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INVITATION TO COMMENT CALCRIM-2022-02

Title

Criminal Jury Instructions: Revisions,
Revocations, and Additions

Proposed Rules, Forms, Standards, or Statutes

New, Revised, and Revoked Jury
Instructions

Proposed by

Advisory Committee on Criminal Jury
Instructions
Hon. Jeffrey Ross, Chair

Action Requested

Review and submit comments by Monday,
January 4, 2023

Proposed Effective Date

March 24, 2023

Contact

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Summary

New and revised jury instructions reflecting recent developments in the law and user suggestions.

Please note that the proposed changes to CALCRIM Nos. 540A and 730 include citation to *People v. Garcia* (2022) 82 Cal.App.5th 956 [299 Cal.Rptr.3d 131] in the bench notes. A petition for review is pending in this case (as of November 18, 2022). If the California Supreme Court grants review, the committee intends to remove this citation from the proposed changes.

CALCRIM Proposed Changes: Invitation to Comment Nov. 21, 2022 – Jan. 4, 2023

Instruction Number	Instruction Title
301, 335, 336, 358, 761, 763	Single Witness’s Testimony; No Dispute Whether Witness is Accomplice; In-Custody Informant; Evidence of Defendant’s Statements; Death Penalty: Duty of Jury Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating
NEW 352 (& 350, 375)	Character of Victim and Violent Character of Defendant Character of Defendant; Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.
418	Coconspirator’s Statements
540A & 730	Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act; Special Circumstances: Murder in Commission of Felony
908	Assault Under Color of Authority
1156	Loitering: For Prostitution
1401 (& 736, 1400, 2542)	Felony or Misdemeanor Committed for Benefit of Criminal Street Gang
1520	Attempted Arson
2181	Evading Police Officer
2622 & 2623	Intimidating a Witness Intimidating a Witness: Sentencing Factors
NEW 3224	Aggravating Factor: Great Violence, Great Bodily Harm, Threat of Great Bodily Harm, or Other Acts
NEW 3225	Aggravating Factor: Armed With or Used a Weapon
NEW 3226	Aggravating Factor: Particularly Vulnerable Victim
NEW 3227	Aggravating Factor: Induced Others or Occupied Leadership Position

Instruction Number	Instruction Title
NEW 3228	Aggravating Factor: Induced Minor
NEW 3229	Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses
NEW 3230	Aggravating Factor: Planning, Sophistication, or Professionalism
NEW 3231	Aggravating Factor: Taking or Damage of Great Monetary Value
NEW 3232	Aggravating Factor: Large Quantity of Contraband
NEW 3233	Aggravating Factor: Position of Trust or Confidence
NEW 3234	Aggravating Factor: Serious Danger to Society

301. Single Witness's Testimony

[Unless I instruct you otherwise,] (T/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

New January 2006; Revised April 2010, February 2012, February 2014, September 2017, March 2019, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].)

Give the bracketed phrase if any testimony requires corroboration. See: Cal. Const., art. I, § 18 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 1111.5 [in-custody informant]; 653f [solicitation of felony]; 118 [perjury]; 1108 [abortion and seduction of minor]; 532 [obtaining property by false pretenses].

AUTHORITY

- Instructional Requirements. ▶ Evid. Code, § 411; *People v. Rincon-Pineda*, *supra*, ~~(1975)~~ 14 Cal.3d at p. 864, 885 ~~[123 Cal.Rptr. 119, 538 P.2d 247]~~.
- Corroboration Required. ▶ *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].
- No Corroboration Requirement for Exculpatory Accomplice Testimony. ▶ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].
- This Instruction Upheld. ▶ *People v. Tran* (2022) 13 Cal.5th 1169, 1233–1234 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

RELATED ISSUES

Uncorroborated Testimony of Defendant

The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14 [268 Cal.Rptr. 706, 789 P.2d 887].)

