Judicial Council of California Criminal Jury Instructions

CALCRIM

Supplement With Revised Instructions

As approved at the
August 2016 Judicial Council Meeting

Judicial Council of California
Advisory Committee on Criminal Jury Instructions

Hon. Sandy R. Kriegler, Chair

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121. Duty to Abide by Translation Provided in Court

<Alternative A—foreign language testimony>

Some testimony may be given in _____ <*insert name or description of language other than English*>. An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff).

<Alternative B—foreign language recording>

You (may/are about to) hear a recording [that is partially] in a foreign language. You will receive a transcript with an English language translation of that recording.

You must rely on the transcript, even if you understand the language in the recording. Do not retranslate the recording for other jurors. If you believe the transcript is incorrect, let me know immediately by writing a note and giving it to the (clerk/bailiff). [If the recording is partially in English, the English parts of the recording are the evidence.]

New January 2006; Revised February 2014, August 2016

BENCH NOTES

Instructional Duty

The committee recommends giving Alternative A of this instruction whenever testimony will be received with the assistance of an interpreter, though no case has held that the court has a sua sponte duty to give the instruction. The instruction may be given at the beginning of the case, when the person requiring translation testifies, or both, at the court's discretion. If the jury may hear a recording that is at least partially in a foreign language, the court may give Alternative B with the appropriate bracketed language, as needed.

If the court chooses, the instruction may also be modified and given again at the end of the case, with all other instructions.

It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238].) "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*Id.* at p. 304.)

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AUTHORITY

- Juror May Not Retranslate. *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303–304 [281 Cal.Rptr. 238].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation, § 55

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

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370. Motive

The People are not required to prove that the defendant had a motive to commit (any of the crimes/the crime) charged. In reaching your verdict you may, however, consider whether the defendant had a motive.

Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

The court does not have a sua sponte duty to instruct on motive. (*People v. Romo* (1975) 14 Cal.3d 189, 196 [121 Cal.Rptr. 111, 534 P.2d 1015] [not error to refuse instruction on motive].)

Do not give this instruction if motive is an element of the crime charged. (See, e.g., CALCRIM No. 1122, *Annoying or Molesting a Child.*) (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317].)

AUTHORITY

- Instructional Requirements. *People v. Romo* (1975) 14 Cal.3d 189, 195–196 [121 Cal.Rptr. 111, 534 P.2d 1015]; *People v. Young* (1970) 9 Cal.App.3d 106, 110 [87 Cal.Rptr. 767].
- Jury May Consider Motive. *People v. Brown* (1900) 130 Cal. 591, 594 [62 P. 1072]; *People v. Gonzales* (1948) 87 Cal.App.2d 867, 877–878 [198 P.2d 81].
- Proof of Presence or Absence of Motive Not Required. *People v. Daly* (1992) 8 Cal.App.4th 47, 59 [10 Cal.Rptr.2d 21]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017–1018 [80 Cal.Rptr.2d 676].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192–1193 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, § 4.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 281.

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, § 123.

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

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RELATED ISSUES

Entrapment Defense

The court should not instruct on motive if the defendant admits his guilt for the substantive crime and presents an entrapment defense, because in that instance his or her commission of the crime would not be an issue and motive would be irrelevant. (See *People v. Martinez* (1984) 157 Cal.App.3d 660, 669 [203 Cal.Rptr. 833]; *People v. Lee* (1990) 219 Cal.App.3d 829, 841 [268 Cal.Rptr. 595].)

No Conflict With Other Instructions

Motive, intent, and malice are separate and distinct mental states. Giving a motive instruction does not conflict with intent and malice instructions. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503–504 [117 Cal.Rptr.2d 45, 40 P.3d 754] [motive describes the reason a person chooses to commit a crime]; *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098 [24 Cal.Rptr.2d 922].) Similarly, a motive instruction that focuses on guilt does not conflict with a special circumstance instruction, which the jury is directed to find true or not true. (*People v. Heishman* (1988) 45 Cal.3d 147, 178 [246 Cal.Rptr. 673, 753 P.2d 629] [defendant argued motive to prevent victim from testifying was at core of special circumstance].) A torture murder instruction that requires an intent to cause cruel pain or suffering for the purpose of revenge, extortion, or any sadistic purpose also does not conflict with the motive instruction. The torture murder instruction does not elevate motive to the status of an element of the crime. It simply makes explicit the treatment of motive as an element of proof in torture murder cases. (*People v. Lynn* (1984) 159 Cal.App.3d 715, 727–728 [206 Cal.Rptr. 181].)

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375. Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.

<Introductory Sentence Alternative A—evidence of other offense admitted>

[The People presented evidence that the defendant committed ((another/other) offense[s]/the offense[s] of _____ *<insert description of alleged offense[s]>*) **that (was/were) not charged in this case.]**

<Introductory Sentence Alternative B—evidence of other act admitted>

[The People presented evidence (of other behavior by the defendant that was not charged in this case/that the defendant _____ *<insert description of alleged conduct admitted under Evid. Code, § 1101(b)>*).]

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]/act[s]). Proof by a preponderance of the evidence is a different burden of proof than 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, you must disregard this evidence entirely.

If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether:

<Select specific grounds of relevance and delete all other options.>

<A. Identity>

[The defendant was the person who committed the offense[s] alleged in this case](./; or)

<B. Intent>

[The defendant acted with the intent to _____ *<insert specific intent required to prove the offense[s] alleged>* **in this case](./; or)**

<C. Motive>

[The defendant had a motive to commit the offense[s] alleged in this case](./; or)

<D. Knowledge>

[The defendant knew _____ *<insert knowledge required to prove the offense[s] alleged>* **when (he/she) allegedly acted in this case](./; or)**

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<E. Accident>

[The defendant's alleged actions were not the result of mistake or accident](./; or)

<F. Common Plan>

[The defendant had a plan [or scheme] to commit the offense[s] alleged in this case](./; or)

<G. Consent>

[The defendant reasonably and in good faith believed that _____ *<insert name or description of complaining witness>* **consented](./; or)**

<H. Other Purpose>

[The defendant _____ *<insert description of other permissible purpose; see Evid. Code, § 1101(b)>***.]**

[In evaluating this evidence, consider the similarity or lack of similarity between the uncharged (offense[s]/ [and] act[s]) and the charged offense[s].]

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>***].**

[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]

If you conclude that the defendant committed the (uncharged offense[s]/ act[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 charge[s]>* **[or that the** _____ *<insert allegation[s]>* **has been proved]. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

New January 2006; Revised April 2008, February 2016, August 2016

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced. (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].) The court is only required to give this instruction **sua sponte** in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose."

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(*People v. Collie, supra,* 30 Cal.3d at pp. 63–64.)

Do not give this instruction in the penalty phase of a capital case. (See CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes*.)

If evidence of uncharged conduct is admitted *only* under Evidence Code section 1108 or 1109, **do not** give this instruction. (See CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*; CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*; and CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person*.)

If the court admits evidence of uncharged conduct amounting to a criminal offense, give introductory sentence alternative A and select the words "uncharged offense[s]" where indicated. If the court admits evidence under Evidence Code section 1101(b) that does not constitute a criminal offense, give introductory sentence alternative B and select the word "act[s]" where indicated. (*People v. Enos* (1973) 34 Cal.App.3d 25, 42 [109 Cal.Rptr. 876] [evidence tending to show defendant was "casing" a home admitted to prove intent where burglary of another home charged and defendant asserted he was in the second home by accident].) The court is not required to identify the specific acts to which this instruction applies. (*People v. Nicolas* (2004) 34 Cal.4th 614, 668 [21 Cal.Rptr.3d 612, 101 P.3d 509].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1101(b), then the court must specify for the jury what evidence it may consider under section 1101(b). (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771], superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742].) In alternative A, insert a description of the uncharged offense allegedly shown by the 1101(b) evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then the court may give the alternative "another offense" or "other offenses" without specifying the uncharged offenses.

The court must instruct the jury on what issue the evidence has been admitted to prove and delete reference to all other potential theories of relevance. (*People v. Swearington* (1977) 71 Cal.App.3d 935, 949 [140 Cal.Rptr. 5]; *People v. Simon* (1986) 184 Cal.App.3d 125, 131 [228 Cal.Rptr. 855].) Select the appropriate grounds from options A through H and delete all grounds that do not apply.

When giving option F, the court may give the bracketed "or scheme" at its discretion, if relevant.

The court may give the bracketed sentence that begins with "In evaluating this evidence" at its discretion when instructing on evidence of uncharged offenses that has been admitted based on similarity to the current offense. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].) For

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example, when the evidence of similar offenses is admitted to prove common plan, intent, or identity, this bracketed sentence would be appropriate.

Give the bracketed sentence beginning with "Do not conclude from this evidence that" on request if the evidence is admitted only under Evidence Code section 1101(b). Do not give this sentence if the court is also instructing under Evidence Code section 1108 or 1109.

The paragraph that begins with "If you conclude that the defendant committed" has been included to prevent jury confusion regarding the standard of proof. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013 [130 Cal.Rptr.2d 254, 62 P.3d 601] [instruction on section 1108 evidence sufficient where it advised jury that prior offense alone not sufficient to convict; prosecution still required to prove all elements beyond a reasonable doubt].)

AUTHORITY

- Evidence Admissible for Limited Purposes. Evid. Code, § 1101(b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 422 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Degree of Similarity Required. *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Analysis Under Evidence Code Section 352 Required. *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 426–427 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Instructional Requirements. *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 790 [155 Cal.Rptr. 152].
- 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].
- Two Burdens of Proof Pose No Problem For Properly Instructed Jury. *People v. Virgil* (2011) 51 Cal.4th 1210, 1258–1259 [126 Cal.Rptr.3d 465, 253 P.3d 553].

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 76–97.

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

RELATED ISSUES

Circumstantial Evidence—Burden of Proof

The California Supreme Court has upheld CALJIC Nos. 2.50, 2.50.1, and 2.50.2 on the burden of proof for uncharged crimes and CALJIC No. 2.01 on sufficiency of circumstantial evidence. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1258–1259 [126 Cal.Rptr.3d 465, 253 P.3d 553].) *Virgil* explained it was not error to permit

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consideration of evidence by two different evidentiary standards: "If the jury finds the facts sufficiently proven [by a preponderance of the evidence] for consideration, it must still decide whether the facts are sufficient, taken with all the other evidence, to prove the defendant's guilt beyond a reasonable doubt." Id. at 1259–1260. Jury instructions on the People's burden of proof and circumstantial evidence eliminate any danger that the jury might use the preponderance of evidence standard to decide elemental facts or issues because together those instructions make clear that ultimate facts must be proved beyond a reasonable doubt. Ibid.

Issue in Dispute

The "defendant's plea of not guilty does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of proof." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Rowland* (1992) 4 Cal.4th 238, 260 [14 Cal.Rptr.2d 377, 841 P.2d 897].) The defense may seek to "narrow the prosecution's burden of proof" by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106 [256 Cal.Rptr. 647].) "[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*People v. Scheid* (1997) 16 Cal.4th 1, 16–17 [65 Cal.Rptr.2d 348, 939 P.2d 748].) However, an offer to stipulate may make the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [101 Cal.Rptr.2d 825] [observing that offer "not to argue" the issue is insufficient].) The court must also consider whether there could be a "reasonable dispute" about the issue. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422–423 [27 Cal.Rptr.2d 666, 867 P.2d 777] [evidence of other offense not admissible to show intent to rape because if jury believed witness's account, intent could not reasonably be disputed]; *People v. Bruce, supra,* 208 Cal.App.3d at pp. 1103–1106 [same].)

Subsequent Offenses Admissible

Evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom* (1994) 7 Cal.4th 414, 422–423, 425 [27 Cal.Rptr.2d 666, 867 P.2d 777].)

Offenses Not Connected to Defendant

Evidence of other offenses committed in the same manner as the alleged offense is not admissible unless there is sufficient evidence that the defendant committed the uncharged offenses. (*People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006–1007 [12 Cal.Rptr.2d 838] [evidence of how auto-theft rings operate inadmissible]; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 242 [63 Cal.Rptr.2d 769] [evidence from police database of similar sexual offenses committed by unknown assailant inadmissible].)

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416. Evidence of Uncharged Conspiracy

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

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

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

AND

4. **[At least one of these/This] overt act[s] was committed in California.**

To decide whether (the/a) defendant or another member of the conspiracy committed (this/these) overt act[s], consider all of the evidence presented about the act[s].

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

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

An *overt act* is an act by one or more of the members of the conspiracy

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

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

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

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

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

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

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

New January 2006; Revised August 2006, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the prosecution has not charged the crime of conspiracy but has introduced evidence of a conspiracy to prove liability for other offenses or to introduce hearsay statements of coconspirators. (See, e.g., *People v. Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656]; *People v. Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714].)

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

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

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

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

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

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

Defenses—Instructional Duty

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

Related Instructions

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

CALCRIM No. 418, *Coconspirator's Statements*.

CALCRIM No. 419, *Acts Committed or Statements Made Before Joining Conspiracy*.

AUTHORITY

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

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- Two Specific Intents. *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1240 [77 Cal.Rptr.2d 733, 960 P.2d 537].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 72–102.

