of whether the defendant used the weapon “in the commission of” the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements ▶ Pen. Code, §§ 667.61(e)(~~4~~3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.
- Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].

- Objects With Innocent Uses ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Personally Uses ▶ *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(2).
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▶ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

Secondary Sources

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

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 320, 324–332.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.30, 91.81[1][d] (Matthew Bender).

RELATED ISSUES

No Duty to Instruct on “Lesser Included Enhancements”

“[A] trial court’s sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on ‘lesser included enhancements.’ ” (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

Weapon Displayed Before Felony Committed

Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was “at least . . . an aid in completing an essential element of the subsequent crimes. . . .”

(*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705].)

Weapon Used Did Not Cause Death

In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. (*Ibid.*) The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be “a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime.” (*Ibid.*) [ellipsis and brackets omitted] Here, the court found that “[t]he knife was instrumental to the consummation of the murder and was used to advantage.” (*Ibid.*)

“One Strike” Law and Use Enhancement

Where the defendant’s use of a weapon has been used as a basis for applying the “one strike” law for sex offenses, the defendant may not also receive a separate enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

Assault and Use of Deadly Weapon Enhancement

“A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b).” (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

Robbery and Use of Deadly Weapon Enhancement

A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

860. Assault on Firefighter or Peace Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(c) & (d))

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

**[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and
1B. The force used was likely to produce great bodily injury;]**

2. The defendant did that act willfully;

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

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

5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer);

[AND]

6. When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a (firefighter/peace officer) who was performing (his/her) duties(;/.)

<Give element 7 when instructing on self-defense or defense of another.>

[AND

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

[A *semiautomatic firearm* extracts a fired cartridge and chambers a fresh cartridge with each single pull of the trigger.]

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

[An *assault weapon* includes _____ <insert names of appropriate designated assault weapons listed in Pen. Code, § 30510 and further defined by Pen. Code § 30515>.]

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

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

AND

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

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

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

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

[The duties of a _____ <insert title of officer> include _____
<insert job duties>.]

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

New January 2006; Revised April 2011, February 2012 [*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.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant’s reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give element 1A if it is alleged the assault was committed with a deadly weapon, a firearm, a semiautomatic firearm, a machine gun, an assault weapon, or .50 BMG rifle. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(c) & (d).)

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

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

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

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

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

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- Assault Weapon Defined ▶ Pen. Code, §§ 30510, 30515.
- Firearm Defined ▶ Pen. Code, § 16520.
- Machine Gun Defined ▶ Pen. Code, § 16880.
- Semiautomatic Pistol Defined ▶ Pen. Code, § 17140.

- .50 BMG Rifle Defined ▶ Pen. Code, § 30530.
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Firefighter Defined ▶ Pen. Code, § 245.1.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

- Deadly Weapon Defined ▶ [People v. Brown \(2012\) 210 Cal.App.4th 1, 3-4 \[147 Cal.Rptr.3d 848\]](#); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 65.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Assault With a Deadly Weapon ▶ Pen. Code, § 245.
- Assault on a Peace Officer ▶ Pen. Code, § 241(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

862. Assault on Custodial Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245, 245.3)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) on a custodial officer [in violation of Penal Code section 245.3].

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

<Alternative 1A—force with weapon>

[1. The defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a custodial officer;

[AND]

6. When the defendant acted, (he/she) knew, or reasonably should have known, both that the person assaulted was a custodial officer and that (he/she) was performing (his/her) duties as a custodial officer(;/.)

<Give element 7 when instructing on self-defense or defense of another.>
[AND

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

New January 2006; Revised April 2011 *[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.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant’s reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.3.)

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

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

In the bracketed definition of “local detention facility,” do not insert the name of a specific detention facility. Instead, insert a description of the type of detention facility at issue in the case. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76

Cal.Rptr.2d 180, 957 P.2d 869] [jury must determine if alleged victim is a peace officer]; see Penal Code section 6031.4 [defining local detention facility].)

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

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245, 245.3.
- Custodial Officer Defined ▶ Pen. Code, § 831.
- Local Detention Facility Defined ▶ Pen. Code, § 6031.4.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ [*People v. Brown* \(2012\) 210 Cal.App.4th 1, 3-4 \[147 Cal.Rptr.3d 848\]](#); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 67.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

**863. Assault on Transportation Personnel or Passenger
With Deadly Weapon or Force Likely to Produce Great Bodily Injury
(Pen. Code, §§ 240, 245, 245.2)**

The defendant is charged [in Count ___] with assault with (force likely to produce great bodily injury/a deadly weapon) on (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____ <insert name of vehicle or transportation entity specified in Pen. Code, § 245.2> [in violation of Penal Code section 245.2].

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

<Alternative 1A—force with weapon>

[1. The defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and
1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

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

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

<Alternative 5A—transportation personnel>

[5. When the defendant acted, the person assaulted was performing (his/her) duties as (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____ <insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>];

<Alternative 5B—passenger>

[5. The person assaulted was a passenger of (a/an) _____ <insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>;]

[AND]

6. When the defendant acted, (he/she) knew, or reasonably should have known, [both] that the person assaulted was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____ <insert name of vehicle or transportation entity specified in Pen. Code, § 245.2> [and that (he/she) was performing (his/her) duties](;/.)

<Give element 7 when instructing on self-defense or defense of another.>

[AND]

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

New January 2006 *[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.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.2.)

If the victim was an operator, driver, station agent, or ticket agent of an identified vehicle or transportation entity, give element 5A and the bracketed language in element 6. If the victim was a passenger, give element 5B and omit the bracketed language in element 6.

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

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

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

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245, 245.2.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ [*People v. Brown* \(2012\) 210 Cal.App.4th 1, 3-4 \[147 Cal.Rptr.3d 848\]](#); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 72.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.11[3]; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.

864–874. Reserved for Future Use

982. Brandishing Firearm or Deadly Weapon to Resist Arrest (Pen. Code, § 417.8)

The defendant is charged [in Count ___] with brandishing a (firearm/deadly weapon) to resist arrest or detention [in violation of Penal Code section 417.8].

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

1. The defendant drew or exhibited a (firearm/deadly weapon);

AND

2. When the defendant drew or exhibited the (firearm/deadly weapon), (he/she) intended to resist arrest or to prevent a peace officer from arresting or detaining (him/her/someone else).

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

[A *deadly weapon* is any object, instrument, or weapon that is inherently ~~deadly or dangerous~~ or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

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

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

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

New January 2006; Revised February 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.

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

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded on request.

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

Related Instructions

CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor*.

CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer*.

CALCRIM No. 2653, *Taking Firearm or Weapon While Resisting Peace Officer or Public Officer*.

AUTHORITY

- Elements ▶ Pen. Code, § 417.8.
- Firearm Defined ▶ Pen. Code, § 16520; see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [7 Cal.Rptr.2d 44] [pellet gun not a “firearm” within meaning of Pen. Code, § 417(a)].
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Deadly Weapon Defined ▶ [*People v. Brown* \(2012\) 210 Cal.App.4th 1, 3-4 \[147 Cal.Rptr.3d 848\]](#); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204] [hands and feet not deadly weapons]; see, e.g., *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [50 Cal.Rptr.2d 351] [screwdriver was capable of being used as a deadly weapon and defendant

intended to use it as one if need be]; *People v. Henderson* (1999) 76 Cal.App.4th 453, 469–470 [90 Cal.Rptr.2d 450] [pit bulls were deadly weapons under the circumstances].

- Lawful Performance of Duties Not an Element ▶ *People v. Simons* (1996) 42 Cal.App.4th 1100, 1109–1110 [50 Cal.Rptr.2d 351].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 6, 7.

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

LESSER INCLUDED OFFENSES

Resisting arrest by a peace officer engaged in the performance of his or her duties in violation of Penal Code section 148(a) is not a lesser included offense of Penal Code section 417.8. (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108–1110 [50 Cal.Rptr.2d 351].) Brandishing a deadly weapon in a rude, angry, or threatening manner in violation of Penal Code section 417(a)(1) is also not a lesser included offense of section 417.8. (*People v. Pruett* (1997) 57 Cal.App.4th 77, 88 [66 Cal.Rptr.2d 750].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer*.

983. Brandishing Firearm or Deadly Weapon: Misdemeanor (Pen. Code, § 417(a)(1) & (2))

The defendant is charged [in Count ___] with brandishing a (firearm/deadly weapon) [in violation of Penal Code section 417(a)].

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

1. The defendant drew or exhibited a (firearm/deadly weapon) in the presence of someone else;

[AND]

<Alternative 2A—displayed in rude, angry, or threatening manner>

2. The defendant did so in a rude, angry, or threatening manner(;/.)

<Alternative 2B—used in fight>

2. The defendant [unlawfully] used the (firearm/deadly weapon) in a fight or quarrel(;/.)

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

[AND]

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

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

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly ~~or dangerous~~ or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

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

[It is not required that the firearm be loaded.]