Uncorroborated Testimony in Sex Offense Cases

In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541, 828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

SECONDARY SOURCES

3 Witkin, *California Evidence* (5th ed. 2012) Presentation at Trial, § 125.

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

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

If the crime[s] of _____ *<insert charged crime[s]>* (was/were) committed, then _____ *<insert name[s] of witness[es]>* (was/were) [an] accomplice[s] to (that/those) crime[s].

You may not convict the defendant of _____ *<insert crime[s]>* based on the (statement/ [or] testimony) of an accomplice alone. You may use (a statement/ [or] testimony) of an accomplice that tends to incriminate the defendant to convict the defendant only if:

1. The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;
2. That supporting evidence is independent of the accomplice's (statement/ [or] testimony);

AND

3. That supporting evidence tends to connect the defendant to the commission of the crime[s].

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758].)

“Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness’s status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction “ ‘if undisputed evidence established the complicity’ ”].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

If a codefendant’s testimony tends to incriminate another defendant, the court **must give** an appropriate instruction on accomplice testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562 [43 Cal.Rptr.3d 1, 133 P.3d 1076]; citing *People v. Box* (2000) 23 Cal.4th 1153, 1209 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Alvarez* (1996) 14 Cal.4th 155, 218 [58 Cal.Rptr.2d 385, 926 P.2d 365].) =The court **must** also instruct on accomplice testimony when two co-defendants testify against each other and blame each other for the crime. =(*Id.* at 218-219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant’s defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with

caution. (See *People v. Coffman and Marlow*, supra, ~~(2004)~~ 34 Cal.4th at p. 1, 105 ~~[17 Cal.Rptr.3d 710, 96 P.3d 30].~~)

Do not give this instruction if accomplice testimony is solely exculpatory or neutral. (*People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892] [telling jurors that corroboration is required to support neutral or exonerating accomplice testimony was prejudicial error].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word “statement” throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

AUTHORITY

- Instructional Requirements. ▶ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence. ▶ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony. ▶ *People v. Guiuan*, supra, ~~(1998)~~ 18 Cal.4th at p. 558, 569 ~~[76 Cal.Rptr.2d 239, 957 P.2d 928].~~
- Defense Admissions May Provide Necessary Corroboration. ▶ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor. ▶ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required. ▶ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another. ▶ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient. ▶ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated. ▶ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v.*

Brocklehurst (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].

- Uncorroborated Accomplice Testimony May Establish Corpus Delicti. ▶ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. ▶ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- This Instruction Upheld. ▶ [*People v. Tran* \(2022\) 13 Cal.5th 1169, 1233–1234 \[298 Cal.Rptr.3d 150, 515 P.3d 1210\]](#); *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363–367 [100 Cal.Rptr.3d 820].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other. ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719–720 [185 Cal.Rptr.3d 672].
- No Corroboration Requirement for Exculpatory Accomplice Testimony. ▶ *People v. Smith*, [*supra*, \(2017\) 12 Cal.App.5th at pp. 766, 778–780 \[218 Cal.Rptr.3d 892\]](#).

SECONDARY SOURCES

3 Witkin, *California Evidence* (5th ed. 2012) Presentation at Trial, §§ 108, 109, 118, 122.

5 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Criminal Trial, §§ 686, 738, 739.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

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

336. In-Custody Informant

View the (statement/ [or] testimony) of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such (a statement/ [or] testimony), you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such (statement/ [or] testimony), but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

<Give the following paragraph if the issue of whether a witness was an in-custody informant is in dispute>

[An *in-custody informant* is someone [, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose (statement/ [or] testimony) is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution. If you decide that a (declarant/ [or] witness) was not an in-custody informant, then you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.]

<Give the first bracketed phrase if the issue of whether a witness was an in-custody informant is in dispute>

[If you decide that a (declarant/ [or] witness) was an in-custody informant, then] (Y/)you may not convict the defendant of _____ *<insert charged crime[s]>* based on the (statement/ [or] testimony) of that in-custody informant alone. [Nor may you find a special circumstance true/ [or] use evidence in aggravation based on the (statement/ [or] testimony) of that in-custody informant alone.]