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

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

RELATED ISSUES

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

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418. Coconspirator's Statements

In deciding whether the People have proved that (the defendant[s]/Defendant[s] _____ <*insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants; see Bench Notes*>) committed [any of] the crime[s] charged, you may not consider any statement made out of court by _____ <*insert name[s] of coconspirator[s]*> unless the People have proved by a preponderance of the evidence that:

1. **Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;**
2. **_____ <*insert name[s] of coconspirator[s]*> (was/were) [a] member[s] of and participating in the conspiracy when (he/she/they) made the statement;**
3. **_____ <*insert name[s] of coconspirator[s]*> made the statement in order to further the goal of the conspiracy;**

AND

4. **The statement was made before or during the time that (the defendant[s]/Defendant[s] _____ <*insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants*>) (was/were) participating in the conspiracy.**

A *statement* means an oral or written expression, or nonverbal conduct intended to be a substitute for an oral or written expression.

***Proof by a preponderance of the evidence* is a different standard of proof than 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.**

[You may not consider statements made by a person who was not a member of the conspiracy even if the statements helped accomplish the goal of the conspiracy.]

[You may not consider statements made after the goal of the conspiracy had been accomplished.]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the use of a coconspirator's statement to incriminate a defendant if the statement has been admitted under

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Evidence Code section 1223. (See *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215 [43 Cal.Rptr.2d 526]; *People v. Herrera* (2000) 83 Cal.App.4th 46, 63 [98 Cal.Rptr.2d 911].)

The court **must also** give either CALCRIM No. 415, *Conspiracy*, or CALCRIM No. 416, *Evidence of Uncharged Conspiracy*, with this instruction.

If the coconspirator statement has been admitted against all defendants on trial, then use "the defendant[s]" in the first sentence and in element 4. If the coconspirator statement has been admitted under Evidence Code section 1223 against only one or some of the defendants on trial, insert the names of the defendants to whom this instruction applies where indicated. For example, if the prosecution is relying on a statement made by a defendant in the trial, the statement may be used against that defendant as an admission. However, as to the other defendants, the statement may be used only if it qualifies under Evidence Code section 1223 or another hearsay exception. In such cases, insert the names of the other codefendants where indicated in the first sentence and in element 4.

Give either of the last two bracketed paragraphs on request, when supported by the evidence.

AUTHORITY

- Hearsay Exception for Coconspirator's Statements. Evid. Code, § 1223; *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215 [43 Cal.Rptr.2d 526]; *People v. Lipinski* (1976) 65 Cal.App.3d 566, 575 [135 Cal.Rptr. 451].
- Statement Defined. Evid. Code, § 225.
- Burden of Proof. *People v. Herrera* (2000) 83 Cal.App.4th 46, 63 [98 Cal.Rptr.2d 911].
- Independent Evidence Conspiracy Existed at Time of Statement. *People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10, 436 [124 Cal.Rptr. 752, 541 P.2d 296].

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Hearsay, § 135.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[5], 141.02 (Matthew Bender).

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703. Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder (Pen. Code, § 190.2(d))

If you decide that (the/a) defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[s] of _____ <*insert felony murder special circumstance[s]*>, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life.

In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove either that the defendant intended to kill, or the People must prove all of the following:

1. **The defendant's participation in the crime began before or during the killing;**
2. **The defendant was a major participant in the crime;**

AND

3. **When the defendant participated in the crime, (he/she) acted with reckless indifference to human life.**

[A person *acts with reckless indifference to human life* when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death.]

[The People do not have to prove that the actual killer acted with intent to kill or with reckless indifference to human life in order for the special circumstance[s] of _____ <*insert felony-murder special circumstance[s]*> to be true.]

[If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find (this/these) special circumstance[s] true, you must find either that the defendant acted with intent to kill or you must find that the defendant acted with reckless indifference to human life and was a *major participant* in the crime.] [When you decide whether the defendant was a *major participant*, consider all the evidence. Among the factors you may consider are:

1. **What role did the defendant play in planning the criminal enterprise that led to the death[s]?**
2. **What role did the defendant play in supplying or using lethal weapons?**
3. **What awareness did the defendant have of particular dangers**

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posed by the nature of the crime, any weapons used, or past experience or conduct of the other participant[s]?

4. Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder?

5. Did the defendant's own actions or inactions play a particular role in the death?

6. What did the defendant do after lethal force was used?

[7. _____ *<insert any other relevant factors.>***]**

No one of these factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant was a major participant.]

If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she) acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance[s] of _____ *<insert felony murder special circumstance[s]>* **to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant].**

New January 2006; Revised April 2008, February 2016, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. *(Ibid.)*

Do not give this instruction when giving CALCRIM No. 731, *Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill After March 8, 2000 or CALCRIM No. 732, Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill.* (*People v. Odom* (2016) 244 Cal.App.4th 237, 256–257 [197 Cal.Rptr.3d 774].)

When multiple special circumstances are charged, one or more of which require intent to kill, the court may need to modify this instruction.

Proposition 115 modified the intent requirement of the special circumstance law, codifying the decisions of *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], and *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127]. The current law provides that the actual killer

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does not have to act with intent to kill unless the special circumstance specifically requires intent. (Pen. Code, § 190.2(b).) If the felony-murder special circumstance is charged, then the People must prove that a defendant who was not the actual killer was a major participant and acted with intent to kill or with reckless indifference to human life. (Pen. Code, § 190.2(d); *People v. Banks* (2015) 61 Cal.4th 788, 807–809 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *People v. Estrada* (1995) 11 Cal.4th 568, 571 [46 Cal.Rptr.2d 586, 904 P.2d 1197].)

Use this instruction for any case in which the jury could conclude that the defendant was an accomplice to a killing that occurred after June 5, 1990, when the felony-murder special circumstance is charged.

Give the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice.

If the jury could convict the defendant either as a principal or as an accomplice, the jury must find intent to kill or reckless indifference if they cannot agree that the defendant was the actual killer. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) In such cases, the court should give both the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer, and the bracketed paragraph that begins with "[I]f you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer . . . ."

The court does not have a sua sponte duty to define "reckless indifference to human life." (*People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197].) However, this "holding should not be understood to discourage trial courts from amplifying the statutory language for the jury." (*Id.* at p. 579.) The court may give the bracketed definition of reckless indifference if requested.

In *People v. Banks* (2015) 61 Cal.4th 788, 803–808 [189 Cal.Rptr.3d 208, 351 P.3d 330], the court identified certain factors to guide the jury about whether the defendant was a major participant, but stopped short of holding that the court has a sua sponte duty to instruct on those factors. The trial court should determine whether the *Banks* factors need be given.

Do not give this instruction if accomplice liability is not at issue in the case.

AUTHORITY

- Accomplice Intent Requirement, Felony Murder. Pen. Code, § 190.2(d).
- Reckless Indifference to Human Life. *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Constitutional Standard for Intent by Accomplice. *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. *People v. Banks* (2015) 61 Cal.4th 788, 803–808 [189 Cal.Rptr.3d 208, 351 P.3d 330].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 536, 543.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.14[2][b][ii] (Matthew Bender).

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731. Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill After March 8, 2000 (Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of kidnapping [in violation of Penal Code section 190.2(a)(17)].

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) kidnapping;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) kidnapping;**

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

[3. If the defendant did not personally commit [or attempt to commit] kidnapping, then another perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] kidnapping;]

(3/4). (The defendant/_____ *<insert name or description of person causing death if not defendant>*) **did an act that was a substantial factor in causing the death of another person;**

AND

(4/5). The defendant intended that the other person be killed.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] kidnapping, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.

<Make certain that all appropriate instructions on underlying kidnapping, aiding and abetting, and conspiracy are given.>

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

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

[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of kidnapping was merely part of or incidental to the commission of that murder.]

New January 2006; Revised August 2013, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The court also has a **sua sponte** duty to instruct on the elements of the kidnapping alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

Do not give CALCRIM No. 703, *Special Circumstances: Intent requirement for Accomplice After June 5, 1990*, together with this instruction. See *People v. Odom* (2016) 244 Cal.App.4th 237, 256–257 [197 Cal.Rptr.3d 774].

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17)*.

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the

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defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)*.

If the facts raise an issue whether the homicidal act caused the death, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution's theory is that the defendant committed or attempted to commit kidnapping, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on kidnapping.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit kidnapping, select one or both of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on kidnapping and on aiding and abetting and/or conspiracy with this instruction.

When giving this instruction with CALCRIM No. 730, give the final bracketed paragraph.

Related Instructions

CALCRIM No. 1200, *Kidnapping: For Child Molestation*.

CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*.

CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion*.

CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

CALCRIM No. 1204, *Kidnapping During Carjacking*.

CALCRIM No. 1215, *Kidnapping*.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(17)(B), (H) & (M).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 532–533.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.13[17], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b], 142.14[3] (Matthew Bender).

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732. Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill (Pen. Code, § 190.2(a)(17))

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of arson that burned an inhabited structure [in violation of Penal Code section 190.2(a)(17)].

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) arson that burned an inhabited structure;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) arson that burned an inhabited structure;**

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

[3. If the defendant did not personally commit [or attempt to commit] arson, then another perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] arson that burned an inhabited structure;]

(3/4). The commission [or attempted commission] of the arson was a substantial factor in causing the death of another person;

AND

(4/5). The defendant intended that the other person be killed.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] arson that burned an inhabited structure, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.

<Make certain that all appropriate instructions on underlying arson, aiding and abetting, and conspiracy are given.>

An act causes death if the death is the direct, natural, and probable

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

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

[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of arson was merely part of or incidental to the commission of that murder.]

New January 2006; Revised August 2013, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The court also has a **sua sponte** duty to instruct on the elements of the arson alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

Do not give CALCRIM No. 703, *Special Circumstances: Intent requirement for Accomplice After June 5, 1990*, together with this instruction. See *People v. Odom* (2016) 244 Cal.App.4th 237, 256–257 [197 Cal.Rptr.3d 774].

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).*

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer.

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If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)*.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution's theory is that the defendant committed or attempted to commit arson, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on arson.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit arson, select one or both of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on arson and on aiding and abetting and/or conspiracy with this instruction.

When giving this instruction with CALCRIM No. 730, give the final bracketed paragraph.

Related Instructions

CALCRIM No. 1502, *Arson: Inhabited Structure*.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(17)(B), (H) & (M).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 532–533.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.13[17], 87.14 (Matthew Bender).

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

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946. Battery Against Custodial Officer (Pen. Code, §§ 242, 243.1)

The defendant is charged [in Count _____] with battery against a custodial officer [in violation of Penal Code section 243.1].

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

1. **_____** *<insert officer's name, excluding title>* **was a custodial officer performing the duties of a custodial officer;**
2. **The defendant willfully [and unlawfully] touched _____** *<insert officer's name, excluding title>* **in a harmful or offensive manner;**

[AND]

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

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

[AND

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

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

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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

A *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 description>*) **is a local detention facility.] [A custodial officer is not a peace officer.]**

New January 2006; Revised April 2011, August 2016

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

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

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

The jury must determine whether the alleged victim is a custodial officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135] [discussing definition of "peace officer"].) The court may instruct the jury on the appropriate definition of "custodial officer" from the statute. *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a custodial officer as a matter of. *(Ibid.)*

If there is a dispute about whether the site of an alleged crime is a local detention facility, see Penal Code section 6031.4.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.1; see *In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1221 [57 Cal.Rptr.2d 851] [section 243.1 applies only to batteries committed against custodial officers in adult penal institutions]; *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- 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].
- 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]].
- Statute Constitutional. *People v. Wilkinson* (2004) 33 Cal.4th 821, 840–841

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[16 Cal.Rptr.3d 420, 94 P.3d 551].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 72–74.

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 on Person Not Confined. Pen. Code, § 243.15.

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

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1022. Oral Copulation While in Custody (Pen. Code, § 288a(a), (e))

The defendant is charged [in Count _____] with oral copulation committed while (he/she) was confined in (state prison/a local detention facility) [in violation of Penal Code section 288a(e)].

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

1. **The defendant participated in an act of oral copulation with someone else;**

AND

2. **At the time of the act, the defendant was confined in a (state prison/local detention facility).**

***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.**

[_____<*insert name of facility*> is a (state prison/local detention facility).] [A state prison is any prison or institution maintained by the Department of Corrections and Rehabilitation.] [A local detention facility includes any city, county, or regional jail or other facility used to confine adults [or both adults and minors].]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

A space is provided to identify a state prison or local detention facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether the defendant was confined in a state prison or local detention facility, give the second or third bracketed sentences (or both, if necessary). (See Pen. Code, §§ 4504, 5003, 6031.4.)

Related Instructions

CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, § 288a(a), (e).
- Local Detention Facility Defined. Pen. Code, § 6031.4.

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- State Prison Defined. Pen. Code, §§ 4504, 5003.
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35, 36, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [4] (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

1023–1029. Reserved for Future Use

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1037. Sodomy While in Custody (Pen. Code, § 286(e))

The defendant is charged [in Count _____] with sodomy while he was confined in (state prison/a local detention facility) [in violation of Penal Code section 286(e)].

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

1. **The defendant participated in an act of sodomy with another person;**

AND

2. **At the time of the act, the defendant was confined in (state prison/a local detention facility).**

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

[_____ <*Insert name of facility*> is a (state prison/local detention facility).] [A *state prison* is any prison or institution maintained by the Department of Corrections and Rehabilitation.] [A *local detention facility* includes any city, county, or regional jail or other facility used to confine adults [or both adults and minors].]

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BENCH NOTES

Instructional Duty

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

A space is provided to identify a state prison or local detention facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether the defendant was confined in a state prison or local detention facility, give the second or third bracketed sentences (or both, if necessary). (See Pen. Code, §§ 4504, 5003, 6031.4.)