BENCH NOTES

Instructional Duty

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

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

If the prosecution alleges that the defendant displayed the weapon in a rude, angry, or threatening manner, give alternative 2A. If the prosecution alleges that the defendant used the weapon in a fight, give alternative 2B.

If the defendant is charged under Penal Code section 417(a)(2)(A), the court **must** also give CALCRIM No. 984, *Brandishing Firearm: Misdemeanor—Public Place*.

Give the bracketed definition of “firearm” or “deadly weapon” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, give the bracketed sentence stating that the firearm need not be loaded.

AUTHORITY

- Elements ▶ Pen. Code, § 417(a)(1) & (2).
- Firearm Defined ▶ Pen. Code, § 16520.
- Deadly Weapon Defined ▶ [People v. Brown \(2012\) 210 Cal.App.4th 1, 3-4 \[147 Cal.Rptr.3d 848\]](#); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Victim’s Awareness of Firearm Not a Required Element ▶ *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891].
- Weapon Need Not Be Pointed Directly at Victim ▶ *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

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

2503. Possession of Deadly Weapon With Intent to Assault (Pen. Code, § 17500)

The defendant is charged [in Count __] with possessing a deadly weapon with intent to assault [in violation of Penal Code section 17500].

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

1. The defendant possessed a deadly weapon on (his/her) person;
2. The defendant knew that (he/she) possessed the weapon;

AND

3. At the time the defendant possessed the weapon, (he/she) intended to assault someone.

A person intends to assault someone else if he or she intends to do an act that by its nature would directly and probably result in the application of force to a person.

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly ~~or dangerous~~ or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term *deadly weapon* is defined in another instruction to which you should refer.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] and any other evidence that indicates that the object would be used for a dangerous, rather than a harmless, purpose.]

The term *application of force* means to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her

clothing, is enough. The touching does not have to cause pain or injury of any kind.

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

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

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

New January 2006; Revised February 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 prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was “fragmented as to time [or] space,” the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed the following weapons,” inserting the items alleged.

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

Give the bracketed paragraph that begins with “In deciding whether” if the object is not a weapon as a matter of law but is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

Defenses—Instructional Duty

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

sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

AUTHORITY

- Elements ▶ Pen. Code, § 17500.
- Deadly Weapon Defined ▶ [*People v. Brown* \(2012\) 210 Cal.App.4th 1, 3-4 \[147 Cal.Rptr.3d 848\]](#); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Objects With Innocent Uses ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Knowledge Required ▶ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Assault ▶ Pen. Code, § 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, § 140.

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

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

2504–2509. Reserved for Future Use

3130. Personally Armed With Deadly Weapon (Pen. Code, § 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a deadly weapon in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

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

A person is *armed* with a deadly weapon when that person:

1. Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense in connection with the crime[s] charged;

AND

2. Knows that he or she is carrying the deadly weapon [or has it available].

<If there is an issue in the case over whether the defendant was armed with the weapon “in the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised December 2008 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed portion that begins with “When deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

In the definition of “armed,” the court may give the bracketed phrase “or has a deadly weapon available” on request if the evidence shows that the weapon was at the scene of the alleged crime and “available to the defendant to use in furtherance of the underlying felony.” (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed “in the commission of” the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement ▶ Pen. Code, § 12022.3.
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 3-4 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].

- Objects With Innocent Uses ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Armed ▶ *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338]; *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Must Be Personally Armed ▶ *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, §§ 311, 329.

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

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.31 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, §§ 142.20[7][c], 142.21[1][d][iii] (Matthew Bender).

RELATED ISSUES

Penal Code Section 220

A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense. (*People v. Rich* (2003) 109 Cal.App.4th 255, 261 [134 Cal.Rptr.2d 553].) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, “translates into an attempt to commit” a sexual offense. (*People v. Rich, supra*, 109 Cal.App.4th at p. 261.)

Multiple Weapons

There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [215 Cal.Rptr. 124] [defendant may only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [182 Cal.Rptr. 790] [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.

Pepper Spray

In *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678], the court upheld the jury's determination that pepper spray was a deadly weapon.

1000. Rape or Spousal Rape by Force, Fear, or Threats (Pen. Code, § 261(a)(2), (6) & (7))

The defendant is charged [in Count ___] with rape [of his wife] by force [in violation of Penal Code section 261(a)].

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

1. The defendant had sexual intercourse with a woman;
2. He and the woman were (not married/married) to each other at the time of the intercourse;
3. The woman did not consent to the intercourse;

AND

4. The defendant accomplished the intercourse by

<Alternative 4A—force or fear>

[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.]

<Alternative 4B—future threats of bodily harm>

[threatening to retaliate in the future against the woman or someone else when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, falsely imprison, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 4C—threat of official action>

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

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

[To *consent*, a woman must act freely and voluntarily and know the nature of the act.]

[A woman who initially consents to an act of intercourse may change her mind during the act. If she does so, under the law, the act of intercourse is then committed without her consent if:

- 1. She communicated to the defendant that she objected to the act of intercourse and attempted to stop the act;**
- 2. She communicated her objection through words or acts that a reasonable person would have understood as showing her lack of consent;**

AND

- 3. The defendant forcibly continued the act of intercourse despite her objection.]**

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

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

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

[*Duress* means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do [or submit to] something that she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the woman's age and 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.]

[Intercourse is *accomplished by fear* if the woman is actually and reasonably afraid [or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it].]

[A woman must be alive at the time of the sexual intercourse for the crime of rape to occur.]

<Defense: Reasonable Belief in Consent>

[The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse [and actually and reasonably believed that she consented throughout the act of intercourse]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty.]

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of rape or spousal rape. If spousal rape is charged, the court must include the appropriate bracketed language throughout the instruction to indicate that the parties were married.

The court should select the appropriate alternative in element 4 describing how the sexual intercourse was allegedly accomplished.

Rape requires that the victim be alive at the moment of intercourse. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175–1177 [270 Cal.Rptr. 286, 791 P.2d 965]; *People v. Carpenter* (1997) 15 Cal.4th 312, 391 [63 Cal.Rptr.2d 1, 935 P.2d 708].) Intercourse with a deceased victim may constitute attempted rape if the defendant intended to rape a live victim. (*People v. Kelly* (1992) 1 Cal.4th 495, 524–526 [3 Cal.Rptr.2d 677, 822 P.2d 385].) If this is an issue in the case, give the bracketed sentence that begins with “A woman must be alive . . .”

The defendant must continue to actually and reasonably believe in the victim’s consent throughout the act. If the act begins consensually and the defendant then uses force or duress, the victim need not express her withdrawal of consent. Lack of consent may be inferred from the circumstances. *People v. Ireland* (2010) 188 Cal.App.4th 328, 338. If there is an issue regarding the defendant’s continued belief in the victim’s consent, give the second optional first sentence in the definition of “Defense: Reasonable Belief in Consent.”

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.” (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841

P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

Related Instructions

CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

Rape:

- Elements ▶ Pen. Code, § 261(a)(2), (6) & (7).
- Consent Defined ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined ▶ Pen. Code, § 261(b).
- Menace Defined ▶ Pen. Code, § 261(c).
- Penetration Defined ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Fear Defined ▶ *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [level of fear].
- Force Defined ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Mistake of Fact Regarding Consent ▶ *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].
- Circumstances Requiring *Mayberry* Instruction ▶ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866].
- [Withdrawal of Consent ▶ *In re John Z.* \(2003\) 29 Cal.4th 756, 760 \[128 Cal.Rptr.2d 783, 60 P.3d 183\].](#)
- [Inferring Lack of Consent From Circumstances ▶ *People v. Ireland* \(2010\) 188 Cal.App.4th 328, 338.](#)

Spousal Rape:

- Elements ▶ Pen. Code, § 262(a)(1), (4) & (5).
- Duress Defined ▶ Pen. Code, § 262(b).
- Menace Defined ▶ Pen. Code, § 262(c).

- Mistake of Fact Regarding Consent ▶ *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1148–1149 [222 Cal.Rptr. 630]; see *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–12, 18.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][a], [2], 142.23[1][e] (Matthew Bender).

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

COMMENTARY

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

Penal Code section 262 requires that the intercourse be “against the person’s [or victim’s] will.” (Pen. Code, § 262(a)(1), (4) & (5).) “Against the will” has been defined as without consent. (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

“[T]he offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. . . . ‘[I]t is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.’” (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].)

The instruction includes definitions of “duress,” “menace,” and the sufficiency of “fear” because those terms have meanings in the context of rape that are technical and may not be readily apparent to jurors. (See Pen. Code, §§ 262(b) [duress] and (c) [menace]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear].)

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

Nor is there anything in the common usage definitions of the term “force,” or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that “in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361])

(*Ibid.* [emphasis in original].)

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

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Assault With Intent to Commit Rape ▶ Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape ▶ Pen. Code, §§ 663, 261.
- Attempted Spousal Rape ▶ Pen. Code, §§ 663, 262.
- Battery ▶ Pen. Code, § 242; *People v. Guitierrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38–39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included of attempted rape].