You may use the (statement/ [or] testimony) of an in-custody informant against the defendant only if:

- 1. The (statement/ [or] testimony) is supported by other evidence that you believe;**
- 2. That supporting evidence is independent of the (statement/ [or] testimony)-;**
AND
- 3. That supporting evidence connects the defendant to the commission of the crime[s] [or to the special circumstance/ [or] to evidence in aggravation]. The supporting evidence is not sufficient if it merely**

shows that the charged crime was committed [or proves the existence of a special circumstance/ [or] evidence in aggravation].

This supporting evidence requirement does not apply where the testimony of an in-custody informant is offered for any purpose other than proving (guilt/ [or] a special circumstance/evidence in aggravation).

[Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.]

[Do not use the (statement/ [or] testimony) of an in-custody informant to support the (statement/ [or] testimony) of another in-custody informant unless you are convinced that _____ <insert name of party calling in-custody informant as witness> has proven it is more likely than not that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.]

[A *percipient witness* is someone who personally perceived the matter that he or she testified about.]

<Insert the name of the in-custody informant if his or her statement is not in dispute>

[_____ <insert name of witness> is an in-custody informant.]

[_____ <insert name of institution> is a correctional institution.]

New January 2006; Revised August 2012, February 2016, October 2021, March 2023

BENCH NOTES

Instructional Duty

The court must give this instruction on request. (Pen. Code, § 1127a.)

The court should also be aware of the following statutory provisions relating to in-custody informants: Penal Code sections 1127a(c) [prosecution must disclose consideration given to witness]; 1191.25 [prosecution must notify victim of in-

custody informant]; and 4001.1 [limitation on payments to in-custody informants and action that may be taken by in-custody informant].

If there is no issue over whether the witness is an in-custody informant and the parties agree, the court may instruct the jury that the witness “is an in-custody informant.” If there is an issue over whether the witness is an in-custody informant, give the bracketed definition of the term.

The committee awaits guidance from courts of review on the issue of whether this instruction applies to witnesses other than those called by the People. -Until the issue is resolved, the committee provides this version consistent with the language of the ~~new~~ statute.

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word “statement” throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

Related Instruction

CALCRIM No. 337, *Witness in Custody or Physically Restrained*.

AUTHORITY

- Instructional Duty. ▶ Pen. Code, §§ 1111.5, 1127a.
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other. ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
- This Instruction Upheld. *People v. Tran* (2022) 13 Cal.5th 1169, 1233–1234 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

2 Witkin, California Evidence (5th ed. 2012) Witnesses, § 20.

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 120, 123.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.32[2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03A, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b] (Matthew Bender).

358. Evidence of Defendant's Statements

You have heard evidence that the defendant made [an] [oral] [and] [a] [written] statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

New January 2006; Revised June 2007, December 2008, February 2014, August 2015, September 2017, September 2020, March 2023

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. *People v. Diaz* (2015) 60 Cal.4th 1176, 1190 [185 Cal.Rptr.3d 431, 345 P.3d 62].

Give the bracketed cautionary instruction on request if there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Diaz, supra*, ~~(2015)~~ 60 Cal.4th ~~1176~~ at p. 1192 [185 Cal.Rptr.3d 431, 345 P.3d 62].) In the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

The bracketed cautionary instruction is not required when the defendant's incriminating statements are written or tape-recorded. (*People v. Gardner* (1961) 195 Cal.App.2d 829, 833 [16 Cal.Rptr. 256]; *People v. Hines* (1964) 61 Cal.2d 164, 173 [37 Cal.Rptr. 622, 390 P.2d 398], disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40 [175 Cal.Rptr. 738, 631 P.2d 446]; *People v. Scherr* (1969) 272 Cal.App.2d 165, 172 [77 Cal.Rptr. 35]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [120 Cal.Rptr.2d 477, 47 P.3d 262] [admonition to view non-recorded statements with caution applies only to a defendant's incriminating statements].) If the jury heard both inculpatory and exculpatory, or only inculpatory, statements attributed to the defendant, give the

bracketed paragraph. If the jury heard only exculpatory statements by the defendant, do not give the bracketed paragraph.