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 286(e); *People v. West* (1991) 226 Cal.App.3d 892, 898 [277 Cal.Rptr. 237] [only applies to inmates].
- Local Detention Facility Defined. Pen. Code, § 6031.4.

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- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- State Prison Defined. Pen. Code, §§ 4504, 5003.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 28, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [4] (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Attempted Sodomy While in Custody. Pen. Code, §§ 664, 286(e).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

1038–1044. Reserved for Future Use

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1045. Sexual Penetration by Force, Fear, or Threats (Pen. Code, § 289(a)(1), (2), (g))

The defendant is charged [in Count _____] with sexual penetration by force [in violation of Penal Code section 289].

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

1. **The defendant committed an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**
3. **The other person did not consent to the act;**

AND

4. **The defendant accomplished the act:**

<Alternative 4A—force or fear>

[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person.]

<Alternative 4B—future threats of bodily harm>

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

<Alternative 4C—threat of official action>

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

***Sexual penetration* means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any

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foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

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

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

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

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

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

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

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

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

<Defense: Reasonable Belief in Consent>

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

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

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The court should select the appropriate alternative in element 4 to instruct how the sexual penetration was accomplished.

Defenses—Instructional Duty

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

AUTHORITY

- Elements. Pen. Code, § 289(a)(1), (2), (g).
- Consent Defined. Pen. Code, §§ 261.6, 261.7.
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rtpr. 170] [a finger is a "foreign object"].
- Menace Defined. Pen. Code, § 261(c) [in context of rape].
- Sexual Penetration Defined. Pen. Code, § 289(k); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Threatening to Retaliate Defined. Pen. Code, § 289(*l*).
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Fear Defined. *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Intent. *People v. Senior* (1992) 3 Cal.App.4th 765, 776 [5 Cal.Rptr.2d 14] [specific intent is "purpose of sexual arousal, gratification, or abuse"].
- Mistake of Fact Regarding Consent. See *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337] [in context of kidnapping and rape].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 56, 58, 178.

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3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 292.

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

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

COMMENTARY

Penal Code section 289 requires that the sexual penetration be "against the victim's will." (Pen. Code, § 289(a)(1), (2), (g).) "Against the will" has been defined as "without consent." (See *People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

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

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 289 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

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

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

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> 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.* at 1023–1024 [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 Forcible Sexual Penetration. See Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape].
- Attempted Forcible Sexual Penetration. Pen. Code, §§ 664, 289(a)(1), (2), (g).
- Battery. Pen. Code, § 242.
- Sexual Battery. Pen. Code, §§ 243.4(a), (e)(1) under the expanded accusatory pleading test; *People v. Ortega* (2015) 240 Cal.App.4th 956, 967–970 [193 Cal.Rptr.3d 142].

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

RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in sexual penetration 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 [wobbler offense].) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant’s argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

Consent Withdrawn

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

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Force, Fear, or Threats, for language that may be adapted for use in this instruction.

Minor Victim

When sexual penetration is committed against the will of a person who is incapable of consent, such as a baby, and is accomplished by physical force that results in physical injury to the victim, the statutory requirements "against the will" and "use of force" are fully satisfied. (*People v. White* (1986) 179 Cal.App.3d 193, 202 [224 Cal.Rptr. 467].)

Multiple Penetrations

A violation of section 289 is complete when "slight" penetration occurs. A new and separate violation is completed each time a new and separate penetration, however slight, occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [256 Cal.Rtpr. 401, 768 P.2d 1078] [disapproving *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1097 [236 Cal.Rptr. 822]].)

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

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

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

<Alternative 1A—defendant touched child>

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

[OR]

<Alternative 1B—child touched defendant>

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised April 2011, August 2014, August 2016

BENCH NOTES

Instructional Duty

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

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

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

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

Defenses—Instructional Duty

Lack of consent by a minor is not an element of lewd act or lascivious act against a child under 14 in violation of Penal Code section 288, subdivision (b), whether accomplished by force, duress, or otherwise. Likewise, consent by the child is not an affirmative defense to such a charge. (*People v. Soto* (2011) 51 Cal.4th 229, 232 [119 Cal.Rptr.3d 775, 245 P.3d 410].) The bracketed paragraph that begins "It is not a defense that the child" may be given on request if there is evidence of consent.

AUTHORITY

- Elements. Pen. Code, § 288(b)(1).
- Duress Defined. *People v. Soto* (2011) 51 Cal.4th 229, 232 [119 Cal.Rptr.3d 775, 245 P.3d 410] ; *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16

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Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].

- Menace Defined. Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Child Touching Own Body Parts at Defendant's Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- Lewd Defined. *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 41–45, 178.

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

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

COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The definition of "force" as used in Penal Code section 288(b)(1) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero* (1984)

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157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 52; see also *People v. Griffin*, *supra*, 33 Cal.4th at pp. 1026–1028.)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal*, *supra*, 33 Cal.4th at p. 1007, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

LESSER INCLUDED OFFENSES

- Attempted Lewd Act by Force With Child Under 14. Pen. Code, §§ 664, 288(b).
- Lewd or Lascivious Act on Child Under 14. Pen. Code, § 288(a).

RELATED ISSUES

Evidence of Duress

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

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

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1121. Annoying or Molesting a Child in a Dwelling (Pen. Code, § 647.6(a)–(c))

The defendant is charged [in Count _____] with annoying or molesting a child in an inhabited dwelling [in violation of Penal Code section 647.6(b)].

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

1. **The defendant entered an inhabited (dwelling house/part of a building/trailer coach) without consent;**
2. **After entering the (house/building/trailer coach), the defendant engaged in conduct directed at a child;**
3. **A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct;**
4. **The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child;**

AND

5. **The child was under the age of 18 years at the time of the conduct.**

[It is not necessary that the child actually be irritated or disturbed.] [It is [also] not necessary that the child actually be touched.]

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

[A (house/part of a building/trailer coach) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged conduct.]

[A (house/part of a building/trailer coach) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (house/part of a building/trailer coach) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *house* includes any (structure/garage/office/_____ *<insert other description>*) **that is attached to the house and functionally connected with it.]**

[A *trailer coach* is a vehicle without its own mode of power, designed to be pulled by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

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[A *trailer coach* is [also] a park trailer that is intended for human habitation for recreational or seasonal use only and

(1) has a floor area of no more than 400 square feet;

(2) is not more than 14 feet wide;

(3) is built on a single chassis;

AND

(4) may be transported on public highways only with a permit.]

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

<Defense: Good Faith Belief Over 18>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the child was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe the child was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised August 2016

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]; *People v. Epps* (1981) 122 Cal.App.3d 691, 703–704 [176 Cal.Rptr. 332].) However, child annoyance or molestation may be committed by a single act or a repetitive course of conduct. There is no sua sponte duty to give a unanimity instruction when a defendant's conduct clearly constituted a single course of conduct. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014–1016 [230 Cal.Rptr. 237].) The court must determine if a unanimity instruction is required and 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.

Do not give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

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If the defendant is charged with a prior conviction for a violation of Penal Code section 647.6 or any other specified sexual offense (see Pen. Code, § 647.6(c)), give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr.2d 21]; see *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480 [279 Cal.Rptr. 847, 807 P.2d 1076].)

Give the bracketed sentence that begins, "It is not a defense that," 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].)

If appropriate, give any of the bracketed definitions of "inhabited," "house" or "trailer coach" on request.

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].)

If the defendant was charged with simple annoying or molesting a child without any allegations about entering an inhabited house, building, or trailer coach, do not give this instruction. Give CALCRIM No. 1122, *Annoying or Molesting a Child*.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably believed that the child was over 18 years of age, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Atchison* (1978) 22 Cal.3d 181, 183 [148 Cal.Rptr. 881, 583 P.2d 735]; *People v. Paz* (2000) 80 Cal.App.4th 293, 300 [95 Cal.Rptr.2d 166].)

AUTHORITY

- Elements. Pen. Code, § 647.6(a)–(c).
- Inhabitation Defined. See Pen. Code, § 459 [in context of burglary].
- Trailer Coach Defined. Veh. Code, § 635; Health & Saf. Code, § 18009.3.
- Acts Motivated by Unnatural or Abnormal Sexual Interest. *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335]; *In re Gladys R.* (1970) 1 Cal.3d 855, 867 [83 Cal.Rptr. 671, 464 P.2d 127].
- Annoy and Molest Defined; Objective Standard. *People v. Lopez* (1998) 19 Cal.4th 282, 289–290 [79 Cal.Rptr.2d 195]; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749–1750 [37 Cal.Rptr.2d 327]; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901–902 [246 P.2d 173].
- Lewd Act Not Required. *People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466 [253 Cal.Rptr. 564].
- 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 act].
- Minor Need Not Actually Be Annoyed. *People v. Lopez* (1998) 19 Cal.4th 282, 290 [79 Cal.Rptr.2d 195, 965 P.2d 713].

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- Actual Touching Not Required. People v. Memro (1995) 11 Cal.4th 786, 871 [47 Cal.Rptr.2d 219, 905 P.2d 1305]; People v. Lopez (1998) 19 Cal.4th 282, 289 [79 Cal.Rptr.2d 195].
- House Not Inhabited If Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 80, 81.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.21[4], 142.23[2] (Matthew Bender).

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

COMMENTARY

See the Commentary section of the Bench Notes for CALCRIM No. 1122, *Annoying or Molesting a Child*.

LESSER INCLUDED OFFENSES

- Attempted Annoying or Molesting of Minor. Pen. Code, §§ 664, 647.6(b).

Annoying or molesting a child without entering an inhabited dwelling is a misdemeanor and lesser included offense. (Pen. Code, § 647.6(a).)

Neither simple assault (*People v. Greene* (1973) 34 Cal.App.3d 622, 654–655 [110 Cal.Rptr. 160]) or contributing to the delinquency of a minor (*People v. Romero* (1975) 48 Cal.App.3d 752, 757 [121 Cal.Rptr. 800] [construing former versions of Pen. Code, §§ 272 and 647.6]) is a necessarily included lesser offense of annoying or molesting a child.

RELATED ISSUES

After Entering

The statute does not require that the defendant engage in the molesting conduct while still in the home. (*People v. Mendoza* (2004) 118 Cal.App.4th 571, 575–576 [13 Cal.Rptr.3d 195].) It is sufficient if the defendant engaged in the conduct after entering the home and there is a "nexus between the residential entry and the molesting conduct." (*Id.* at p. 576.)

See the Related Issues section of the Bench Notes for CALCRIM No. 1122, *Annoying or Molesting a Child*.

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1122. Annoying or Molesting a Child (Pen. Code, § 647.6(a)–(c))

The defendant is charged [in Count _____] with annoying or molesting a child [in violation of Penal Code section 647.6].

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

1. **The defendant engaged in conduct directed at a child;**
2. **A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct;**
3. **The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child;**

AND

4. **The child was under the age of 18 years at the time of the conduct.**

[It is not necessary that the child actually be irritated or disturbed.] [It is [also] not necessary that the child actually be touched.]

[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.]

<Defense: Good Faith Belief Over 18>

[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the child was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe the child was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

Do not give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

If the defendant is charged in a single count with multiple alleged acts, the court

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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]; *People v. Epps* (1981) 122 Cal.App.3d 691, 703–704 [176 Cal.Rptr. 332].) However, child annoyance or molestation may be committed by either a single act or a repetitive course of conduct. There is no sua sponte duty to give a unanimity instruction when a defendant's conduct clearly constituted a single course of conduct. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014–1016 [230 Cal.Rptr. 237].) The court must determine if a unanimity instruction is required and 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 a prior conviction for a violation of Penal Code section 647.6 or any other specified sexual offense (see Pen. Code, § 647.6(c)), give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr.2d 21]; see *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480 [279 Cal.Rptr. 847, 807 P.2d 1076].)

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].)

If the defendant was charged with annoying or molesting a child after entering an inhabited house, building, or trailer coach, do not give this instruction. Give CALCRIM No. 1121, *Annoying or Molesting a Child in a Dwelling*.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably believed that the child was over 18 years of age, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Atchison* (1978) 22 Cal.3d 181, 183 [148 Cal.Rptr. 881, 583 P.2d 735]; *People v. Paz* (2000) 80 Cal.App.4th 293, 300 [95 Cal.Rptr.2d 166].)

AUTHORITY

- Elements. Pen. Code, § 647.6(a)–(c).
- Acts Motivated by Unnatural or Abnormal Sexual Interest. *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335]; *In re Gladys R.* (1970) 1 Cal.3d 855, 867 [83 Cal.Rptr. 671, 464 P.2d 127].
- Annoy and Molest Defined; Objective Standard. *People v. Lopez* (1998) 19 Cal.4th 282, 289–290 [79 Cal.Rptr.2d 195, 965 P.2d 713]; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749–1750 [37 Cal.Rptr.2d 327]; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901–902 [246 P.2d 173].

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- Lewd Act Not Required. *People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466 [253 Cal.Rptr. 564].
- 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 act].
- Minor Need Not Actually Be Annoyed. *People v. Lopez* (1998) 19 Cal.4th 282, 290 [79 Cal.Rptr.2d 195, 965 P.2d 713].
- Actual Touching Not Required. *People v. Memro* (1995) 11 Cal.4th 786, 871 [47 Cal.Rptr.2d 219, 905 P.2d 1305]; *People v. Lopez* (1998) 19 Cal.4th 282, 289 [79 Cal.Rptr.2d 195, 965 P.2d 713].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 80, 81.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.21[4], 142.23[2] (Matthew Bender).