RELATED ISSUES

Consent Obtained by Fraudulent Representation

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

Minor Victim and Unanimity

“Generic testimony” by a victim who was 15 and 16 years old does not deprive a defendant of a due process right to defend against the charges. If the victim “specifies the type of conduct involved, its frequency, and that the conduct occurred during the limitation period, nothing more is required to establish the substantiality of the victim’s testimony.” (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1446 [127 Cal.Rptr.2d 472] [affirming conviction for multiple counts of rape under Pen. Code, § 261(a)(2); citing *People v. Jones* (1990) 51 Cal.3d 294, 316 [270 Cal.Rptr. 611, 792 P.2d 643]].)

When there is no reasonable likelihood the jury will disagree on particular acts of molestation, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. (*People v. Matute, supra*, 103 Cal.App.4th at p. 1448; *People v. Jones, supra*, 51 Cal.3d at pp. 321–322; see CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented.*)

Mistake-of-Fact Defense and Developmental Disability

A defendant cannot base a reasonable-belief-of-consent defense on the fact that he is developmentally disabled and, as a result, did not act as a reasonable person would have acted. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].)

Multiple Rapes

A penetration, however slight, completes the crime of rape; therefore a separate conviction is proper for each penetration that occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329–334 [256 Cal.Rptr. 401, 768 P.2d 1078].)

Resistance Is Not Required

Resistance by the victim is not required for rape; any instruction to that effect is erroneous. (*People v. Barnes* (1986) 42 Cal.3d 284, 292, 302 [228 Cal.Rptr. 228, 721 P.2d 110].)

925. Battery Causing Serious Bodily Injury (Pen. Code, §§ 242, 243(d))

The defendant is charged [in Count ___] with battery causing serious bodily injury [in violation of Penal Code section 243(d)].

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

1. The defendant willfully [and unlawfully] touched _____ <insert name> in a harmful or offensive manner;

[AND]

2. _____ <insert name> suffered serious bodily injury as a result of the force used(;/.)

<Give element 3 when instructing on self-defense, defense of another, or reasonable discipline.>

[AND]

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

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.

Making contact with another person, including through his or her clothing, is enough to commit a battery.

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

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

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

New January 2006 *[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.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words “and unlawfully” in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If there is sufficient evidence of reasonable parental discipline, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words “and unlawfully” in element 1, and CALCRIM No. 3405, *Parental Right to Punish a Child*.

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

Give the final bracketed paragraph if indirect touching is an issue.

AUTHORITY

- Elements ▶ Pen. Code, §§ 242, 243(d); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Serious Bodily Injury Defined ▶ Pen. Code, § 243(f)(4); *People v. Burroughs* (1984) 35 Cal.3d 824, 831 [201 Cal.Rptr. 319, 678 P.2d 894] [serious bodily injury and great bodily injury are essentially equivalent elements], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

- Defense of Parental Discipline ▶ *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051 [12 Cal.Rptr.2d 33].
- Medical Treatment Not an Element ▶ *People v. Wade* (2012) 204 Cal.App.4th 1142, 1148-1150 [139 Cal.Rptr.3d 529].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 39.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Battery ▶ Pen. Code, § 242.

Assault by means of force likely to produce great bodily injury is not a lesser included offense. (Pen. Code, § 245; *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1095 [92 Cal.Rptr.2d 228].)

1120. Continuous Sexual Abuse (Pen. Code, § 288.5(a))

The defendant is charged [in Count __] with continuous sexual abuse of a child under the age of 14 years [in violation of Penal Code section 288.5(a)].

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

1. The defendant (lived in the same home with/ [or] had recurring access to) a minor child;
2. The defendant engaged in three or more acts of (substantial sexual conduct/ [or] lewd or lascivious conduct) with the child;
3. Three or more months passed between the first and last acts;

AND

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

[*Substantial sexual conduct* means oral copulation or masturbation of either the child or the perpetrator, or penetration of the child's or perpetrator's vagina or rectum by (the other person's penis/ [or] any foreign object).]

[*Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.]

[*Lewd or lascivious conduct* is any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. ~~The touching need not be done in a lewd or sexual manner.~~ Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched.] [*Lewd or lascivious conduct* [also] includes causing a child to touch his or her own body or someone else's body at the instigation of a perpetrator who has the required intent.]

[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.]

You cannot convict the defendant unless all of you agree that (he/she) committed three or more acts over a period of at least three months, but you do not all need to agree on which three acts were committed.

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

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

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

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

BENCH NOTES

Instructional Duty

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

If the court gives the definition of “lewd and lascivious conduct,” the definition of “willfully” must also be given.

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 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, § 288.5(a); *People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284–1285, 1287 [59 Cal.Rptr.2d 389].
- Substantial Sexual Conduct Defined ▶ Pen. Code, § 1203.066(b).
- Unanimity on Specific Acts Not Required ▶ Pen. Code, § 288.5(b); *People v. Adames* (1997) 54 Cal.App.4th 198, 208 [62 Cal.Rptr.2d 631].

- 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]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- 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 in context of lewd or lascivious act].
- Oral Copulation Defined ▶ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884]; see Pen. Code, § 288a(a).
- [“Recurring Access” Is Commonly Understand Term Not Requiring Sua Sponte Definitional Instruction](#) ▶ *People v. Rodriguez* (2002) 28 Cal.4th 543, 550 [122 Cal.Rptr.2d 348, 49 P.3d 1085][disapproving *People v. Gohdes* (1997) 58 Cal.App.4th 1520, 1529 [68 Cal.Rptr.2d 719].
- [Necessary Intent in Touching](#) ▶ *People v. Cuellar* (2012) 208 Cal.App.4th 1067, 1070-1072 [145 Cal.Rptr.3d 898].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 51–53.\

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][c][ii], [2] (Matthew Bender).

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

COMMENTARY

Penal Code section 288.5 does not require that the defendant reside with, or have access to, the child continuously for three consecutive months. It only requires that a period of at least three months passes between the first and last acts of molestation. (*People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284–1285, 1287 [59 Cal.Rptr.2d 389].)

Section 288.5 validly defines a prohibited offense as a continuous course of conduct and does not unconstitutionally deprive a defendant of a unanimous jury verdict. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309–1312 [18 Cal.Rptr.2d 511].)

LESSER INCLUDED OFFENSES

- Simple Assault ▶ Pen. Code, § 240.
- Simple Battery ▶ Pen. Code, § 242.

Since a conviction under Penal Code section 288.5 could be based on a course of substantial sexual conduct without necessarily violating section 288 (lewd or lascivious conduct), the latter is not necessarily included within the former and no sua sponte instruction is required. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1313–1314 [18 Cal.Rptr.2d 511]; see *People v. Palmer* (2001) 86 Cal.App.4th 440, 444–445 [103 Cal.Rptr.2d 301].)

RELATED ISSUES

Alternative Charges

Under Penal Code section 288.5(c), continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period may only be charged in the alternative. In these circumstances, multiple convictions are precluded. (*People v. Johnson* (2002) 28 Cal.4th 240, 245, 248 [121 Cal.Rptr.2d 197, 47 P.3d 1064] [exception to general rule in Pen. Code, § 954 permitting joinder of related charges].) 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*. If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses and a greater aggregate sentence is imposed for the specific offenses, the appropriate remedy is to reverse the conviction for continuous sexual abuse. (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1060 [126 Cal.Rptr.2d 92].)

Masturbation

For a discussion of the term masturbation, see *People v. Chambliss* (1999) 74 Cal.App.4th 773, 783–784, 786–787 [88 Cal.Rptr.2d 444] [construing term for purposes of finding defendant committed sexually violent offenses under the Sexually Violent Predators Act].

1060. Lewd or Lascivious Act: Dependent Person (Pen. Code, § 288(b)(2) & (c)(2))

The defendant is charged [in Count ___] with a lewd or lascivious act on a dependent person [by force or fear] [in violation of Penal Code section 288].

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

1. The defendant was a caretaker of a dependent person;
2. The defendant, while serving as a caretaker, willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on that person;

[AND]

3. The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent person(;/.)

<Give element 4 when instructing on force or violence>

[AND]

4. In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent person or someone else.]

A *lewd or lascivious act* is any touching of a person with the intent to sexually arouse the perpetrator or the other person. ~~The touching need not be done in a lewd or sexual manner.~~ A *lewd or lascivious act* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]

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

A caretaker is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including (a/an) _____ <insert specific facility from Pen. Code, § 288(f)(1)>, that provides care for dependent persons or for those aged 65 or older.

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

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

[The force used must be substantially different from or substantially greater than the force needed to accomplish the lewd and lascivious act itself.]

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

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

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

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

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.

If the defendant is charged with using force or fear in committing the lewd act on a dependent person, give bracketed element 4 and the bracketed sentence that begins with “The force must be substantially different.” (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [court has **sua sponte** duty to define “force” as used in Pen. Code, § 288(b)(1)]; *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) On request, give any of the relevant bracketed definitions of duress, menace, or fear.