If ~~the a~~ defendant ~~was a minor~~ suspected of murder ~~who~~ made a statement in a custodial interview that did not comply with Penal Code section 859.5, give the following additional instruction:

Consider with caution any statement tending to show defendant's guilt made by (him/her) during _____ <insert description of interview, e.g., interview with Officer Smith of October 15, 2013. >

When a defendant's statement is a verbal act, as in conspiracy cases, this instruction applies. ~~(~~*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 [249 Cal.Rptr. 71, 756 P.2d 795]; *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352 [114 Cal.Rptr. 916]; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases].

When a defendant's statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction still applies. (*People v. Diaz, supra, (2015)* 60 Cal.4th at p. 1187-1176 [~~185 Cal.Rptr.3d 431, 345 P.3d 62~~], overruling *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509].)

Related Instructions

If out-of-court oral statements made by the defendant are prominent pieces of evidence in the trial, then CALCRIM No. 359, *Corpus Delicti: Independent Evidence of a Charged Crime*, may also have to be given together with the bracketed cautionary instruction.

AUTHORITY

- Instructional Requirements. ▶ *People v. Diaz, supra, (2015)* 60 Cal.4th at pp. 1187, 1190, 1192-1176 [~~185 Cal.Rptr.3d 431, 345 P.3d 62~~]; ~~-~~*People v. Livaditis, supra, (1992)* 2 Cal.4th at p. 759, 784 [~~9 Cal.Rptr.2d 72, 831 P.2d 297~~].
- Custodial Statements by ~~Minors~~ Defendants Suspected of Murder. ▶ Pen. Code, § 859.5(c)(3), ~~effective 1/1/2014~~.
- This Instruction Upheld. ▶ *People v. Tran* (2022) 13 Cal.5th 1169, 1233-1234 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial §§ 683-686, 723, 724, 733.

1 Witkin, California Evidence (5th ed. 2012) Hearsay § 52.

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial § 127.

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

761. Death Penalty: Duty of Jury

I will now instruct you on the law that applies to this [phase of the] case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.]

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

You must decide whether (the/each) defendant will be sentenced to death or life in prison without the possibility of parole. It is up to you and you alone to decide what the penalty will be. [In reaching your decision, consider all of the evidence from the entire trial [unless I specifically instruct you not to consider something from an earlier phase].] Do not allow bias, prejudice, or public opinion to influence your opinion in any way.

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.] After you have decided what the facts are, follow the instructions that apply to the facts as you find them.

BENCH NOTES

Instructional Duty

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

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

The court should give the bracketed portion of the last paragraph that begins with “Do not assume just because,” unless the court will be commenting on the evidence pursuant to Penal Code section 1127. The committee recommends against any comment on the evidence in the penalty phase of a capital case.

This instruction should be followed by any other general instructions on evidence or principles of law the court deems appropriate based on the facts of the case. Specifically:

- The court has a **sua sponte** duty to give CALCRIM No. 222, *Evidence* and CALCRIM No. 226, *Witnesses*. (See *People v. Miranda* (1987) 44 Cal.3d 57, 107-108 [241 Cal.Rptr. 594, 744 P.2d 1127].)
- The court has a **sua sponte** duty to give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, if the prosecution offers aggravating evidence of other criminal conduct or other felony convictions. However, the reasonable doubt standard does not apply to the question of whether the jury should impose the death penalty or to proof of other aggravating factors. (*People v. Miranda, supra*, 44 Cal.3d

at p. 107; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rptr. 667, 726 P.2d 113].)