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

COMMENTARY

"Annoy" and "molest" are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person. (*People v. Lopez* (1998) 19 Cal.4th 282, 289 [79 Cal.Rptr.2d 195, 965 P.2d 713]; *People v. Carskaddon* (1957) 49 Cal.2d 423, 426 [318 P.2d 4].) "Annoy means to disturb or irritate, especially by continued or repeated acts. . . . [¶] '[M]olest' [means] . . . 'to interfere with or meddle with unwarrantably so as to injure or disturb.' " (*People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901 [246 P.2d 173].) A photographer can "annoy" a minor by taking the minor's photograph in a public place in an offensive and irritating manner. (See *Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1325 [105 Cal.Rptr.2d 320].) A lewd act is not required. (*People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466 [253 Cal.Rptr. 564].)

LESSER INCLUDED OFFENSES

- Attempted Annoying or Molesting of Minor. Pen. Code, §§ 664, 647.6(a).

Annoying or Molesting a minor is a misdemeanor unless the defendant is charged with one of the specified prior convictions. (Pen. Code, § 647.6(a).) If the defendant is charged with a felony based on a qualifying prior conviction, the misdemeanor is a lesser included offense.

Neither simple assault (*People v. Greene* (1973) 34 Cal.App.3d 622, 654–655 [110 Cal.Rptr. 160]) or contributing to the delinquency of a minor (*People v. Romero* (1975) 48 Cal.App.3d 752, 757 [121 Cal.Rptr. 800] [construing former versions of Pen. Code, §§ 272 and 647.6]) is a necessarily included lesser offense of annoying or molesting a child.

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RELATED ISSUES

Minor Perpetrator

A minor under age 14 may be convicted for violating Penal Code section 647.6 on clear proof of the minor's knowledge of wrongfulness. (See Pen. Code, § 26; *In re Gladys R.* (1970) 1 Cal.3d 855, 862, 869 [83 Cal.Rptr. 671, 464 P.2d 127] [12-year-old may be declared ward of court for annoying or molesting another minor].)

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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. *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, February 2013, August 2016

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

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for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

Do not give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr. 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

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 (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 66, 178.

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).

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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. *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, February 2013, August 2016

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BENCH NOTES

Instructional Duty

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

Do not give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr. 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

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, 854855 [143 Cal.Rptr.3d 823].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 66, 178.

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).

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1193. Testimony on Child Sexual Abuse Accommodation Syndrome

You have heard testimony from _____ <*insert name of expert*> regarding child sexual abuse accommodation syndrome.

_____'s <*insert name of expert*> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).

You may consider this evidence only in deciding whether or not _____'s <*insert name of alleged victim of abuse*> conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony.

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give this instruction when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073–1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090–1091, 1100 [56 Cal.Rptr.2d 142, 92 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [9 Cal.Rtpr.2d 431], which did find a sua sponte duty to give this instruction.

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness*.

AUTHORITY

- Eliminate Juror Misconceptions or Rebut Attack on Victim's Credibility. *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394 [249 Cal.Rptr. 886].

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 54–56.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).

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

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Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:7 (The Rutter Group).

COMMENTARY

The jurors must understand that the research on child sexual abuse accommodation syndrome assumes a molestation occurred and seeks to describe and explain children's common reactions to the experience. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 [249 Cal.Rptr. 886].) However, it is unnecessary and potentially misleading to instruct that the expert testimony assumes that a molestation has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660].)

The prosecution must identify the myth or misconception the evidence is designed to rebut (*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735 [256 Cal.Rptr. 446]; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449–450 [271 Cal.Rptr. 653]), or the victim's credibility must have been placed in issue (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745 [32 Cal.Rptr.2d 345]).

RELATED ISSUES

Expert Testimony Regarding Parent's Behavior

An expert may also testify regarding reasons why a parent may delay reporting molestation of his or her child. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300–1301 [283 Cal.Rptr. 382, 812 P.2d 563].)

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1502. Arson: Inhabited Structure or Property (Pen. Code, § 451(b))

The defendant is charged [in Count _____] with arson that burned an inhabited structure or inhabited property [in violation of Penal Code section 451(b)].

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

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/ [or] property);**
2. **(He/She) acted willfully and maliciously;**

AND

3. **The fire burned an inhabited structure or inhabited property.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent.)

A structure or property is *inhabited* if someone lives there and either is present or has left but intends to return. An inhabited structure or property does not include the land on which it is located.

[*Property* means personal property or land other than forest land.]

New January 2006; Revised February 2013, August 2016

BENCH NOTES

Instructional Duty

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

Related Instructions

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

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AUTHORITY

- Elements. Pen. Code, § 451(b).
- Inhabited Defined. Pen. Code, § 450; *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85].
- Structure and Maliciously Defined. Pen. Code, § 450.
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268–276.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Arson. Pen. Code, § 451.
- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Inhabited Apartment

Defendant's conviction for arson of an inhabited structure was proper where he set fire to his estranged wife's apartment several days after she had vacated it. Although his wife's apartment was not occupied, it was in a large apartment building where many people lived; it was, therefore, occupied for purposes of the arson statute. (*People v. Green* (1983) 146 Cal.App.3d 369, 378–379 [194 Cal.Rptr. 128].)

1503–1514. Reserved for Future Use

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1515. Arson (Pen. Code, § 451(c–d))

The defendant is charged [in Count _____] with arson [in violation of Penal Code section 451(c/d)].

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

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/ property);**

AND

2. **(He/She) acted willfully and maliciously.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

New January 2006; Revised February 2013, August 2016

BENCH NOTES

Instructional Duty

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

Related Instructions

If it is also alleged that the fire caused great bodily injury or burned an inhabited structure or property, see CALCRIM No. 1501, *Arson: Great Bodily Injury* and

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CALCRIM No. 1502, *Arson: Inhabited Structure*.

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451(c–d).
- Structure, Forest Land, and Maliciously Defined. Pen. Code, § 450; see *People v. Labaer* (2001) 88 Cal.App.4th 289, 293–294 [105 Cal.Rptr.2d 629] ["structure" does not require finished or completed building].
- General Intent Crime. *People v. Atkins* (2001) 25 Cal.4th 76, 83–84, 86 [104 Cal.Rptr.2d 738, 18 P.3d 660] [evidence of voluntary intoxication not admissible to negate mental state].
- Property Defined. *In re L.T.* (2002) 103 Cal.App.4th 262, 264–265 [126 Cal.Rptr.2d 778].
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268–276.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Fixtures

Fire damage to fixtures within a building may satisfy the burning requirement if the fixtures are an integral part of the structure. (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 167–168 [270 Cal.Rptr. 389]; *People v. Lee* (1994) 24 Cal.App.4th 1773, 1778

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[30 Cal.Rptr.2d 224] [whether wall-to-wall carpeting is a fixture is question of fact for jury].)

Property: Clothing

Arson includes burning a victim's clothing. (*People v. Reese* (1986) 182 Cal.App.3d 737, 739–740 [227 Cal.Rptr. 526].)

Property: Trash

Burning trash that does not belong to the defendant is arson. There is no requirement for arson that the property belong to anyone. (*In re L.T.* (2002) 103 Cal.App.4th 262, 264 [126 Cal.Rptr.2d 778].)

1516–1519. Reserved for Future Use

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1800. Theft by Larceny (Pen. Code, § 484)

The defendant is charged [in Count _____] with [grand/petty] theft [by larceny] [in violation of Penal Code section 484].

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

1. **The defendant took possession of property owned by someone else;**
2. **The defendant took the property without the owner's [or owner's agent's] consent;**
3. **When the defendant took the property (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property);**

AND

4. **The defendant moved the property, even a small distance, and kept it for any period of time, however brief.**

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

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

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

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

Related Instructions

If the defendant is also charged with grand theft, give CALCRIM No. 1801, *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM

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No. 1850, *Petty Theft With Prior Conviction*.

If a different theory of theft is presented, see CALCRIM No. 1804, *Theft by False Pretense*, CALCRIM No. 1805, *Theft by Trick*, CALCRIM No. 1806, *Theft by Embezzlement*. See also CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft*. The court may also wish to instruct with the bracketed "[by larceny]" in the first sentence to distinguish this theory of theft from the others.

For theft of real property, use CALCRIM No. 1804, *Theft by False Pretense*. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].)

AUTHORITY

- Elements. Pen. Code, § 484; *People v. Williams* (1946) 73 Cal.App.2d 154, 157 [166 P.2d 63]; *People v. Edwards* (1925) 72 Cal.App. 102, 112–117 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].
- Intent to Deprive Owner of Main Value. *People v. Avery* (2002) 27 Cal.4th 49, 57–59 [115 Cal.Rptr.2d 403, 38 P.3d 1], disapproving, to extent it is inconsistent, *People v. Marquez* (1993) 16 Cal.App.4th 115, 123 [20 Cal.Rptr.2d 365]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 14–17.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

COMMENTARY

Asportation

To constitute a completed theft, the property must be asported or carried away. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654 [78 Cal.Rptr.2d 177].) Asportation requires three things: (1) the goods are severed from the possession or custody of the owner, (2) the goods are in the complete possession of the thief or thieves, and (3) the property is moved, however slightly. (*Ibid.*; *People v. Edwards* (1925) 72 Cal.App. 102, 114–115 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948]; *People v. Collins* (1959) 172 Cal.App.2d 295, 299 [342 P.2d 370] [joint possession of property by more than one thief].) Asportation is fulfilled by wrongful removal of property from the owner or possessor, against his or her will with the intent to steal it, even though the property is retained by the thief but a moment. (*People v. Quiel* (1945) 68 Cal.App.2d 674, 679 [157 P.2d 446].) Paragraph 4 sets forth the asportation element.

Value

The property taken must have some intrinsic value, however slight. (*People v. Franco* (1970) 4 Cal.App.3d 535, 542 [84 Cal.Rptr. 513]; *People v. Martinez*

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(2002) 95 Cal.App.4th 581, 585 [115 Cal.Rptr.2d 574].) The final bracketed paragraph may be given on request if the property in question was of slight value.

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.
- Taking an Automobile Without Consent. Veh. Code, § 10851; *People v. Pater* (1968) 267 Cal.App.2d 921, 926 [73 Cal.Rptr. 823].
- Auto Tampering. Veh. Code, § 10852; *People v. Anderson* (1975) 15 Cal.3d 806, 810–811 [126 Cal.Rptr. 235, 543 P.2d 603].
- Misdemeanor Joyriding. Pen. Code, § 499b [of bicycle, motorboat, or vessel].

Petty theft is a not lesser-included offense of grand theft when the charge of grand theft is based on the type of property taken. (*People v. Thomas* (1974) 43 Cal.App.3d 862, 870 [118 Cal.Rptr. 226].)

RELATED ISSUES

Claim of Right

If a person actually believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to theft. (*People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440]; see also *People v. Devine* (1892) 95 Cal. 227, 229 [30 P. 378] ["[i]t is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another's goods"]; *In re Bayles* (1920) 47 Cal.App. 517, 519–521 [190 P. 1034] [larceny conviction reversed where landlady actually believed she was entitled to take tenant's property for cleaning fees incurred even if her belief was unreasonable]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4–6, 10–11 [160 Cal.Rptr. 692]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.)

Community Property

A person may be found guilty of theft of community property, but only if he or she has the intent to deprive the other owner of the property permanently. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1738–1740 [60 Cal.Rptr.2d 357].)

Fraudulent Refunds

A person who takes property while in a store and presents it for a refund is guilty of theft. (*People v. Davis* (1998) 19 Cal.4th 301 [79 Cal.Rptr.2d 295, 965 P.2d 1165].) The Supreme Court held that taking with the intent to fraudulently obtain a refund constitutes both an intent to permanently deprive the store of property and a trespassory taking within the meaning of larceny. (*Id.* at pp. 317–318; see also *People v. Shannon* (1998) 66 Cal.App.4th 649 [78 Cal.Rptr.2d 177].)

Multiple or Single Conviction of Theft-Overall Plan or Scheme

If multiple items are stolen from a single victim over a period of time and the takings are part of one intent, plan, or impulse, only one theft occurs and the value

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of the items is aggregated when determining the degree of theft. (*People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39]; accord *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19–21 [145 Cal.Rptr. 313]; see CALCRIM No. 1802, *Theft: As Part of Overall Plan*.)

A serial thief "may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." [disapproving any interpretation of *People v. Bailey* (1961) 55 Cal.2d 514 [11 Cal.Rptr. 543, 360 P.2d 39] inconsistent with this conclusion.] *People v. Whitmer* (2014) 59 Cal.4th 733, 740–741 [174 Cal.Rptr.3d 594, 329 P.3d 154].

No Need to Use or Benefit From the Property Taken

It does not matter that the person taking the property does not intend to use the property or benefit from it; he or she is guilty of theft if there is intent to permanently deprive the other person of the property. (*People v. Kunkin* (1973) 9 Cal.3d 245, 251 [107 Cal.Rptr. 184, 507 P.2d 1392]; *People v. Green* (1980) 27 Cal.3d 1, 57–58 [164 Cal.Rptr. 1, 609 P.2d 468] [defendant intended to destroy the property], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Pierce* (1952) 110 Cal.App.2d 598, 609 [243 P.2d 585] [irrelevant that defendant did not personally benefit from embezzled funds]; see also *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [intent to deprive owner of major value or enjoyment].)