In the paragraph defining “caretaker,” insert applicable caretaker facilities listed in Penal Code section 288(f)(1), such as a 24-hour health facility, a home health agency, or a community care or respite care facility, depending on the facts of the case.

Penal Code section 288(b)(2) or (c)(2) does not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person. (Pen. Code, § 288(h).)

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

Defenses—Instructional Duty

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

AUTHORITY

- Elements ▶ Pen. Code, § 288(b)(2) & (c)(2).
- Caretaker Defined ▶ Pen. Code, § 288(f)(1) & (g).
- Dependent Person Defined ▶ Pen. Code, § 288(f)(3).
- Duress Defined ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869]; *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].
- Elder Defined ▶ See Pen. Code, § 368(g).
- Menace Defined ▶ See Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required ▶ See *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching With Intent to Arouse ▶ See *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].
- Dependent Person Touching Own Body Parts at Defendant’s Instigation ▶ See *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 ▶ See *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 ▶ See *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, 41–46.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][iv], [v], [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 Court of Appeal has held that the definition of “force” as used in Penal Code section 288(b), subsection (1) (lewd acts by force with a minor) 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.) It would seem that this definition of “force” would also apply to the crime of lewd acts with a dependant person, under Penal Code section 288(b) subsection (2).

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 With Dependent Person ▶ Pen. Code, §§ 664, 288(c)(2).
- Attempted Lewd Act by Force With Dependent Person ▶ Pen. Code, §§ 664, 288(b)(2).
- Simple Assault ▶ Pen. Code, § 240.
- Simple Battery ▶ Pen. Code, § 242.

RELATED ISSUES

Developmental Disability

If the dependent person has a developmental disability, arguably there is no sua sponte duty to define “developmental disability” under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase in other code sections to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (See *People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation of disabled person].)

1061–1069. Reserved for Future Use

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

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

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

<Alternative 1A—defendant touched child>

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

[OR]

<Alternative 1B—child touched defendant>

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

2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child;

AND

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

Give the bracketed paragraph that begins with “It is not a defense that” on request, if there is evidence that the minor consented to the act. (*People v. Soto* (2011) 51 Cal.4th 229, 232[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].
- Simple Assault ▶ Pen. Code, § 240.
- Simple Battery ▶ Pen. Code, § 242.

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

RELATED ISSUES

Any Act That Constitutes Sexual Assault

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

Calculating Age

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

Minor Perpetrator

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

Solicitation to Violate Section 288

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

Mistaken Belief About Victim’s Age

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

Multiple Lewd Acts

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

1125. Arranging Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(a)(1))

The defendant is charged [in Count __] with arranging a meeting with a minor for a lewd purpose [while having a prior conviction] [in violation of Penal Code section 288.4(a)(1)].

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

1. The defendant arranged a meeting with (a minor / [or] a person (he/she) believed to be a minor);
2. When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;

[AND]

3. At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior).

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

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

[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. ~~The touching need not be done in a lewd or sexual manner.~~ Lewd or lascivious behavior includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]

New August 2009; Revised April 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.

The court has a **sua sponte** duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(a)(1), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

Whether the defendant suffered a prior conviction for an offense listed in subsection (c) of section 290 is not an element of the offense and is subject to a severed jury trial. (Pen. Code, § 288.4(a)(2).) See CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements and Enumerated Offenses ▶ Pen. Code, § 288.4.
- Lewd Defined ▶ See *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].
- Calculating Age ▶ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2008 supp.) Sex Offenses and Crimes Against Decency, § 54A.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, 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).

1126. Going to Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(b))

The defendant is charged [in Count __] with going to a meeting with a minor for a lewd purpose [in violation of Penal Code section 288.4(b)].

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

1. The defendant arranged a meeting with (a minor/ [or] a person (he/she) believed to be a minor);
2. When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;
3. At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior);

AND

4. The defendant went to the arranged meeting place at or about the arranged time.

<Give the bracketed language at the beginning of the following sentence if instructing on other offenses mentioning children for which the definition given here does not apply>

[For the purposes of this instruction,] (A/a) child or minor is a person under the age of 18.

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

[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. ~~The touching need not be done in a lewd or sexual manner.~~ Lewd or lascivious behavior includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]

BENCH NOTES

Instructional Duty

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

It is unclear how violations of Pen. Code, § 288.4(b), which involve actually going to an arranged meeting, correlate to violations of Pen. Code, § 288.4(a) (cf. CALCRIM No. 1125, *Arranging Meeting With Minor for Lewd Purpose*). Violations of section 288.4(a) may be lesser included offenses of violations of section 288.4(b). In the alternative, a violation of section 288.4(b) could be characterized as sentence enhancement of a violation of section 288.4(a). This matter must be left to the trial court's discretion until courts of review provide guidance.

The court has a **sua sponte** duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(b), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

AUTHORITY

- Elements and Enumerated Offenses ▶ Pen. Code, § 288.4.
- Lewd Defined ▶ See *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].
- Calculating Age ▶ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Meaning of Child and Minor ▶ *People v. Yuksel* (2012) 207 Cal.App.4th 850, 854-855 [143 Cal.Rptr.3d 822].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Sex Offenses and Crimes Against Decency, § 54A.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, 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).

1152. Child Procurement (Pen. Code, § 266j)

The defendant is charged [in Count __] with (providing/causing) a child to engage in a lewd or lascivious act [in violation of Penal Code section 266j].

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

<Alternative 1A—gave/transported a child>

1. The defendant intentionally (gave/transported/provided/made available) a child to someone else so the person could engage in a lewd or lascivious act with that child;

<Alternative 1B—offered to give/transport a child>

1. The defendant offered to (give/transport/provide/make available) a child to someone else so the person could engage in a lewd or lascivious act with that child;

<Alternative 1C—caused child to engage in>

1. The defendant (caused/persuaded/induced) a child to engage in a lewd or lascivious act with someone else;

[AND]

2. When the defendant acted, the child was under the age of 16 years(;/.)

<Give element 3 when instructing on “offered.”>

[AND]

3. When the defendant made the offer, (he/she) intended to (give/transport/provide/make available) a child to someone else so the person could engage in a lewd or lascivious act with that child.]

A *lewd or lascivious act* is any touching of a child with the intent to sexually arouse either the perpetrator or the child. **The touching need not be done in a lewd or sexual manner.** Contact with the child’s bare skin or private parts is not required. Any part of the child’s body or the clothes the child is wearing may be touched. [A *lewd or lascivious act* includes causing a child to touch his or her own body or someone else’s body at the instigation of the other person who has the required intent.]

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

New January 2006 *[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 element 1, give the appropriate alternative A–C depending on the evidence in the case. When giving alternative 1B, “offered,” give element 3 as well.

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].)

Related Instructions

See CALCRIM Nos. 1110–1112, relating to lewd and lascivious acts in violation of Penal Code section 288.

AUTHORITY

- Elements ▶ Pen. Code, § 266j.
- Any Touching of Child With Intent to Arouse ▶ *People v. Martinez* (1995) 11 Cal.4th 434, 443–445, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [in context of Pen. Code, § 288; 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 Request ▶ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] [“constructive” touching; approving *Austin* instruction in context of Pen. Code, § 288]; *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].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 39, 45–46.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Attempted Child Procurement ▶ Pen. Code, §§ 664, 266j.

RELATED ISSUES

Corroboration Not Required

A minor victim is not an accomplice and the jury need not be instructed that the minor's testimony requires corroboration. (*People v. Mena* (1988) 206 Cal.App.3d 420, 425 [254 Cal.Rptr. 10].)

See CALCRIM Nos. 1110–1112, relating to lewd and lascivious acts in violation of Penal Code section 288.

1126. Going to Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(b))

The defendant is charged [in Count __] with going to a meeting with a minor for a lewd purpose [in violation of Penal Code section 288.4(b)].

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

1. The defendant arranged a meeting with (a minor/ [or] a person (he/she) believed to be a minor);
2. When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;
3. At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior);

AND

4. The defendant went to the arranged meeting place at or about the arranged time.

<Give the bracketed language at the beginning of the following sentence if instructing on other offenses mentioning children for which the definition given here does not apply>

[For the purposes of this instruction,] (A/a) child or minor is a person under the age of 18.

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

[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. ~~The touching need not be done in a lewd or sexual manner.~~ Lewd or lascivious behavior includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]

BENCH NOTES

Instructional Duty

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

It is unclear how violations of Pen. Code, § 288.4(b), which involve actually going to an arranged meeting, correlate to violations of Pen. Code, § 288.4(a) (cf. CALCRIM No. 1125, *Arranging Meeting With Minor for Lewd Purpose*). Violations of section 288.4(a) may be lesser included offenses of violations of section 288.4(b). In the alternative, a violation of section 288.4(b) could be characterized as sentence enhancement of a violation of section 288.4(a). This matter must be left to the trial court's discretion until courts of review provide guidance.