- If the prosecution relies on circumstantial evidence to prove other criminal conduct, the court has a **sua sponte** duty to instruct on circumstantial evidence in the penalty phase. (See *People v. Brown* (2003) 31 Cal.4th 518, 564 [3 Cal.Rptr.3d 145, 73 P.3d 1137] [no error where prosecution relied exclusively on direct evidence].)
- When requested, the court must give instructions admonishing the jury not to consider the defendant’s failure to testify during the penalty phase. (*People v. Melton* (1988) 44 Cal.3d 713, 757–758 [244 Cal.Rptr. 867, 750 P.2d 741].)

AUTHORITY

- Death Penalty Statute. ▶ Pen. Code, § 190.3.
- Must Tell Jury Which Instructions Apply. ▶ *People v. Babbitt*, ~~*supra*, (1988)~~ 45 Cal.3d ~~at p. 660~~, 718, fn. 26 ~~[248 Cal.Rptr. 69, 755 P.2d 253]~~.
- Should Give Jury New Set of Instructions. ▶ *People v. Weaver*, ~~*supra*, (2001)~~ 26 Cal.4th ~~at p. 876~~, 982 ~~[111 Cal.Rptr.2d 2, 29 P.3d 103]~~, ~~cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828]~~.
- Error to Instruct Not to Consider Sympathy. ▶ *People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934].
- Reasonable Doubt. ▶ *People v. Miranda*, ~~*supra*, (1987)~~ 44 Cal.3d ~~at p. 57~~, 107 ~~[241 Cal.Rptr. 594, 744 P.2d 1127]~~; *People v. Rodriguez*, ~~*supra*, (1986)~~ 42 Cal.3d ~~at pp. 730~~, 777–779 ~~[230 Cal.Rptr. 667, 726 P.2d 113]~~.
- Circumstantial Evidence. ▶ *People v. Brown*, ~~*supra*, (2003)~~ 31 Cal.4th ~~at p. 518~~, 564 ~~[3 Cal.Rptr.3d 145, 73 P.3d 1137]~~.
- Defendant’s Failure to Testify. ▶ *People v. Melton*, ~~*supra*, (1988)~~ 44 Cal.3d ~~713~~, ~~at pp. 757–758~~ ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~.
- This Instruction Upheld. ▶ *People v. Tran* (2022) 13 Cal.5th 1169, 1245–1248 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 549.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.24 (Matthew Bender).

763. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating (Pen. Code, § 190.3)

In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.

An *aggravating circumstance or factor* is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.

A *mitigating circumstance or factor* is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

Under the law, you must consider, weigh, and be guided by specific factors, where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

The factors are:

- (a) The circumstances of the crime[s] of which the defendant was convicted in this case and any special circumstances that were found true.**
- (b) Whether or not the defendant has engaged in violent criminal activity other than the crime[s] of which the defendant was convicted in this case. *Violent criminal activity* is criminal activity involving the unlawful use, attempt to use, or direct or implied threat to use force or violence against a person. [The other violent criminal activity alleged in this case will be described in these instructions.]**
- (c) Whether or not the defendant has been convicted of any prior felony other than the crime[s] of which (he/she) was convicted in this case.**

- (d) Whether the defendant was under the influence of extreme mental or emotional disturbance when (he/she) committed the crime[s] of which (he/she) was convicted in this case.**
- (e) Whether the victim participated in the defendant's homicidal conduct or consented to the homicidal act.**
- (f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct in committing the crime[s] of which (he/she) was convicted in this case.**
- (g) Whether at the time of the murder the defendant acted under extreme duress or under the substantial domination of another person.**
- (h) Whether, at the time of the offense, the defendant's capacity to appreciate the criminality of (his/her) conduct or to follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication.**
- (i) The defendant's age at the time of the crime[s] of which (he/she) was convicted in this case.**
- (j) Whether the defendant was an accomplice to the murder and (his/her) participation in the murder was relatively minor.**
- (k) Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above.**

[You must disregard any jury instruction given to you in the guilt [and sanity] phase[s] of this trial if it conflicts with your consideration and weighing of these factors.]

Do not consider the absence of a mitigating factor as an aggravating factor.

[You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the death penalty.]