Possession

The victim of a theft does not have to be the owner of property, only in possession of it. (*People v. Edwards* (1925) 72 Cal.App. 102, 116 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].) "Considered as an element of larceny, 'ownership' and 'possession' may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner." (*Ibid;* see also *People v. Davis* (1893) 97 Cal. 194, 195 [31 P. 1109] [fact that property in possession of victim sufficient to show ownership].)

Unanimity of Theft Theory Not Required

If multiple theories of theft have been presented, the jury does not need to agree on which form of theft was committed. All the jury must agree on is that an unlawful taking of property occurred. (*People v. Counts* (1995) 31 Cal.App.4th 785, 792–793 [37 Cal.Rptr.2d 425]; *People v. Failla* (1966) 64 Cal.2d 560, 567–569 [51 Cal.Rptr. 103, 414 P.2d 39] [burglary case]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 [233 P.2d 897] [addressing the issue for theft].) See CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft*.

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1802. Theft: As Part of Overall Plan

If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that:

1. **The defendant committed theft of property from the same owner or possessor on more than one occasion;**
2. **The combined value of the property was over $950;**

AND

3. **The defendant obtained the property as part of a single, overall plan or objective.**

If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts.

New January 2006; Revised February 2012, August 2015, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aggregating the value of the property or services taken if grand theft is charged on that theory.

The total value of the property taken must exceed $950 to be grand theft. (See Pen. Code, § 490.2.)

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision (c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Aggregating Value of Property Taken According to Overall Plan or General Intent. *People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39].
- Grand Theft of Property or Services. Pen. Code, § 487(a) [property or services exceeding $950 in value].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 12, 13.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1][i] (Matthew Bender).

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RELATED ISSUES

Multiple Victims

Where multiple victims are involved, there is disagreement about applying the *Bailey* doctrine and cumulating the charges even if a single plan or intent is demonstrated. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 30 [210 Cal.Rptr. 90] [auctioneer stole proceeds from property belonging to several people during a single auction; conviction for multiple counts of theft was error]; *People v. Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33 [163 Cal.Rptr. 455] [series of petty thefts from numerous victims occurring over 10-month period properly consolidated into single grand theft conviction where defendant employed same scheme to defraud victims of money]; but see *People v. Garcia* (1990) 224 Cal.App.3d 297, 307–309 [273 Cal.Rptr. 666] [defendant filed fraudulent bonds at different times involving different victims; multiple convictions proper]; *In re David D.* (1997) 52 Cal.App.4th 304, 309 [60 Cal.Rptr.2d 552] [stating that *Garcia* "articulately criticized" *Brooks* and *Columbia Research*; declined to apply *Bailey* to multiple acts of vandalism].)

Combining Grand Thefts

The *Bailey* doctrine can be asserted by the *defendant* to combine multiple grand thefts committed as part of an overall scheme into a single offense. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 31 [210 Cal.Rptr. 90] [multiple grand thefts from single auction fund]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 47–48 [153 Cal.Rptr. 160] [multiple grand theft of hog carcasses]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [148 Cal.Rptr. 120] [multiple attempted grand thefts], disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8 [156 Cal.Rptr. 871, 597 P.2d 130]; see also *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19 [145 Cal.Rptr. 313] [error to refuse defense instruction about aggregating thefts].)

A serial thief "may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." [disapproving any interpretation of *People v. Bailey* (1961) 55 Cal.2d 514 [11 Cal.Rptr. 543, 360 P.2d 39] inconsistent with this conclusion.] *People v. Whitmer* (2014) 59 Cal.4th 733, 740–741 [174 Cal.Rptr.3d 594, 329 P.3d 154].

Theft Enhancement

If there are multiple charges of theft, whether grand or petty theft, the aggregate loss exceeds any of the statutory minimums in Penal Code section 12022.6(a), and the thefts arise from a common scheme or plan, an additional prison term may be imposed. (Pen. Code, § 12022.6(b).) If the aggregate loss exceeds statutory amounts ranging from $50,000 to $2.5 million, an additional term of one to four years may be imposed. (Pen. Code, § 12022.6(a)(1)–(4); see *People v. Daniel* (1983) 145 Cal.App.3d 168, 174–175 [193 Cal.Rptr. 277] [no error in refusing to give unanimity instruction].)

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2000. Insurance Fraud: Fraudulent Claims (Pen. Code, § 550(a)(1), (4)–(7) & (9))

The defendant is charged [in Count _____] with insurance fraud committed by fraudulent claim [in violation of Penal Code section 550(a)].

To prove that the defendant is guilty of this crime, the People must prove that the defendant knowingly committed the following crime[s] [[or] [aided and abetted] [or] [solicited] [or] [conspired with someone else] to commit (it/them)]:

1.

<Alternative 1A—presented fraudulent claim>

[1. The defendant (presented/ [or] caused to be presented) a false or fraudulent claim for payment for a loss or injury;]

<Alternative 1B—presented fraudulent claim for vehicle theft or damage>

[1. The defendant falsely or fraudulently claimed payment for a loss due to (theft[,]/ [or] destruction[,]/ [or] damage[,]/ [or] conversion) of (a motor vehicle[,]/ [or] a motor vehicle part[,]/ [or] contents of a motor vehicle);]

<Alternative 1C—writing to be used for fraudulent claim>

[1. The defendant (prepared[,]/ [or] made[,]/ [or] signed or subscribed) a document with the intent to (present or use it/ [or] allow it to be presented) to support a false or fraudulent claim;]

<Alternative 1D—made fraudulent claim for health-care benefits>

[1. The defendant (made/ [or] caused to be made) a false or fraudulent claim for payment of a health-care benefit;]

<Alternative 1E—submitted claim for health-care benefit not used>

[1. The defendant presented a claim for a health-care benefit that was not used by [or on behalf of] the person named in the claim;]

<Alternative 1F—presented claim for health-care benefit undercharges>

[1. The defendant claimed payment for undercharges for health-care benefits for a specific person without presenting for reconciliation, at that same time, any known overcharges for benefits for the same person;]

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2. The defendant knew that the claim was false or fraudulent;

AND

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

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

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

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

A person *claims, makes, or presents a claim for payment* by requesting payment under a contract of insurance for (a/an) ((loss/ [or] injury)/ health-care benefit).

[A *claim for payment of a health-care benefit* includes a claim submitted by or on behalf of the provider of a workers' compensation health benefit defined in the Labor Code.]

[*Conversion* of property means interfering with someone else's property, without authorization or justification, and depriving the owner of use and possession of the property.]

New January 2006; Revised February 2012, August 2016

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 presented or caused to be presented multiple claims or made multiple documents in support of a fraudulent claim, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*Id.* at p. 275.) If the court concludes that a unanimity instruction is required, give CALCRIM No. 3500, *Unanimity*.

If the prosecution proceeds on a theory of aiding and abetting, soliciting, or conspiracy, give appropriate instructions for those theories.

In element 1, give alternative 1A if the prosecution alleges a violation of Penal Code section 550(a)(1). Give alternative 1B if the prosecution alleges a violation of Penal Code section 550(a)(4). Give alternative 1C if the prosecution alleges a

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violation of Penal Code section 550(a)(5). Give alternative 1D if the prosecution alleges a violation of Penal Code section 550(a)(6). Give alternative 1E if the prosecution alleges a violation of Penal Code section 550(a)(7). Give alternative 1F if the prosecution alleges a violation of Penal Code section 550(a)(9).

If a violation of Penal Code section 550(a)(2) or (8) is alleged, give CALCRIM No. 2001, *Insurance Fraud: Multiple Claims*. If a violation of Penal Code section 550(a)(3) is alleged, give CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

If the defendant is charged with a felony violation of Penal Code section 550(a)(6), (7), or (9), give CALCRIM No. 2003, *Insurance Fraud: Health-Care Claims—Total Value*.

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

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone.

Related Instructions

See generally CALCRIM No. 400, *Aiding and Abetting: General Principles* and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

CALCRIM No. 415, *Conspiracy*

CALCRIM No. 441, *Solicitation: Elements*

CALCRIM No. 2001, *Insurance Fraud: Multiple Claims*.

CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

CALCRIM No. 2003, *Insurance Fraud: Health-Care Claims—Total Value*.

AUTHORITY

- Elements. Pen. Code, § 550(a)(1), (4), (5), (6), (7) & (9).
- Intent to Defraud Element of Offense. *People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026 [95 Cal.Rptr. 405]; *People v. Benson* (1962) 206 Cal.App.2d 519, 529 [23 Cal.Rptr. 908], overruled on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776, fn. 2 [44 Cal.Rptr. 326, 401 P.2d 934].
- Intent to Defraud—Defined. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction. *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 222, 224.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143,

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Crimes Against Property, § 143.01[1][f] (Matthew Bender).

LESSER INCLUDED OFFENSES

Fraudulent claims for health-care benefits, under Penal Code section 550(a)(6) to (9), are misdemeanors if the total amount of the claims does not exceed $950. (Pen. Code, § 550(c)(2).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the total amount of the claims exceeds $950. If the jury finds that the amount does not exceed $950, then the offense should be set at a misdemeanor.

RELATED ISSUES

Writing to Be Used for Fraudulent Claim

Penal Code section 550(a)(5) makes it a felony to "[k]nowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim." "Under this section, the writing required need not be false or fraudulent as long as it is intended to be presented or used in support of any false or fraudulent claim." (*People v. Zelver* (1955) 135 Cal.App.2d 226, 235 [287 P.2d 183].) In addition, "[i]t need not be shown that defendant himself executed the false instrument if there is proof that he procured its execution or aided and abetted another in doing so." (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1376 [44 Cal.Rptr.2d 644].)

Liability of Care Provider

A doctor or other care provider who prepares false documents for a fraudulent insurance claim may be prosecuted under Penal Code section 550(a)(1) for "causing the presentation of a fraudulent claim," even though another person actually presents the claim. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1369–1370 [44 Cal.Rptr.2d 644].) Alternatively, the care provider may be prosecuted under Penal Code section 550(a)(5), discussed above. *(Ibid.)*

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2360. Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor (Health & Saf. Code, § 11360(b))

The defendant is charged [in Count _____] with [unlawfully] (giving away/transporting for sale) 28.5 grams or less of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(b)].

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

1. **The defendant [unlawfully] (gave away/transported for sale) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana was in a usable amount but not more than 28.5 grams in weight.**

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

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

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

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported).]

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

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New January 2006; Revised April 2010, October 2010, February 2015, August 2016

BENCH NOTES

Instructional Duty

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

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

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then also give the bracketed word "unlawfully" in the first paragraph and element 1.

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away 28.5 grams or less of marijuana. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(b).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.

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- Primary Caregiver. *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense. *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana Program Act Defense. *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 115.

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

RELATED ISSUES

Transportation

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

Medical Marijuana Not a Defense to Giving Away

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389).

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2361. Transporting or Giving Away Marijuana: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count _____] with [unlawfully] (giving away/transporting for sale) more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. **The defendant [unlawfully] (gave away/transported for sale) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana possessed by the defendant weighed more than 28.5 grams.**

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

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

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported).]

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

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BENCH NOTES

Instructional Duty

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

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

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then also give the bracketed word "unlawfully" in the first paragraph and element 1.

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away more than 28.5 grams of marijuana. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997)

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56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].

- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver. *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense. *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense. *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].
- This Instruction Upheld. *People v. Busch* (2010) 187 Cal.App.4th 150, 155–156 [113 Cal.Rptr.3d 683].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 115.

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

LESSER INCLUDED OFFENSES

- Transporting, Giving Away, etc., Not More Than 28.5 Grams of Marijuana. Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

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2362. Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor (Health & Saf. Code, § 11360(b))

The defendant is charged [in Count _____] with [unlawfully] (offering to give away/offering to transport for sale/attempting to transport for sale) 28.5 grams or less of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(b)].

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

1. **The defendant [unlawfully] (offered to give away/offered to transport for sale/attempted to transport for sale) marijuana, a controlled substance, in an amount weighing 28.5 grams or less;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport for sale) the controlled substance.**

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

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

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

New January 2006; Revised April 2010, February 2015, August 2016

BENCH NOTES

Instructional Duty

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

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

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Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully."

Related Instructions

Use this instruction when the defendant is charged with offering to transport or give away 28.5 grams or less of marijuana. For transporting or giving away 28.5 grams or less of marijuana, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(b).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver. *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense. *People v.*

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Mentch (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

- Medical Marijuana Program Act Defense. *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 115.

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

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

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2363. Offering to Transport or Give Away Marijuana: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count _____] with [unlawfully] (offering to give away/offering to transport for sale/attempting to transport for sale) more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. **The defendant [unlawfully] (offered to give away/offered to transport for sale/attempted to transport for sale) marijuana, a controlled substance, in an amount weighing more than 28.5 grams;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport for sale) the controlled substance.**

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

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

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

New January 2006; Revised April 2010, February 2015, August 2016

BENCH NOTES

Instructional Duty

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences

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should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully."

Related Instructions

Use this instruction when the defendant is charged with offering to transport or give away more than 28.5 grams of marijuana. For transporting or giving away more than 28.5 grams of marijuana, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver. *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].

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- Defendant's Burden of Proof on Compassionate Use Defense. *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense. *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 115.