The court has a **sua sponte** duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(b), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

AUTHORITY

- Elements and Enumerated Offenses ▶ Pen. Code, § 288.4.
- Lewd Defined ▶ See *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].
- Calculating Age ▶ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Meaning of Child and Minor ▶ *People v. Yuksel* (2012) 207 Cal.App.4th 850, 854-855 [143 Cal.Rptr.3d 822].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Sex Offenses and Crimes Against Decency, § 54A.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, 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).

1191. Evidence of Uncharged Sex Offense

The People presented evidence that the defendant committed the crime[s] of _____ *<insert description of offense[s]>* that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

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

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

New January 2006; Revised April 2008 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727] [in context of prior acts of domestic violence]; but see *CJER*

Mandatory Criminal Jury Instructions Handbook (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.1112(e) [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

Evidence Code section 1108(a) provides that “evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101.” Subdivision (d)(1) defines “sexual offense” as “a crime under the law of a state or of the United States that involved any of the following[,]” listing specific sections of the Penal Code as well as specified sexual conduct. In the first sentence, the court must insert the name of the offense or offenses allegedly shown by the evidence. The court **must** also instruct the jury on elements of the offense or offenses.

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

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

Related Instructions

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

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

CALCRIM No. 853, *Evidence of Uncharged Abuse to Elder or Dependent Person.*

AUTHORITY

- Instructional Requirement ▶ Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- CALCRIM No. 1191 Upheld ▶ *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [57 Cal.Rptr.3d 922]; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 [62 Cal.Rptr.3d 848].
- Sexual Offense Defined ▶ Evid. Code, § 1108(d)(1).

- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [same].
- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity ▶ *People v. Villatoro* (2012) 54 Cal.4th 1152, ____ [add parallel cites].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 96–97.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:9 (The Rutter Group).

COMMENTARY

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

If you decide that the defendant committed the other sexual offense[s], you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <insert charged sex offense>.

Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of _____ <insert charged sex offense>. The People must still prove (the/each) _____(charge/[and] allegation) of _____ <insert charged sex offense> beyond a reasonable doubt.

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra*, 55 Cal.App.4th at pp. 184–185).

Expert Testimony

Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution's case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496 [92 Cal.Rptr.2d 884] [expert testified on ultimate issue of abnormal sexual interest in child].)

Rebuttal Evidence

When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

Subsequent Offenses Admissible

“[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108.” (*People v. Medina* (2003) 114 Cal.App.4th 897, 903 [8 Cal.Rptr.3d 158].)

Evidence of Acquittal

If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663 [14 Cal.Rptr.3d 534].)

See also the Related Issues section of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

**1200. Kidnapping: For Child Molestation (Pen. Code, §§ 207(b),
288(a))**

The defendant is charged [in Count ___] with kidnapping for the purpose of child molestation [in violation of Penal Code section 207(b)].

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

1. The defendant (persuaded/hired/enticed/decoyed/ [or] seduced by false promises or misrepresentations) a child younger than 14 years old to go somewhere;
2. When the defendant did so, (he/she) intended to commit a lewd or lascivious act on the child;

AND

3. As a result of the defendant's conduct, the child then moved or was moved a substantial distance.

[As used here, *substantial distance* means more than a slight or trivial distance. The movement must have **substantially** increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the molestation. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.]

As used here, a *lewd or lascivious act* is any touching of a child with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of either the perpetrator or the child. The touching does not need to be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched. [A *lewd or lascivious act* includes causing a child to touch his or her own body, the perpetrator's body, or someone else's body at the instigation of a perpetrator who has the required intent.]

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

New January 2006; Revised February 2012 *[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.

Give this instruction when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act. Give CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*, when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement.

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].)

Related Instructions

Kidnapping with intent to commit a rape or other specified sex crimes is a separate offense under Penal Code section 209(b). (*People v. Rayford* (1994) 9 Cal.4th 1, 8–11 [36 Cal.Rptr.2d 317, 884 P.2d 1369].) See CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions based on violations of Penal Code section 288, see CALCRIM No. 1110, *Lewd or Lascivious Acts: Child Under 14*, and the following instructions in that series.

AUTHORITY

- Elements ▶ Pen. Code, §§ 207(b), 288(a).
- Increased Prison Term If Victim Under 14 Years of Age ▶ Pen. Code, § 208(b).
- Asportation Requirement ▶ See *People v. Rayford* (1994) 9 Cal.4th 1, 11–14, 20 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225].

- Lewd or Lascivious Acts Defined ▶ *People v. Martinez* (1995) 11 Cal.4th 434, 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]; *People v. Levesque* (1995) 35 Cal.App.4th 530, 538–542 [41 Cal.Rptr.2d 439]; *People v. Marquez* (1994) 28 Cal.App.4th 1315, 1321–1326 [33 Cal.Rptr.2d 821].
- ~~Substantial Distance Requirement ▶ See *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].~~

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 246, 247, 255.

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.14[1][a], [3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Kidnapping ▶ Pen. Code, § 207.
- Attempted Kidnapping ▶ Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].

False imprisonment is a lesser included offense if there is an unlawful restraint of the child. (See Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338].)

Kidnapping

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

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

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

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

[AND]

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

<Give element 7 if instructing on reasonable belief in consent.>

[AND]

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

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

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

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

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

<Defense: Good Faith Belief in Consent>

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

<Defense: Consent Given>

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

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

New January 2006; Revised June 2007, April 2008 [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 addition, the court has a **sua sponte** duty to instruct on the elements of the alleged underlying crime.

Give the bracketed definition of “consent” on request.

Defenses—Instructional Duty

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

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

Timing of Necessary Intent

No court has specifically stated whether the necessary intent must precede all movement of the victim, or only one phase of it involving an independently adequate asportation.

Related Instructions

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

AUTHORITY

- Elements ▶ Pen. Code, § 209(b); *People v. Rayford* (1994) 9 Cal.4th 1, 12–14, 22 [36 Cal.Rptr.2d 317, 884 P.2d 1369] [following modified two-prong *Daniels* test for movement necessary for aggravated kidnapping]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 168 [112 Cal.Rptr.2d 826].
- Robbery Defined ▶ Pen. Code, § 211.
- Rape Defined ▶ Pen. Code, § 261.
- Other Sex Offenses Defined ▶ Pen. Code, §§ 262 [spousal rape], 264.1 [acting in concert], 286 [sodomy], 288a [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking ▶ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery ▶ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim ▶ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear ▶ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].
- Movement ~~Must Need Not~~No Longer Must Substantially Increase Risk of Harm to Victim ▶ *People v. Robertson*~~*Dominguez*~~ (2006) ~~12 Cal.App.4th 39~~12 Cal.App.4th 1141, 1153 [~~47 Cal.Rptr.3d 575, 140 P.3d 866~~][insert final cites when available].
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent ▶ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d

92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].

Secondary Sources

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

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Psychological Harm

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

1204. Kidnapping: During Carjacking (Pen. Code, §§ 207(a), 209.5(a), (b), 215(a))

The defendant is charged [in Count ___] with kidnapping during a carjacking [in violation of Penal Code section 209.5].

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

1. The defendant committed a carjacking;
2. During the carjacking, the defendant took, held, or detained another person by using force or by instilling reasonable fear;
3. The defendant moved the other person or made that person move a substantial distance from the vicinity of the carjacking;
4. The defendant moved or caused the other person to move with the intent to facilitate the carjacking [or to help (himself/herself) escape/or to prevent the other person from sounding an alarm];
5. The person moved was not one of the carjackers;

[AND]

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

<Give element 7 when instructing on reasonable belief in consent.>

[AND]

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

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

<Defense: Good Faith Belief in Consent>

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

movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>

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

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

To decide whether the defendant committed carjacking, please refer to the separate instructions that I (will give/have given) you on that crime.

[As used here, *substantial distance* means more than a slight or trivial distance. The movement must have been more than merely brief and incidental to the commission of the carjacking. The movement must also have **substantially** increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the carjacking. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.]

[*Fear*, as used in this instruction, means fear of injury to the person or injury to the person's family or property.] [It also means fear of immediate injury to another person present during the incident or to that person's property.]

New January 2006 *[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. The court also has a **sua sponte** duty to instruct on the elements of carjacking. Give CALCRIM No. 1650, *Carjacking*.

Give the bracketed definition of “consent” on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) An optional paragraph is provided for this purpose, “Defense: Consent Given.”

The court has a **sua sponte** duty to instruct on the defendant’s reasonable and actual belief in the victim’s consent to go with the defendant, if supported by the evidence. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) Give bracketed element 7 and the paragraph “Defense: Good Faith Belief in Consent.”