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

LESSER INCLUDED OFFENSES

- Offering to Transport or Giving Away Not More Than 28.5 Grams of Marijuana. Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

2364–2369. Reserved for Future Use

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2630. Evidence Tampering by Peace Officer or Other Person (Pen. Code, § 141)

The defendant is charged [in Count _____] with tampering with evidence [in violation of Penal Code section 141].

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

1. **The defendant willfully, intentionally, and wrongfully (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) _____** *<insert name/description of physical matter at issue>***;**
2. **The defendant knew (he/she) was (changing[,]/ [or] planting[,]/ [or] placing[,]/ [or] making[,]/ [or] hiding[,]/ [or] moving) the _____** *<insert name/ description of physical matter at issue>***;**

[AND]

3. **When the defendant (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) the _____** *<insert name/description of physical matter at issue>***, (he/she) intended that (his/her) action would result in (someone being charged with a crime/ [or] the _____** *<insert name/description of physical matter at issue>* **being wrongfully produced as genuine or true in (a/an) _____** *<insert type of court proceeding specified in Pen. Code, § 141>***)(;/.)**

<Give element 4 if the defendant is charged under Pen. Code, § 141(b).>

[AND

4. **When the defendant acted, (he/she) was a peace officer.]**

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

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

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

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Give element 4 if the defendant is a peace officer charged with a felony violation of Penal Code section 141(b).

The jury must determine whether the defendant was a peace officer. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury on the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is error for the court to instruct that a person is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

AUTHORITY

- Elements. Pen. Code, § 141.
- Peace Officer Defined. Pen. Code, § 830 et seq.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 4.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 70, *Discovery and Inspection,* § 70.21[3] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence,* § 83.10[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on being a peace officer

(Pen. Code, § 141(b)), then the misdemeanor of evidence tampering by a non-peace officer is a lesser included offense. (Pen. Code, § 141(a).)

2631–2639. Reserved for Future Use

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

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

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

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

AND

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

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

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

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

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

[Photographing or recording an *executive officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime.]

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

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

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

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

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

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

New January 2006; Revised August 2014, August 2016

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 69.

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

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

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

RELATED ISSUES

Resisting an Officer Not Lesser Included Offense

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

Statute as Written Is Overbroad

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

State of Mind of Victim Irrelevant

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

Immediate Ability to Carry Out Threat Not Required

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

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(1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

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

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

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

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

AND

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

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

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

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

[Taking a photograph or making an audio or video recording of an *executive officer* while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

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

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

New January 2006; Revised August 2014, February 2015, August 2016

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BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 69.
- General Intent Offense. *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer. *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 69(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

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

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

LESSER INCLUDED OFFENSES

Penal Code section 148(a) is not a lesser included offense of this crime under the statutory elements test, but may be one under the accusatory pleading test. *People v. Smith* (2013) 57 Cal.4th 232, 241–242 [159 Cal.Rptr.3d 57, 303 P.3d 368]; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].

Assault may be a lesser included offense of this crime under the accusatory

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pleading test. See *People v. Brown* (2016) 245 Cal.App.4th 140, 153 [199 Cal.Rptr.3d 303].

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2653. Taking Firearm or Weapon While Resisting Peace Officer or Public Officer (Pen. Code, § 148(b) & (c))

The defendant is charged [in Count _____] with taking a (firearm/ weapon) from a (peace/public) officer while (resisting[,]/obstructing[,]/ [or] delaying) the officer in performing or attempting to perform (his/ her) duties [in violation of Penal Code section 148].

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

1. **_____** *<insert officer's name, excluding title>* **was a (peace/ public) officer lawfully performing or attempting to perform (his/ her) duties as a (peace/public) officer;**
2. **The defendant willfully (resisted[,]/obstructed[,]/ [or] delayed) _____** *<insert officer's name, excluding title>* **in the performance of or attempt to perform those duties;**
3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____** *<insert officer's name, excluding title>* **was a (peace/public) officer performing or attempting to perform (his/her) duties;**

[AND]

4. **While the defendant (resisted[,]/obstructed[,]/ [or] delayed) _____** *<insert officer's name, excluding title>*, **the defendant took or removed a (firearm/weapon) from _____'s** *<insert officer's name, excluding title>* **person [or immediate presence](;/.)**

<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.

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

[The term *firearm* is defined in another instruction 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*.]**

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

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

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

[Taking a photograph or making an audio or video recording of a (*peace officer*/ [or] *public officer*) while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

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

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

New January 2006; Revised February 2012, August 2016

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 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance and the appropriate

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portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. If lawful performance by a public officer is an issue, the court must draft an appropriate instruction depending on the duties of the officer.

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

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].)

Related Instructions

CALCRIM No. 2654, *Intentionally Taking or Attempting to Take Firearm From Peace Officer or Public Officer*.

AUTHORITY

- Elements. Pen. Code, § 148(b) & (c); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21] [elements of Pen. Code, § 148(a) offense]; *Nuno v. County of San Bernardino* (1999) 58 F.Supp.2d 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207] [knowledge that other person is an officer].
- Firearm Defined. Pen. Code, § 16520.
- Multiple Violations. Pen. Code, § 148(e).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Public Officer. See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Official Defined. Gov. Code, § 82048; see *In re Eddie D.* (1991) 235

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Cal.App.3d 417, 421 [286 Cal.Rptr. 684].

- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].
- Delaying Officer From Performing Duties. *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].
- General Intent Crime. *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21]; *People v. Matthews* (1999) 70 Cal.App.4th 164, 175 [82 Cal.Rptr.2d 502].
- "Take" or "Remove" Defined. *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175 [82 Cal.Rptr.2d 502].
- Verbal Resistance or Obstruction. *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 18–20.

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

LESSER INCLUDED OFFENSES

- Attempted Removal of Firearm or Weapon. Pen. Code, §§ 663, 148(b) & (c).
- Misdemeanor Resisting Arrest. Pen. Code, § 148(a)(1).

RELATED ISSUES

Multiple Violations

A person may be convicted of multiple violations of this section if there are multiple officer victims. (Pen. Code, § 148(e).) However, a person may not be convicted of both resisting an officer in violation of Penal Code section 148(a) and removing a weapon or firearm from an officer in violation of Penal Code section 148(b), (c), or (d) if the resistance and removal were committed against the same officer. (Pen. Code, § 148(e).)

Other Forms of Resistance or Interference

It is a misdemeanor under Penal Code section 148(a)(1) to willfully resist, delay, or obstruct any emergency medical technician in discharging or attempting to discharge his or her duties of employment. (See Health & Saf. Code, § 1797

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[defining emergency medical technician].) It is also a misdemeanor under Penal Code section 148(a)(2) to knowingly and maliciously interrupt, disrupt, impede, or otherwise interfere with the transmission of a communication over a public safety radio frequency.

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2655. Causing Death or Serious Bodily Injury While Resisting Peace Officer (Pen. Code, § 148.10(a) & (b))

The defendant is charged [in Count _____] with causing (the death of/serious bodily injury to) a peace officer performing (his/her) duties [in violation of Penal Code section 148.10].

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

1. **_____** *<insert officer's name, excluding title>* **was a peace officer lawfully performing or attempting to perform (his/her) duties as a peace officer;**
2. **The defendant willfully resisted _____** *<insert officer's name, excluding title>* **in the performance of or the attempt to perform (his/her) duties;**
3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____** *<insert officer's name, excluding title>* **was a peace officer performing or attempting to perform (his/her) duties;**
4. **_____'s** *<insert officer's name, excluding title>* **actions were reasonable, based on the facts or circumstances confronting (him/her) at the time;**
5. **The detention and arrest of (the defendant/ _____** *<insert name of person other than defendant who was arrested>***) were lawful and there was probable cause to detain;**

[AND]

6. **The defendant's willful resistance caused (the death of/serious bodily injury to) _____** *<insert officer's name, excluding title>***(;/.)**

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

[AND

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

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

In order to prove that _____'s *<insert officer's name, excluding title>* **(death/serious bodily injury) was *caused* by the defendant's willful resistance, the People must prove that:**

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1. **A reasonable person in the defendant's position would have foreseen that (his/her) willful resistance could begin a chain of events likely to result in the officer's death or serious bodily injury;**
2. **Defendant's willful resistance was a direct and substantial factor in causing _____'s** *<insert officer's name, excluding title>* **(death/serious bodily injury);**

AND

3. **_____'s** *<insert officer's name, excluding title>* **(death/serious bodily injury) would not have happened if the defendant had not willfully resisted _____** *<insert officer's name, excluding title>* **from performing or attempting to perform (his/her) duties.**

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused _____'s *<insert officer's name, excluding title>* **(death/serious bodily injury).**

[Willful resistance may include fleeing from the officer.]

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

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

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

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

[Taking a photograph or making an audio or video recording of an *executive officer* while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

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

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable

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or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2006, August 2016

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 148.10(a) & (b).

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- Peace Officer Defined. Pen. Code, § 830 et seq.
- Serious Bodily Injury Defined. Pen. Code, §§ 148.10(d), 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Willful Resistance Includes Flight. *People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1535 [34 Cal.Rptr.3d 481].
- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 21.

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

LESSER INCLUDED OFFENSES

- Misdemeanor Resisting Arrest. Pen. Code, § 148(a)(1).

RELATED ISSUES

Exclusions

Penal Code section 148.10 "does not apply to conduct that occurs during labor picketing, demonstrations, or disturbing the peace." (Pen. Code, § 148.10(c).)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. This new provision limits its application to violations of subdivision (a) of the same statute, however. Until the legislature or courts of review provide further guidance, it is unclear whether section 148(g) would apply to violations of Penal Code section 148.10.

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2656. Resisting Peace Officer, Public Officer, or EMT (Pen. Code, § 148(a))

The defendant is charged [in Count _____] with (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) in the performance or attempted performance of (his/her) duties [in violation of Penal Code section 148(a)].

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

1. **_____** *<insert name, excluding title>* **was (a/an) (peace officer/public officer/emergency medical technician) lawfully performing or attempting to perform (his/her) duties as a (peace officer/public officer/emergency medical technician);**
2. **The defendant willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____** *<insert name, excluding title>* **in the performance or attempted performance of those duties;**

AND

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____** *<insert name, excluding title>* **was (a/an) (peace officer/public officer/emergency medical technician) performing or attempting to perform (his/her) duties.**

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

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

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

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

[An *emergency medical technician* is someone who holds a valid certificate as an emergency medical technician.]

[The duties of (a/an) _____ *<insert title of peace officer, public officer, or emergency medical technician>* **include _____** *<insert job duties>*.]

[Taking a photograph or making an audio or video recording of a

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(*peace officer/public officer/emergency medical technician*) while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

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

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

[[The People allege that the defendant (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ <*insert name, excluding title*> by doing the following: _____ <*insert description of acts when multiple acts alleged*>.] You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) who was lawfully performing his or her duties, and you all agree on which act (he/she) committed.]

[If a person intentionally goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) the officer if all the other requirements are met.]

New January 2006; Revised June 2007, August 2016

BENCH NOTES

Instructional Duty

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

The court may use the optional bracketed language in the penultimate paragraph to insert a description of the multiple acts alleged if appropriate.

"[I]f a defendant is charged with violating section 148 and the arrest is found to be unlawful, a defendant cannot be convicted of that section." (*People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].) An unlawful arrest includes both an arrest made without legal grounds and an arrest made with excessive force. (*Id.* at p. 167.) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct that the defendant is not guilty of the offense charged if the arrest was unlawful. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr.

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663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].)

If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. When giving the portion of CALCRIM No. 2670 on the "use of force," the court **must** either delete the following sentence or specify that this sentence does not apply to a charge of violating Penal Code section 148: "If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force." (*People v. White, supra,* 101 Cal.App.3d at pp. 168–169 [court must clarify that Pen. Code, § 834a does not apply to charge under section 148].)

If the prosecution alleges multiple, distinct acts of resistance, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].) Give CALCRIM No. 3500, *Unanimity*, if needed.

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

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

If the facts indicate passive resistance to arrest, give the bracketed sentence that begins with "If a person goes limp." (*In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].)

AUTHORITY

- Elements. Pen. Code, § 148(a); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- General-Intent Crime. *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- Knowledge Required. *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207].
- Multiple Violations Permissible If Multiple Officers. Pen. Code, § 148(e).

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- Peace Officer Defined. Pen. Code, § 830 et seq.
- Emergency Medical Technician Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Delaying Officer From Performing Duties. *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].
- Verbal Resistance or Obstruction. *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Passive Resistance to Arrest. *In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].
- Unanimity. *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 18–19.

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

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The People have the burden of proving beyond a reasonable doubt that _____ <*insert name, excluding title*> was lawfully performing (his/her) duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert name[s] of all offense[s] with lawful performance as an element*>.

A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention).

<A. Unlawful Detention>

[A peace officer may legally detain someone if [the person consents to the detention or if]:

1. **Specific facts known or apparent to the officer lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime;**

AND

2. **A reasonable officer who knew the same facts would have the same suspicion.**

Any other detention is unlawful.

In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime.

In deciding whether the arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she arrested the person.

<Arrest without warrant for most misdemeanors or infractions>

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause

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to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

<Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence; see Bench Notes>

[In order for an officer to lawfully arrest someone for (a/an) (felony/ [or] _____ <*insert misdemeanor not requiring commission in officer's presence*>) without a warrant, the officer must have probable cause to believe the person to be arrested committed (a/an) (felony/ [or] _____ <*insert misdemeanor not requiring commission in officer's presence*>). However, it is not required that the offense be committed in the officer's presence.]

_____ <*insert crime that was basis for arrest*> **is (a/an) (felony/ misdemeanor/infraction).**

<Entering home without warrant>

[In order for an officer to enter a home to arrest someone without a warrant [and without consent]:

1. **The officer must have probable cause to believe that the person to be arrested committed a crime and is in the home;**

AND

2. **Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest. [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing immediately after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which he or she is being arrested if he or she asks for that information.]]]

<When giving either paragraph A on unlawful detention or paragraph B on unlawful arrest, give the following paragraph also, if applicable>

[Photographing or recording a *peace officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime nor a basis for (reasonable suspicion to detain/ [nor] probable cause to arrest).]

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<C. Use of Force>

[Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

[If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him.]]

If a peace officer uses unreasonable or excessive force while (arresting or attempting to arrest/ [or] detaining or attempting to detain) a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested or detained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] ["disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element"]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

Give section A if there is an issue as to whether the officer had a legal basis to detain someone. Give section B if there is an issue as to whether the officer had a legal basis to arrest someone. Give section C if there is an issue as to whether the officer used excessive force in arresting or detaining someone. If the issue is whether the officer used excessive force in some other duty, give section C with any necessary modifications.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the bracketed sentence in section C that begins with "If a

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person knows, or reasonably should know, that a peace officer is arresting or detaining him or her." (*People v. White, supra,* 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with "However, you may not find the defendant guilty of resisting arrest."

When giving the bracketed section under the heading "A. Unlawful Detention," if there is a factual issue about whether the person was in fact "detained," the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

In the section headed "B. Unlawful Arrest," two options are provided for arrests without a warrant. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the officer made the arrest for an infraction or a misdemeanor falling under the general rule, give the bracketed paragraph under the heading "Arrest without warrant for most misdemeanors or infraction." If the officer made the arrest for a felony or misdemeanor not requiring commission in the officer's presence give the bracketed paragraph under the heading "Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence." The court may also give both bracketed paragraphs, if appropriate.

Give the bracketed section about entering a home without a warrant if the arrest took place in a home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].) If there is a factual issue about whether the officer had consent to enter the home, the court must also instruct on the legal requirements for consent. *(Ibid.)*

AUTHORITY

- Instructional Duty. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Lawful Detention. *People v. Celis* (2004) 33 Cal.4th 667, 674–675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].
- Lawful Arrest. Pen. Code, §§ 834–836, 841.

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- Probable Cause Defined. *People v. Celis* (2004) 33 Cal.4th 667, 673 [16 Cal.Rptr.3d 85, 93 P.3d 1027]; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer's Training and Experience Relevant. *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention. Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home. *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743]; *People v. Ramey* (1976) 16 Cal.3d 263, 276 [127 Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].
- Reasonable Force. Pen. Code, §§ 692, 693.
- Excessive Force Makes Arrest Unlawful. *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

Secondary Sources

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* §§ 11.01–11.06 (Matthew Bender).

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

RELATED ISSUES

Service of Warrant

An officer is lawfully engaged in his or her duties if he or she is correctly serving "a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].) On the other hand, "the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement." (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. *(Ibid.)*

Lawfulness of Officer's Conduct Based on Objective Standard

The rule "requires that the officer's lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant's mens rea." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d

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1044].) The defendant's belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. The intended scope of this new legislation is unclear. Until the legislature or courts of review provide further guidance, the court will have to determine whether section 148(g) should apply in an individual case.

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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).]

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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

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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 Corrections and Rehabilitation[, Division of Juvenile Justice,]) 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; Revised February 2013, August 2016

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.

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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].

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- 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 (4th ed. 2012) 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 on 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

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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.)*

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2721. Assault by Prisoner (Pen. Code, § 4501)

The defendant is charged [in Count _____] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence [in violation of Penal Code section 4501].

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;

[AND]

5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND

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

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

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

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[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.]

A person is confined in a state prison if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) 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 *confined 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 *confined in a state prison*.]

New January 2006; Revised August 2016

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 6 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.

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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.

In the definition of "serving a sentence in a state prison," 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].)

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements of Assault by Prisoner . Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined. Pen. Code, § 7 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]].
- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 61, 63.

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. 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].

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RELATED ISSUES

Not Serving a Life Sentence

Previously, this statute did not apply to an inmate "undergoing a life sentence." (See *People v. Noah* (1971) 5 Cal.3d 469, 477 [96 Cal.Rptr. 441, 487 P.2d 1009].) The statute has been amended to remove this restriction, effective January 1, 2005. If the case predates this amendment, the court must add to the end of element 5, "for a term other than life."

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2722. Battery by Gassing (Pen. Code, §§ 243.9, 4501.1)

The defendant is charged [in Count _____] with battery by gassing [in violation of _____ <*insert appropriate code section[s]*>].

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

1. **The defendant was (serving a sentence in a [California] state prison/confined in a local detention facility);**
2. **While so confined, the defendant intentionally committed an act of gassing, that is, (he/she) (placed[,]/ [or] threw[,]/ [or] caused to be placed or thrown) (human excrement/human urine/human bodily fluids or substances/a mixture containing human bodily substances) on the body of (a peace officer/an employee of a (state prison/local detention facility));**

AND

3. **The (excrement/urine/bodily fluids or substances/mixture) actually made contact with the skin [or membranes] of (a peace officer/an employee of a (state prison/local detention facility)).**

[A person is *serving a sentence in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) 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 *serving a sentence 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 *serving a sentence in a state prison*.]]

[A (county jail/city jail/_____ <*insert description*>) is a *local detention facility*.]

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

New January 2006; Revised August 2016

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BENCH NOTES

Instructional Duty

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

If the battery is charged under Penal Code section 4501.1, in element 1, use the phrase "serving a sentence in state prison" and the bracketed definition of this phrase. If the battery is charged under Penal Code section 243.9, in element 1, give the language referencing a "local detention facility" and the bracketed definition of local detention facility.

When giving the definition of "serving a sentence in a state prison," give the bracketed portion that begins "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

The jury must determine whether the alleged victim was a peace officer. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. (*Ibid.*) It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.9, 4501.1.
- Confined in State Prison Defined. Pen. Code, § 4504.
- Local Detention Facility Defined. Pen. Code, § 6031.4.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 62.

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

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2723. Battery by Prisoner on Nonprisoner (Pen. Code, § 4501.5)

The defendant is charged [in Count _____] with battery on someone who was not a prisoner [in violation of Penal Code section 4501.5].

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

1. **The defendant willfully touched _____** *<insert name of person allegedly battered, excluding title of law enforcement agent>* **in a harmful or offensive manner;**
2. **When (he/she) acted, the defendant was serving a sentence in a [California] state prison;**

[AND]

3. **_____** *<insert name of person allegedly battered, excluding title of law enforcement agent>* **was not serving a sentence in state prison(;/.)**

<Give element 4 when self-defense or defense of another is an issue raised by the evidence.>

[AND

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

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

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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

A person is *serving a sentence in a state prison* if he or she is (confined in _____ *<insert name of institution from Pen. Code, § 5003>***/committed to the Department of (Corrections and Rehabilitation, Division of Juvenile Justice/Corrections and Rehabilitation)) 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 *serving a sentence in a state prison* even if, at the time of the offense,**

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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 *serving a sentence in a state prison*.]

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

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

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

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

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. (See *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022–1023 [149 Cal.Rptr. 134]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If there is evidence of excessive force, give bracketed element 4, the last bracketed paragraph, and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

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

In the definition of "serving a sentence in a state prison," 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.

Related Instructions

CALCRIM No. 960, *Simple Battery*.

AUTHORITY

- Elements of Battery by Prisoner on Nonprisoner. Pen. Code, § 4501.5.
- Elements of Battery. Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71

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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]].

- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–16, 57.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 69.

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

LESSER INCLUDED OFFENSES

- Simple Battery. Pen. Code, § 242.
- Assault. Pen. Code, § 240.
- Battery by Gassing. *People v. Flores* (2009) 176 Cal.App.4th 924, 929 [97 Cal.Rptr.3d 924].

2724–2734. Reserved for Future Use

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2735. Holding a Hostage (Pen. Code, § 4503)

The defendant is charged [in Count _____] with holding a hostage [in violation of Penal Code section 4503].

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

1. **The defendant (held a person hostage/ [or] held a person against his or her will, by force or threat of force, in defiance of official orders) inside a (prison/facility under the jurisdiction of the Department of Corrections);**

AND

2. **When the defendant acted, (he/she) was serving a sentence in a [California] state prison.**

A person is *serving a sentence in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) 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 *serving a sentence 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 *serving a sentence in a state prison*.]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

In the definition of "serving a sentence in a state prison," 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.

AUTHORITY

- Elements. Pen. Code, § 4503.
- Confined in State Prison Defined. Pen. Code, § 4504.

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- Underlying Conviction Need Not Be Valid. Wells v. California (9th Cir. 1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 291.

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2901. Vandalism: Amount of Damage (Pen. Code, § 594(b)(1))

If you find the defendant guilty of vandalism [in Count[s] _____], you must then decide whether the People have proved that the amount of damage caused by the vandalism [(in each count/in Count[s] _____)] was $400 or more. [If you decide that the amount of damage was $400 or more, you must then decide whether the People have proved that the damage [(in each count/in Count[s] _____)] was also $10,000 or more.]

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; Revised February 2014, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on these sentencing factors.

This instruction **must** be given with CALCRIM No. 2900, *Vandalism*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved that the damage was $400 or more and, if appropriate, $10,000 or more.

AUTHORITY

- Enhancement. Pen. Code, § 594(b)(1).
- This Instruction Upheld. *People v. Carrasco* (2012) 209 Cal.App.4th 715, 722–723 [147 Cal.Rptr.3d 383].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 277–285.

RELATED ISSUES

Aggregation of Damages

Damage resulting from multiple acts of vandalism may be aggregated to constitute a felony if the acts were part of a single general impulse, intention, or plan. (*People v. Carrasco*, *supra*, 209 Cal.App.4th at pp. 719–721.)

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2980. Contributing to Delinquency of Minor (Pen. Code, § 272)

The defendant is charged [in Count _____] with contributing to the delinquency of a minor [in violation of Penal Code section 272].

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

<Alternative A—caused or encouraged minor to come under jurisdiction of juvenile court>

[1. The defendant (committed an act/ [or] failed to perform a duty);

AND

2. In (doing so/ [or] failing to do so)[,] the defendant (caused[,]/ [or] encouraged[,]/ [or] contributed to (causing/ [or] encouraging)) a minor to become [or continue to be] a (dependent /delinquent) child of the juvenile court.]

<Alternative B—induced minor to come or remain under jurisdiction of juvenile court or not to follow court order>

[The defendant by (act[,]/ [or] failure to act[,]/ [or] threat[,]/ [or] command[,]/ [or] persuasion) induced or tried to induce a (minor/delinquent child of the juvenile court/dependent child of the juvenile court) to do either of the following:

1. Fail or refuse to conform to a lawful order of the juvenile court;

OR

2. (Do any act/Follow any course of conduct/Live in a way) that would cause or obviously tend to cause that person to become or remain a (dependent /delinquent) child of the juvenile court.]

In order to commit this crime, a person must act with [either] (general criminal intent/ [or] criminal negligence).

[In order to act with *general criminal intent,* a person must not only commit the prohibited act [or fail to do the required act], but must do so intentionally or on purpose. However, it is not required that he or she intend to break the law.]

[*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.

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

A *minor* is a person under 18 years old.

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

[A parent [or legal guardian] has a duty to exercise reasonable care, supervision, protection, and control over his or her minor child.]

[A *guardian* means the legal guardian of a child.]

<A. Dependent Child Defined: Physical Abuse>

[A minor may become a *dependent child* if his or her parent [or guardian] has intentionally inflicted serious physical harm on him or her, or there is a substantial risk that the parent [or guardian] will do so.]

[The manner in which a less serious injury, if any, was inflicted, any history of repeated infliction of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian may be relevant to whether the child is at substantial risk of serious physical harm.]

[*Serious physical harm* does not include reasonable and age-appropriate spanking of the buttocks when there is no evidence of serious physical injury.]

<B. Dependent Child Defined: Neglect>

[A minor may become a *dependent child* if he or she has suffered, or is at substantial risk of suffering, serious physical harm or illness as a result of [one of the following]:

[1.] [The failure or inability of his or her parent [or guardian] to adequately supervise or protect the child(;/.)]

[OR]

[(1/2).] [The willful or negligent failure of his or her parent [or guardian] to provide the child with adequate food, clothing, shelter, or medical treatment(;/.)]

[OR]

[(1/2/3).] [The inability of his or her parent [or guardian] to provide regular care for the child due to the parent's [or guardian's] (mental illness[,]/ [or] developmental disability[,]/ [or] substance abuse).]

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[A minor cannot become a dependent child based only on the fact that there is a lack of emergency shelter for the minor's family.]

[Deference must be given to a parent's [or guardian's] decision to give medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by one of its accredited practitioners. A minor cannot be found to be a dependent child unless such a finding is necessary to protect the minor from suffering serious physical harm or illness. The following factors may bear on such a determination:

1. **The nature of the treatment proposed by the parent [or guardian];**
2. **The risks, if any, to the child posed by the course of treatment or nontreatment proposed by the parent [or guardian];**
3. **The risks, if any, of any alternative course of treatment being proposed for the child by someone other than the parent [or guardian];**

AND

4. **The likely success of the course of treatment or nontreatment proposed by the parent [or guardian].]**

[A minor may be a dependent child only as long as necessary to protect him or her from the risk of suffering serious physical harm or illness.]]