AUTHORITY

- Elements ▶ Pen. Code, §§ 207(a), 209.5(a), (b), 215(a).
- Force or Fear Requirement ▶ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820] [fear must be reasonable].
- Incidental Movement ▶ See *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Increased Risk of Harm ▶ *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415 [124 Cal.Rptr.2d 92].
- Intent to Facilitate Commission of Carjacking ▶ *People v. Perez* (2000) 84 Cal.App.4th 856, 860–861 [101 Cal.Rptr.2d 376].
- Substantial Distance Requirement ▶ *People v. Ortiz* (2002) 101 Cal.App.4th 410 [124 Cal.Rptr.2d 92]; *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877].
- Vicinity of Carjacking ▶ *People v. Moore* (1999) 75 Cal.App.4th 37, 43–46 [88 Cal.Rptr.2d 914].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 276.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10A, 142.14 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Carjacking ▶ Pen. Code, § 215(a); *People v. Jones* (1999) 75 Cal.App.4th 616, 624–626 [89 Cal.Rptr.2d 485]; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765 [64 Cal.Rptr.2d 233] [Pen. Code, § 209.5 requires completed offense of carjacking].
- Attempted Carjacking ▶ Pen. Code, §§ 664, 215(a); *People v. Jones* (1999) 75 Cal.App.4th 616, 626 [89 Cal.Rptr.2d 485].
- False Imprisonment ▶ Pen. Code, §§ 236, 237; see *People v. Russell* (1996) 45 Cal.App.4th 1083, 1088–1089 [53 Cal.Rptr.2d 241]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

An unlawful taking or driving of a vehicle with an intent to temporarily deprive the owner of possession (Veh. Code, § 10851(a)) is not a necessarily included lesser offense or a lesser related offense of kidnapping during a carjacking. (*People v. Russell* (1996) 45 Cal.App.4th 1083, 1088–1091 [53 Cal.Rptr.2d 241] [evidence only supported finding of kidnapping by force or fear; automobile joyriding formerly governed by Pen. Code, § 499b].)

Grand theft is not a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].)

RELATED ISSUES

Dominion and Control

Carjacking can occur when a defendant forcibly takes a victim's car keys, not just when a defendant takes a car from the victim's presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [victim was not physically present when defendant drove car away].)

1205–1214. Reserved for Future Use

1700. Burglary (Pen. Code, § 459)

The defendant is charged [in Count ___] with burglary [in violation of Penal Code section 459].

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

- 1. The defendant entered (a/an) (building/room within a building/locked vehicle/_____ <insert other statutory target>);**

AND

- 2. When (he/she) entered (a/an) (building/room within the building/locked vehicle/_____ <insert other statutory target>), (he/she) intended to commit (theft/ [or] _____ <insert one or more felonies>).**

To decide whether the defendant intended to commit (theft/ [or] _____ <insert one or more felonies>), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

<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 burglary, it is burglary of the second degree.]

A burglary was committed if the defendant entered with the intent to commit (theft/ [or] _____ <insert one or more felonies>). The defendant does not need to have actually committed (theft/ [or] _____ <insert one or more felonies>) as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/ [or] _____ <insert one or more felonies>).]

[Under the law of burglary, a person *enters a building* if some part of his or her body [or some object under his or her control] penetrates the area inside the building's outer boundary.]

[A building's *outer boundary* includes the area inside a window screen.]

[An attached balcony designed to be entered only from inside of a private, residential apartment on the second or higher floor of a building is ~~within~~inside a building's outer boundary.]

[The People allege that the defendant intended to commit (theft/ [or] _____ <insert one or more felonies>). You may not find the defendant guilty of burglary unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes (he/she) intended.]

New January 2006; Revised October 2010, February 2012 [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.

If second degree burglary is the only possible degree of burglary that the jury may return as their verdict, do not give CALCRIM No. 1701, *Burglary: Degrees*.

Although actual commission of the underlying theft or felony is not an element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903]), the court has a **sua sponte** duty to instruct that the defendant must have intended to commit a felony and has a **sua sponte** duty to define the elements of the underlying felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706 [144 Cal.Rptr. 330]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432].) Give all appropriate instructions on theft or the felony alleged.

If the area alleged to have been entered is something other than a building or locked vehicle, insert the appropriate statutory target in the blanks in elements 1 and 2. Penal Code section 459 specifies the structures and places that may be the targets of burglary. The list includes a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home as defined in Health and Safety Code section 18075.55(d), railroad car, locked or sealed cargo container whether or not mounted on a vehicle, trailer coach as defined in Vehicle Code section 635, house car as defined in Vehicle Code section 362, inhabited camper as defined in Vehicle Code section 243, locked vehicle as defined by the Vehicle Code, aircraft as defined in Public

Utilities Code section 21012, or mine or any underground portion thereof. (See Pen. Code, § 459.)

On request, give the bracketed paragraph that begins with “Under the law of burglary,” if there is evidence that only a portion of the defendant’s body, or an instrument, tool, or other object under his or control, entered the building. (See *People v. Valencia* (2002) 28 Cal.4th 1, 7–8 [120 Cal.Rptr.2d 131, 46 P.3d 920]; *People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083].)

On request, give the bracketed sentence defining “outer boundary” if there is evidence that the outer boundary of a building for purposes of burglary was a window screen. (See *People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].)

Whenever a private, residential apartment and its balcony are on the second or higher floor of a building, and the balcony is designed to be entered only from inside the apartment, that balcony is part of the apartment and its railing constitutes the apartment’s “outer boundary.” (*People v. Yarbrough* (2012) 54 Cal.4th 889, 894 [___ Cal.Rptr.2d ___, 281 P.3d 68.])

If multiple underlying felonies are charged, give the bracketed paragraph that begins with “The People allege that the defendant intended to commit either.” (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

If the defendant is charged with first degree burglary, give CALCRIM No. 1701, *Burglary: Degrees*.

AUTHORITY

- Elements ▶ Pen. Code, § 459.

- Instructional Requirements ▶ *People v. Failla* (1966) 64 Cal.2d 560, 564, 568–569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Smith* (1978) 78 Cal.App.3d 698, 706–711 [144 Cal.Rptr. 330]; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903].
- Burden for Consent Defense Is to Raise Reasonable Doubt ▶ *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1308–1309 [128 Cal.Rptr.3d 255].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 113, 115.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.10 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Burglary ▶ Pen. Code, §§ 663, 459.
- Tampering With a Vehicle ▶ Veh. Code, § 10852; *People v. Mooney* (1983) 145 Cal.App.3d 502, 504–507 [193 Cal.Rptr. 381] [if burglary of automobile charged].

RELATED ISSUES

Auto Burglary–Entry of Locked Vehicle

Under Penal Code section 459, forced entry of a locked vehicle constitutes burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 863 [57 Cal.Rptr.2d 12].) However, there must be evidence of forced entry. (See *People v. Woods* (1980) 112 Cal.App.3d 226, 228–231 [169 Cal.Rptr. 179] [if entry occurs through window deliberately left open, some evidence of forced entry must exist for burglary conviction]; *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [pushing open broken wing lock on window, reaching one’s arm inside vehicle, and unlocking car door evidence of forced entry].) Opening an unlocked passenger door and lifting a trunk latch to gain access to the trunk is not an auto burglary. (*People v. Allen* (2001) 86 Cal.App.4th 909, 917–918 [103 Cal.Rptr.2d 626].)

Auto Burglary–Definition of Locked

To lock, for purposes of auto burglary, is “to make fast by interlinking or interlacing of parts ... [such that] some force [is] required to break the seal to permit entry” (*In re Lamont R.* (1988) 200 Cal.App.3d 244, 247 [245 Cal.Rptr. 870], quoting *People v. Massie* (1966) 241 Cal.App.2d 812, 817 [51

Cal.Rptr. 18] [vehicle was not locked where chains were wrapped around the doors and hooked together]; compare *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [vehicle with locked doors but broken wing lock that prevented window from being locked, was for all intents and purposes a locked vehicle].)

Auto Burglary–Intent to Steal

Breaking into a locked car with the intent to steal the vehicle constitutes auto burglary. (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461 [25 Cal.Rptr.2d 296]; see also *People v. Blalock* (1971) 20 Cal.App.3d 1078, 1082 [98 Cal.Rptr. 231] [auto burglary includes entry into locked trunk of vehicle].) However, breaking into the headlamp housings of an automobile with the intent to steal the headlamps is not auto burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 864 [57 Cal.Rptr.2d 12] [stealing headlamps, windshield wipers, or hubcaps are thefts, or attempted thefts, auto tampering, or acts of vandalism, not burglaries].)

Building

A building has been defined for purposes of burglary as “any structure which has walls on all sides and is covered by a roof.” (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672].) Courts have construed “building” broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133 Cal.App.3d 200, 204–205 [183 Cal.Rptr. 773].) However, the definition of building is not without limits and courts have focused on “whether the nature of a structure’s composition is such that a reasonable person would expect some protection from unauthorized intrusions.” (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672] [open pole barn is not a building]; see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–1424 [252 Cal.Rptr. 17] [electric company’s “gang box,” a container large enough to hold people, is not a building; such property is protected by Penal Code sections governing theft].)

Outer Boundary

A building’s outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. Under this test, a window screen is part of the outer boundary of a building for purposes of burglary. (*People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].) Whether penetration into an area behind a window screen amounts to an entry of a building within the meaning of the burglary statute is a question of law. The instructions must resolve such a legal issue for the jury. (*Id.* at p. 16.)

Attached Residential Balconies

An attached residential balcony is part of an inhabited dwelling. (*People v. Jackson* (2010) 190 Cal.App.4th 918, 924–925 [118 Cal.Rptr.3d 623] [balcony

was “functionally interconnected to and immediately contiguous to . . . [part of] the apartment . . . used for ‘residential activities’”]; but see dictum in *People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. 5 [120 Cal.Rptr.2d 131, 46 P.3d 920] [“unenclosed balcony” is not structure satisfying “reasonable belief test”).]

Theft

Any one of the different theories of theft will satisfy the larcenous intent required for burglary. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 29–30 [219 Cal.Rptr. 707] [entry into building to use person’s telephone fraudulently]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30–31 [46 Cal.Rptr.2d 840].)

Burglarizing One’s Own Home—Possessory Interest

A person cannot burglarize his or her own home as long as he or she has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [125 Cal.Rptr. 773, 542 P.2d 1365].) However, a family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she has no claim of a right to enter that residence. (*In re Richard M.* (1988) 205 Cal.App.3d 7, 15–16 [252 Cal.Rptr. 36] [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent’s home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–893 [268 Cal.Rptr. 501] [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People v. Sears* (1965) 62 Cal.2d 737, 746 [44 Cal.Rptr. 330, 401 P.2d 938], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 510 [20 Cal.Rptr.2d 582, 853 P.2d 1037] [burglary conviction proper where husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, 712–714 [170 Cal.Rptr. 292] [husband had unconditional possessory interest in jointly owned home; his access to the house was not limited and strictly permissive, as in *Sears*].)

Consent

While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1302 [128 Cal.Rptr.3d 255]; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [253 Cal.Rptr. 316] [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be buyers, no burglary occurred].) The consent must be express and clear; the owner/occupant must both expressly permit the person to enter and know of the felonious or larcenous intent of the invitee. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860].) A person who enters for a felonious purpose, however, may be found guilty of burglary even if he or she enters with the owner’s or occupant’s consent. (*People v. Frye* (1998) 18 Cal.4th 894, 954 [77 Cal.Rptr.2d 25, 959 P.2d 183] [no evidence of unconditional possessory right to enter].) A joint property owner/occupant

cannot give consent to a third party to enter and commit a felony on the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 420–423 [76 Cal.Rptr.2d 536] [husband’s consent did not preclude a burglary conviction based upon defendant’s entry of premises with the intent to murder wife].) The defense of consent is established when the evidence raises a reasonable doubt of consent by the owner or occupant. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1309 [128 Cal.Rptr.3d 255]).

Entry by Instrument

When an entry is made by an instrument, a burglary occurs if the instrument passes the boundary of the building and if the entry is the type that the burglary statute intended to prohibit. (*People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083] [placing forged check in chute of walk-up window of check-cashing facility was not entry for purposes of burglary] disapproving of *People v. Ravenscroft* (1988) 198 Cal.App.3d 639, 643–644 [243 Cal.Rptr. 827] [insertion of ATM card into machine was burglary].)

Multiple Convictions

Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–318 [256 Cal.Rptr. 64], the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099 [236 Cal.Rptr. 822] [multiple penetration case]: “ ‘[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by the defendant] is nevertheless renewed, a new and separate crime is committed.’ ” (*In re William S.*, *supra*, 208 Cal.App.3d at p. 317.) The court in *In re William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce “absurd results.” The court gave this example: where “a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts.” (*Ibid.*) The *In re William S.* test has been called into serious doubt by *People v. Harrison* (1989) 48 Cal.3d 321, 332–334 [256 Cal.Rptr. 401, 768 P.2d 1078], which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison*, *supra*, 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568 [57 Cal.Rptr.2d 774], a burglary case, agreed with *In re William S.* to the extent that burglary is analogous to crimes of sexual penetration. Following *Harrison*, the court held that each separate entry into a building or structure with the requisite intent is a burglary even if multiple entries are made into the same building or as part of the same plan. (*People v. Washington*, *supra*, 50 Cal.App.4th at pp. 574–579; see also 2 Witkin and Epstein, Cal. Criminal Law (2d. ed. 1999 Supp.) “Multiple Entries,” § 662A, p. 38.) The court further stated that any “concern about absurd results are [sic] better resolved under [Penal Code] section 654, which limits the punishment for separate offenses committed during a single transaction, than by [adopting] a

rule that, in effect, creates the new crime of continuous burglary.” (*People v. Washington*, *supra*, 50 Cal.App.4th at p. 578.)

Room

Penal Code section 459 includes “room” as one of the areas that may be entered for purposes of burglary. (Pen. Code, § 459.) An area within a building or structure is considered a room if there is some designated boundary, such as a partition or counter, separating it from the rest of the building. It is not necessary for the walls or partition to touch the ceiling of the building. (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257–1258 [263 Cal.Rptr. 183] [office area set off by counters was a room for purposes of burglary].) Each unit within a structure may constitute a separate “room” for which a defendant can be convicted on separate counts of burglary. (*People v. O’Keefe* (1990) 222 Cal.App.3d 517, 521 [271 Cal.Rptr. 769] [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [264 Cal.Rptr. 49] [separate business offices in same building].)

Entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after entry into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289] [“the unadorned word ‘room’ in section 459 reasonably must be given its ordinary meaning”]; see *People v. McCormack* (1991) 234 Cal.App.3d 253, 255–257 [285 Cal.Rptr. 504]; *People v. Young* (1884) 65 Cal. 225, 226 [3 P. 813].) However, entry into multiple rooms within one apartment or house cannot support multiple burglary convictions unless it is established that each room is a separate dwelling space, whose occupant has a separate, reasonable expectation of privacy. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575 [11 Cal.Rptr.3d 802]; see also *People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2 [1 Cal.Rptr.2d 434].)

Temporal or Physical Proximity—Intent to Commit the Felony

According to some cases, a burglary occurs “if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction.” (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [23 Cal.Rptr. 734] [defendant entered office with intent to steal tires from attached open-air shed].) This test was followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932 [102 Cal.Rptr. 266] [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–232 [214 Cal.Rptr. 82] [defendant entered lobby of apartment building, intending to burglarize one of the units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696 [14 Cal.Rptr.2d 246] [defendant entered a home to facilitate the crime of extortion].

However, in *People v. Kwok* (1998) 63 Cal.App.4th 1236 [75 Cal.Rptr.2d 40], the court applied a less restrictive test, focusing on just the facilitation factor. A burglary is committed if the defendant enters a building in order to facilitate commission of theft or a felony. The defendant need not intend to commit the target crime in the same building or on the same occasion as the entry. (*People v. Kwok, supra*, 63 Cal.App.4th at pp. 1246–1248 [defendant entered building to copy a key in order to facilitate later assault on victim].) The court commented that “the ‘continuous transaction test’ and the ‘immediate vicinity test’ . . . are artifacts of the particular factual contexts of *Wright*, *Nance*, and *Nunley*.” (*Id.* at p. 1247.) With regards to the *Ortega* case, the *Kwok* court noted that even though the *Ortega* court “purported to rely on the ‘continuous transaction’ factor of *Wright*, [the decision] rested principally on the ‘facilitation’ factor.” (*Id.* at pp. 1247–1248.) While *Kwok* and *Ortega* dispensed with the elemental requirements of spatial and temporal proximity, they did so only where the subject entry is “closely connected” with, and is made in order to facilitate, the intended crime. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749 [109 Cal.Rptr.2d 273].)

1807. Theft From Elder or Dependent Adult (Pen. Code, § 368(d), (e))

The defendant is charged [in Count __] with theft of property from (an elder/a dependent adult) [in violation of Penal Code section 368].

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

1. The defendant committed (theft[,]/ embezzlement[,]/ forgery[,]/ fraud[,]/ [or] identity theft);
2. The (property taken/ [or] personal identifying information used) was (owned by/that of) (an elder/a dependent adult);

<Do not give element 3 in misdemeanor cases where the value is \$950 or less>

3. [The property, goods, or services obtained was worth more than \$950; ~~(more than \$950/\$950 or less)~~];

AND

<Alternative 4A—defendant not caretaker>

- [4. The defendant knew or reasonably should have known that the (owner of the property/person to whom the identifying information belonged) was (an elder/a dependent adult).]

[OR]

<Alternative 4B—defendant caretaker>

- [4. The defendant was a caretaker of the (elder/dependent adult).]

To decide whether the defendant committed (theft[,]/ embezzlement[,]/ forgery[,]/ fraud[,]/ [or] identity theft), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights.] [This definition includes an adult who has physical or developmental disabilities or whose physical or

mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a [psychiatric] health facility [or chemical dependency recovery hospital/ or _____ <insert relevant type of health facility from Health & Safety Code, § 1250>] that provides 24-hour inpatient care.]