<C. Dependent Child Defined: Serious Emotional Damage>

[A minor may become a *dependent child* if (his or her parent's [or guardian's] conduct[,]/ [or] the lack of a parent [or guardian] who is capable of providing appropriate care[,]) has caused the minor to suffer serious emotional damage or to face a substantial risk of suffering serious emotional damage. *Serious emotional damage* may be shown by severe anxiety, depression, withdrawal, or unruly, aggressive behavior toward himself, herself, or others. [However, a minor cannot become a *dependent child* on this basis if the parent [or guardian] willfully fails to provide mental health treatment to the minor based on a sincerely held religious belief and a less-intrusive intervention is available.]]

<D. Dependent Child Defined: Sexually Abused>

[A minor may become a *dependent child* if he or she:

1. **Has been sexually abused;**
2. **Faces a substantial risk of being sexually abused by (his or her (parent/ [or] guardian)/ [or] a member of his or her household);**

OR

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3. Has a parent [or guardian] who has failed to adequately protect him or her from sexual abuse when the parent [or guardian] knew or reasonably should have known that the child was in danger of sexual abuse.]

<E. Dependent Child Defined: Severe Physical Abuse Under Age Five>

[A minor may become a *dependent child* if he or she is under five years old and has suffered severe physical abuse by a parent or by any person known by the parent if the parent knew or reasonably should have known that the person was physically abusing the child.

As used here, the term *severe physical abuse* means any of the following:

1. A single act of abuse that causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death;

2. A single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling;

3. More than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness;

OR

4. The willful, prolonged failure to provide adequate food.]

<F. Dependent Child Defined: Parent or Guardian Caused Death>

[A minor may become a *dependent child* if his or her parent [or guardian] caused the death of another child through abuse or neglect.]

<G. Dependent Child Defined: Left Without Support>

[A minor may become a *dependent child* if he or she has been left without any provision for support.]

[A minor may become a *dependent child* if he or she has been voluntarily surrendered according to law and has not been reclaimed within the 14-day period following that surrender.]

[A minor may become a *dependent child* if his or her parent [or guardian] has been incarcerated or institutionalized and cannot arrange for the child's care.]

[A minor may become a *dependent child* if his or her relative or other adult custodian with whom he or she resides or has been left is unwilling or unable to provide care or support for the child, the parent's whereabouts are unknown, and reasonable efforts to locate the parent have been unsuccessful.]

<H. Dependent Child Defined: Freed for Adoption>

[A minor may become a *dependent child* if he or she has been freed for

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adoption by one or both parents for 12 months by either relinquishment or termination of parental rights, or an adoption petition has not been granted.]

<I. Dependent Child Defined: Acts of Cruelty>

[A minor may become a *dependent child* if he or she has been subjected to an act or acts of cruelty by (his or her (parent/ [or] guardian)/ [or] a member of his or her household), or the parent [or guardian] has failed to adequately protect the child from an act or acts of cruelty when the parent [or guardian] knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty.]

<J. Dependent Child Defined: Sibling Abused>

[A minor may become a *dependent child* if his or her sibling has been abused or neglected, as explained above, and there is a substantial risk that the child will be abused or neglected in the same way. The circumstances surrounding the abuse or neglect of the sibling, the mental condition of the parent [or guardian], and other factors may bear on whether there is a substantial risk to the child.]

<Delinquent Child Defined>

[A *delinquent child* is a minor whom a court has found to have committed a crime.]

[A *delinquent child* is [also] a minor who has violated a curfew based solely on age.]

[A *delinquent child* is [also] a minor who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parent [or guardian or custodian], or who is beyond the control of that person.]

[A *delinquent child* is [also] a minor who _____ *<insert other grounds for delinquency from Welf. & Inst. Code, § 601>*.**]**

<Sexual Abuse Defined>

[*Sexual abuse* includes (rape[,]/ [and] statutory rape[,]/ [and] rape in concert[,]/ [and] incest[,]/ [and] sodomy[,]/ [and] lewd or lascivious acts on a child[,]/ [and] oral copulation[,]/ [and] sexual penetration [,]/ [and] child molestation[,]/ [and] employing a minor to perform obscene acts[,]/ [and] preparing, selling, or distributing obscene matter depicting a minor).]

To decide whether the (parent/guardian/_____ *<insert description of person alleged to have committed abuse>*) **committed (that/one of those) crime[s], please refer to the separate instructions that I (will give/ have given) you on (that/those) crime[s].**

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[*Sexual abuse* also includes, but is not limited to, the following:

- **[Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not semen is emitted(;/.)]**
- **[Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person(;/.)]**
- **[Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose[, unless it is done for a valid medical purpose](;/.)]**
- **[The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks), or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification(;/.) [However, *sexual abuse* does not include touching that may be reasonably construed as normal caretaker responsibilities, interactions with, or demonstrations of affection for the child, or acts performed for a valid medical purpose(;/.)]]**
- **[The intentional masturbation of the perpetrator's genitals in the child's presence(;/.)]**
- **[Conduct by (someone who knows that he or she is aiding, assisting, employing, using, persuading, inducing, or coercing/a person responsible for a child's welfare who knows that he or she is permitting or encouraging) a child to engage in[, or assist others to engage in,] (prostitution[,]/ [or] a live performance involving obscene sexual conduct[,]/ [or] posing or modeling, alone or with others, for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction involving obscene sexual conduct)(;/.) [A *person responsible for a child's welfare* is a (parent[,]/ [or] guardian[,]/ [or] foster parent[,]/ [or] licensed administrator or employee of a public or private residential home, residential school, or other residential institution)(;/.)]]**
- **[Commercial sexual exploitation including (the sexual trafficking of a child/ [or] providing food, shelter, or payment to a child in exchange for the performance of _____ <*insert description of sex act[s] specified in Penal Code sections 11165.1 or 236.1*>).]**
- **[(Depicting a child in/[,] [or] (K/k)nowingly (developing/[,] duplicating/[,] printing/[,] downloading/[,] streaming/[,] accessing through electronic or digital media/[,] [or] exchanging,) any (film/[,] photograph/[,] videotape/[,] video recording/[,] negative/[,] [or] slide) knowing that it shows a child engaged in an act of**

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obscene sexual conduct. [However, *sexual abuse* does not include (conduct by a person engaged in legitimate medical, scientific, or educational activities[;]/ [or] lawful conduct between spouses[;]/ conduct by a person engaged in law enforcement activities[;]/ [or] conduct by an employee engaged in work for a commercial film developer while acting within the scope of his or her employment and as instructed by his or her employer, provided that the employee has no financial interest in the commercial developer who employs him or her).]]]

New January 2006; Revised August 2015, August 2016

BENCH NOTES

Instructional Duty

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

If more than one act is alleged as a basis for the charge, the court has a **sua sponte** duty to give a unanimity instruction. (*People v. Madden* (1981) 116 Cal.App.3d 212, 215–216 [171 Cal.Rptr. 897].) Give CALCRIM No. 3500, *Unanimity*. A unanimity instruction is not required if the acts "constitute a continuing course of conduct." *(Ibid.)* See the discussion in the Bench Notes for CALCRIM No. 3500. (See also *People v. Schoonderwood* (1945) 72 Cal.App.2d 125, 127 [164 P.2d 69] [continuous course of conduct exception applied to charge of contributing to delinquency of a minor]; *People v. Dutra* (1946) 75 Cal.App.2d 311, 321–322 [171 P.2d 41] [exception did not apply].)

If the case involves allegations of child molestation and the evidence has been presented in the form of "generic testimony" about recurring events without specific dates and times, the court should determine whether it is more appropriate to give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) See discussion in the Related Issues section of CALCRIM No. 3500, *Unanimity*.

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

The remaining bracketed paragraphs should be given on request if relevant.

AUTHORITY

- Elements and Definitions. Pen. Code, § 272.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Sexual Abuse Defined. Pen. Code, § 11165.1.

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- Delinquent/Ward of Court Defined. Welf. & Inst. Code, §§ 601–602.
- Dependent Child Defined. Welf. & Inst. Code, § 300.
- Minor Defined. Pen. Code, § 270e; Fam. Code, § 6500.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency § 154.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.20[8], Ch. 144, *Crimes Against Order*, § 144.10[1] (Matthew Bender).

RELATED ISSUES

Lesser Offense of Rape or Lewd Acts

There is disagreement regarding whether a violation of Penal Code section 272 is a necessarily lesser included offense of rape or lewd and lascivious acts. The Supreme Court concluded that it was in *People v. Greer* (1947) 30 Cal.2d 589, 597–598 [184 P.2d 512], overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6 [52 Cal.Rptr.2d 282, 914 P.2d 832]. However, in *People v. Bobb* (1989) 207 Cal.App.3d 88, 92 [254 Cal.Rptr. 707], disapproved on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531], the Court of Appeal expressly declined to follow *Greer*, concluding that "the calculus has been altered" by an intervening amendment to Welfare and Institutions Code section 601 and further faulting *Greer* for failing to analyze the elements of the lesser included offenses.

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3220. Amount of Loss (Pen. Code, § 12022.6)

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 crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether the People have proved the additional allegation that the value of the property (taken[,]/ [or] damaged[,]/ [or] destroyed) was more than $_____ <*insert amount alleged*>.

To prove this allegation, the People must prove that:

1. **In the commission [or attempted commission] of the crime, the defendant (took[,]/ [or] damaged[,]/ [or] destroyed) property;**
2. **When the defendant acted, (he/she) intended to (take[,]/ [or] damage[,]/ [or] destroy) the property;**

AND

3. **The loss caused by the defendant's (taking[,]/ [or] damaging[,]/ [or] destroying) the property was greater than $_____ <*insert amount alleged*>.**

[If you find the defendant guilty of more than one crime, you may add together the loss suffered by each victim in Count[s] _____ <*specify all counts that jury may use to compute cumulative total loss*> to determine whether the total losses to all the victims were more than $_____ <*insert amount alleged*> if the People prove that:

A. **The defendant intended to and did (take[,]/ [or] damage[,]/ [or] destroy) property in each crime;**

AND

B. **The losses arose from a common scheme or plan.]**

[The value of property is the fair market value of the property.]

[When computing the amount of loss according to this instruction, do not count any taking, damage, or destruction more than once simply because it is mentioned in more than one count, if the taking, damage, or destruction mentioned in those counts refers to the same taking, damage, or destruction with respect to the same victim.]

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

New January 2006; Revised August 2009, April 2010, August 2016

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BENCH NOTES

Instructional Duty

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

The court **must** insert the alleged amounts of loss in the blanks provided so that the jury may first determine whether the statutory threshold amount exists for any single victim, and then whether the statutory threshold amount exists for all victims or for all losses to one victim cumulatively.

AUTHORITY

- Enhancement. Pen. Code, § 12022.6 [in effect until January 1, 2018 unless otherwise extended].
- Value Is Fair Market Value. *People v. Swanson* (1983) 142 Cal.App.3d 104, 107–109 [190 Cal.Rptr. 768].
- Definition of "Loss" of Computer Software. Pen. Code, § 12022.6(e).
- Defendant Need Not Intend to Permanently Deprive Owner of Property. *People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].
- Victim Need Not Suffer Actual Loss. *People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].
- Defendant Need Not Know or Reasonably Believe Value of Item Exceeded Amount Specified. *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606–607 [188 Cal.Rptr. 63].
- Great Taking Enhancement Encompasses Liability of Aiders and Abettors. *People v. Acosta* (2014) 226 Cal.App.4th 108, 123–126 [171 Cal.Rptr.3d 774].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 378.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.45 (Matthew Bender).

RELATED ISSUES

"Take"

As used in Penal Code section 12022.6, "take" does not have the same meaning as in the context of theft. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].) The defendant need not intend to permanently deprive the owner of the property so long as the defendant intends to take, damage, or destroy the property. *(Ibid.)* Moreover, the defendant need not actually steal the property but

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may "take" it in other ways. (*People v. Superior Court (Kizer)* (1984) 155 Cal.App.3d 932, 935 [204 Cal.Rptr. 179].) Thus, the enhancement may be applied to the crime of receiving stolen property *(ibid.)* and to the crime of driving a stolen vehicle (*People v. Kellett*, *supra*, 134 Cal.App.3d at pp. 958–959).

"Loss"

As used in Penal Code section 12022.6, "loss" does not require that the victim suffer an actual or permanent loss. (*People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr. 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].) Thus, the enhancement may be imposed when the defendant had temporary possession of the stolen property but the property was recovered (*People v. Bates*, *supra*, 113 Cal.App.3d at pp. 483–484), and when the defendant attempted fraudulent wire transfers but the bank suffered no actual financial loss (*People v. Ramirez*, *supra*, 109 Cal.App.3d at pp. 539–540).

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3223. Reckless Driving With Specified Injury (Veh. Code, § 23105(a))

If you find the defendant guilty of reckless driving, you must then decide whether the People have proved the additional allegation that when the defendant committed that crime, (he/she) caused someone else to suffer _____ <*insert injury or injuries specified in Veh. Code § 23105(b)*>.

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

New August 2013; Revised August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction. See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] [any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt.]

The court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*, if the issue of whether the defendant's act caused injury goes to the jury. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 591 [35 Cal.Rptr. 401].

AUTHORITY

- Elements. Veh. Code, § 23105(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 271.

Related Instructions

CALCRIM No. 2200, *Reckless Driving*.

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