[A *caretaker* is someone who has the care, custody, or control of (a/an) (elder/dependent adult), or is someone who stands in a position of trust with (a/an) (elder/dependent adult).]

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

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

New January 2006; Revised February 2012 [*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. The court also has a **sua sponte** duty to instruct on the elements of the underlying theft offense.

In element 3, if the defendant is charged with taking property valued at more than \$950, give the phrase “more than \$950.” (See Pen. Code, § 368(d), (e).) Otherwise, give the phrase “\$950 or less.”

If the person charged is not alleged to be a caretaker (see Pen. Code, § 368(i)), give alternative 4A. If the person charged stipulated to be a caretaker, give alternative 4B. If it is in dispute whether the person charged is a caretaker, give both alternatives 4A and 4B and the bracketed paragraph defining caretaker.

Give the bracketed definition of “elder” or “dependent adult” (see Pen. Code, § 368(g), (h)) on request depending on the evidence in the case. Give the second and/or third bracketed sentences of the definition of “dependent adult” if a further definition is requested.

The definition of “property” may be given on request. (See Pen. Code, § 368(d), (e).)

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, § 368(d), (e).
- Caretaker Defined ▶ Pen. Code, § 368(i).
- Dependent Adult Defined ▶ Pen. Code, § 368(h).
- Elder Defined ▶ Pen. Code, § 368(g).
- 24-Hour Health Facility ▶ Health & Saf. Code, §§ 1250, 1250.2, 1250.3.

Secondary Sources

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 143, *Crimes Against Property*, § 143.01[1], [4][h] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Theft From Elder or Dependent Adult ▶ Pen. Code, §§ 664, 368(d), (e).
- Theft ▶ Pen. Code, § 484.

1808–1819. Reserved for Future Use

2160. Fleeing the Scene Following Accident: Enhancement for Vehicular Manslaughter (Veh. Code, § 20001(c))

If you find the defendant guilty of vehicular manslaughter [as a felony] [under Count ___], you must then decide whether the People have proved the additional allegation that the defendant fled the scene of the accident after committing vehicular manslaughter [in violation of Vehicle Code section 20001(c)].

To prove this allegation, the People must prove that:

1. The defendant knew that (he/she) had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];

AND

2. The defendant willfully ~~failed to immediately stop at~~fled the scene of the accident.

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

~~The duty to immediately stop means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.~~

[To be *involved in an accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006 *[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 sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged with an enhancement under Vehicle Code section 20001(c). This enhancement only applies to felony vehicular manslaughter convictions (Pen. Code, §§ 191.5, 192(c)(1) & (3), and 192.5(a) & (c)) and must be pleaded and proved. (Veh. Code, § 20001(c).) Give the bracketed “felony” in the introductory paragraph if the jury is also being instructed on misdemeanor vehicular manslaughter.

Give the bracketed paragraph defining “involved in an accident” if that is an issue in the case.

~~The court must determine whether to apply this enhancement only to individuals who personally commit the vehicular manslaughter. A depublished case would have precluded giving this instruction if the People allege that the defendant aided and abetted but did not personally commit the manslaughter. (*People v. Calhoun* (2004) 123 Cal.App.4th 1031, 1044, review granted and depublished, Nov. 2, 2004, D042645 [24 Cal.Rptr.3d 865, 106 P.3d 304].)~~

AUTHORITY

- Enhancement ▶ Veh. Code, § 20001(c).
- Knowledge of Accident and Injury ▶ *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Willful Failure to Perform Duty ▶ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Involved Defined ▶ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Fleeing Scene of Accident ▶ *People v. Vela* (2012) 205 Cal.App.4th 942, 950 [140 Cal.Rptr.3d 755].
- First Element of This Instruction Cited With Approval ▶ ~~(2010)~~ *People v. Nordberg* (2010) 189 Cal.App.4th 1228, 1238 [117 Cal.Rptr.3d 558].

- ~~Immediately Stopped Defined ▶ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 245.

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

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2720. Assault by Prisoner Serving Life Sentence (Pen. Code, § 4500)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence [in violation of Penal Code section 4500].

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

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

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

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

5. The defendant acted with malice aforethought;

[AND]

<Alternative 6A—defendant sentenced to life term>

[6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]

<Alternative 6B—defendant sentenced to life and to determinate term>
[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

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

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

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

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

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

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

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

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

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

There are two kinds of *malice aforethought*, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for this crime.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill the person assaulted.

The defendant acted with *implied malice* if:

1. (He/She) intentionally committed an act.
2. The natural **and probable** consequences of the act were dangerous to human life.
3. At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life.

AND

4. (He/She) deliberately acted with conscious disregard for human life.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act is committed. It does not require deliberation or the passage of any particular period of time.

[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of (the Youth Authority/Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]

New January 2006 [[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 there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

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

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

On request, give the bracketed definition of “sentenced to a term in state prison.” Within that definition, give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

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

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless “the person subjected to such assault does not die within a year and a day after” the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense–Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

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

AUTHORITY

- Elements of Assault by Life Prisoner ▶ Pen. Code, § 4500.
- Elements of Assault With Deadly Weapon or Force Likely ▶ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Malice Equivalent to Malice in Murder ▶ *People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].
- Malice Defined ▶ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969].
- Ill Will Not Required for Malice ▶ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].

- Undergoing Sentence of Life ▶ *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 58–60.

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

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▶ Pen. Code, § 245; see *People v. St. Martin* (1970) 1 Cal.3d 524, 536 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault ▶ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

Note: In *People v. Noah* (1971) 5 Cal.3d 469, 476–477 [96 Cal.Rptr. 441, 487 P.2d 1009], the court held that assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner serving a life sentence, Penal Code section 4500. The court based its conclusion on the fact that Penal Code section 4501 includes as an element of the offense that the prisoner was not serving a life sentence. However, Penal Code section 4501 was amended, effective January 1, 2005, to remove this element. The trial court should, therefore, consider whether Penal Code section 4501 is now a lesser included offense to Penal Code section 4500.

RELATED ISSUES

Status as Life Prisoner Determined on Day of Alleged Assault

Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836]; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell)*, *supra*, 99 Cal.App.4th at p. 1341; *Graham v. Superior Court*, *supra*, 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life

This statute applies to “[e]very person undergoing a life sentence” (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836], the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating “a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had ‘nothing left to lose’ by committing the assault.” (*Ibid.*)

Error to Instruct on General Definition of Malice and General Intent

“Malice,” as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. (*Ibid.*)

2900. Vandalism (Pen. Code, § 594)

The defendant is charged [in Count ___] with vandalism [in violation of Penal Code section 594].

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

1. The defendant maliciously (defaced with graffiti or with other inscribed material[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property;

[AND]

2. The defendant (did not own the property/owned the property with someone else)(;/.)

<See Bench Notes regarding when to give element 3.>

[AND]

3. The amount of damage caused by the vandalism was \$400 or more.]

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

Grffiti or other inscribed material includes an unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.

| New January 2006; Revised June 2007 [\[insert date of council approval\]](#)

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 with a felony for causing \$400 or more in damage and the court is *not* instructing on the misdemeanor offense, give element 3. If the court *is* instructing on both the felony and the misdemeanor offenses, give

CALCRIM No. 2901, *Vandalism: Amount of Damage*, with this instruction. (Pen. Code, § 594(b)(1).) The court should also give CALCRIM No. 2901 if the defendant is charged with causing more than \$10,000 in damage under Penal Code section 594(b)(1).

In element 2, give the alternative language “owned the property with someone else” if there is evidence that the property was owned by the defendant jointly with someone else. (*People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722] [Pen. Code, § 594 includes damage by spouse to spousal community property].)

AUTHORITY

- Elements ▶ Pen. Code, § 594.
- Malicious Defined ▶ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Damage to Jointly Owned Property ▶ *People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722].
- [Wrongful Act Explained Need Not Be Directed at Victim](#) ▶ *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1282 [139 Cal.Rptr.3d 637].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Property, §§ 243–245.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 143, *Crimes Against Property*, § 143.11[2], Ch. 144, *Crimes Against Order*, § 144.03[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

This offense is a misdemeanor unless the amount of damage is \$400 or more. (Pen. Code, § 594(b)(1) & (2)(A).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. When instructing on both the felony and misdemeanor, the court must provide the jury with a verdict form on which the jury will indicate if the amount of damage has or has not been proved to be \$400 or more. If the jury finds that the damage has not been proved to be \$400 or more, then the offense should be set at a misdemeanor.

RELATED ISSUES

Lack of Permission Not an Element

The property owner's lack of permission is not an element of vandalism. (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1014 [34 Cal.Rptr.2d 864].)

Damage Need Not Be Permanent

To "deface" under Penal Code section 594 does not require that the defacement be permanent. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 944 [102 Cal.Rptr.2d 511] [writing on a glass window with a marker pen was defacement under the statute].)