[Even if a fact is both a “special circumstance” and also a “circumstance of the crime,” you may consider that fact only once as an aggravating factor in your weighing process. Do not double-count that fact simply because it is both a “special circumstance” and a “circumstance of the crime.”]

[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant’s family influence your decision.

[However, you may consider evidence about the impact the defendant’s execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant’s background or character.]]

New January 2006; Revised August 2006, June 2007, April 2008, December 2008, March 2021, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Although not required, “[i]t is . . . the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record.” (*People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110]; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Melton* (1988) 44 Cal.3d 713, 770 [244 Cal.Rptr. 867, 750 P.2d 741].) The jury must be instructed to consider only those factors that are “applicable.” (*Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023.)

When the court will be instructing the jury on prior violent criminal activity in aggravation, give the bracketed sentence that begins with “The other violent criminal activity alleged in this case.” (See *People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d 1166].) The court also has a **sua sponte** duty to give CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes* in addition to this instruction.

When the court will be instructing the jury on prior felony convictions, the court also has a **sua sponte** duty to give CALCRIM No. 765, *Death Penalty: Conviction for Other Felony Crimes* in addition to this instruction.

On request, the court must instruct the jury not to double-count any “circumstances of the crime” that are also “special circumstances.” (*People v. Melton, supra*, 44 Cal.3d at p. 768.) When requested, give the bracketed paragraph that begins with “Even if a fact is both a ‘special circumstance’ and also a ‘circumstance of the crime’.”

On request, give the bracketed sentence that begins with “You may not let sympathy for the defendant’s family.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 456 [79 Cal.Rptr.2d 408, 966 P.2d 442].) On request, give the bracketed sentence that begins with “However, you may consider evidence about the impact the defendant’s execution.” (~~*Ibid.*~~)

The bracketed sentence that begins with “You must disregard any jury instruction” may be given unless the jury did not hear a prior phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171 [51 Cal.Rptr.2d 770, 913 P.2d 980], cert. den. sub nom. *Arias v. California* (1997) 520 U.S. 1251 [117 S.Ct. 2408, 138 L.Ed.2d 175].)

AUTHORITY

- Death Penalty Statute. ▶ Pen. Code, § 190.3.
- Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy. ▶ *Lockett v. Ohio, supra, (1978)* 438 U.S. at pp. 586, 604–605 [~~98 S.Ct. 2954, 57 L.Ed.2d 973~~]; *People v. Benson, supra, (1990)* 52 Cal.3d at p. 754, 799 [~~276 Cal.Rptr. 827, 802 P.2d 330~~]; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].
- Should Instruct on All Factors. ▶ *People v. Marshall, supra, (1990)* 50 Cal.3d at p. 907, 932 [~~269 Cal.Rptr. 269, 790 P.2d 676~~], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Must Instruct to Consider Only “Applicable Factors”. ▶ *Williams v. Calderon, supra, (1998)* 48 F.Supp.2d at p. 979, 1023; *People v. Marshall, supra, (1990)* 50 Cal.3d at p. 907, 932 [~~269 Cal.Rptr. 269, 790 P.2d 676~~], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Mitigating Factor Must Be Supported by Evidence. ▶ *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277 [113 S.Ct. 1222, 122 L.Ed.2d 620].

- Aggravating and Mitigating Defined. ▶ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].
- On Request Must Instruct to Consider Only Statutory Aggravating Factors. ▶ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].
- Mitigating Factors Are Examples. ▶ *People v. Melton*, ~~*supra*, (1988)~~ 44 Cal.3d ~~at p.713~~, 760 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].
- Must Instruct to Not Double-Count. ▶ *People v. Melton*, ~~*supra*, (1988)~~ 44 Cal.3d ~~at p.713~~, 768 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~.
- Threats of Violence Must Be Directed at Persons. ▶ *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [30 Cal.Rptr.2d 818, 874 P.2d 248].
- This Instruction Upheld Against Due Process Challenge to Victim-Impact Factors. ▶ *People v. Tran* (2022) 13 Cal.5th 1169, 1245–1248 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse*, ~~*supra*, (2002)~~ 27 Cal.4th ~~at p.469~~, 509 ~~[117 Cal.Rptr.2d 45, 40 P.3d 754]~~, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].) “The aggravating or mitigating nature of the factors is self-evident within the context of each case.” (*Ibid.*) However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*Ibid.*; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].) In *People v. Hillhouse*, the Supreme Court stated, “we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors.” The committee has rephrased this for clarity and included in the text of this instruction, “You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case.” (*People v. Hillhouse*, ~~*supra*, (2002)~~ 27 Cal.4th ~~at p.469~~, 509, fn. 6 ~~[117 Cal.Rptr.2d 45, 40 P.3d 754]~~, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].)

Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269 [74 Cal.Rptr.2d 212, 954 P.2d 475].) In *People v. Musselwhite, supra*, 17 Cal.4th at p. 1269, decided prior to *Hillhouse*, the Supreme Court held that the trial court properly instructed the jury that “*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . .” (italics in original).

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 545, 549–550, 563, 568, 571–572, 584–591.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.23, 87.24 (Matthew Bender).

352. Character of Victim and Violent Character of Defendant

You have heard testimony that _____ <insert name of alleged victim> (is/was) a (violent/ _____ <insert character trait> person/has a character trait for (violence/ _____ <insert character trait>) [and testimony that _____ <insert name of alleged victim> (is not a violent person/does not have a character trait for violence)]. [You have also heard testimony that the defendant (is a violent person/has a character trait for violence) [and testimony that the defendant (is not a violent person/does not have a character trait for violence).]

<Give only when specific conduct evidence of the defendant's character for violence has been admitted>

[The People presented evidence that the defendant (committed ([an]other offense[s]/the offense[s] of _____ <insert description of alleged offense[s]> / _____ <insert description of alleged conduct admitted under Evid. Code, § 1103(b)>) that (was/were) not charged in this case.

You may consider this evidence about the defendant 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 the defendant (is a violent person/has a trait for violence) and acted in conformity with that character trait.]

A person's character for (violence/ _____ <insert other relevant trait>) may be shown by evidence of reputation, opinion, or specific acts. Evidence of a person's character for (violence/ _____ <insert other relevant trait>) may tend to show the person acted in conformity with that character trait. You may consider such evidence only for this limited purpose. [You may consider such evidence only in deciding the charges of _____ <insert applicable counts>.]

You must decide the meaning and importance of the character evidence. Whether a person had a character for (violence/ _____ <insert other relevant trait>) and whether that person acted in conformity with that character trait are matters for you to decide.

[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 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.

You may consider the testimony regarding character along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.

New March 2023

BENCH NOTES

Instructional Duty

No case holds that a trial court has a sua sponte duty to instruct on the use of character evidence admitted under Evidence Code section 1103. However, the court should give an instruction on request. (See Evid. Code, § 355.)

AUTHORITY

- Admissibility. ▶ Evid. Code, § 1103.
- Victim Defined. ▶ *People v. Tackett* (2006) 144 Cal.App.4th 445, 455 [50 Cal.Rptr.3d 449].
- Character Evidence Defined. ▶ *People v. Myers* (2007) 148 Cal.App.4th 546, 552–553 [56 Cal.Rptr.3d 27].
- Statute Constitutional. ▶ *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173 [13 Cal.Rptr.2d 176].

- Defendant's Character for Violence Must Be Relevant to Material Issue. ▶ *People v. Fuiava* (2012) 53 Cal.4th 622, 700 [137 Cal.Rptr.3d 147, 269 P.3d 568].
- Analysis under Evidence Code Section 352 Applies. ▶ *People v. Fuiava* (2012) 53 Cal.4th 622, 700 [137 Cal.Rptr.3d 147, 269 P.3d 568].
- Similar Instruction Upheld. ▶ *People v. Fuiava* (2012) 53 Cal.4th 622, 694–695 [137 Cal.Rptr.3d 147, 269 P.3d 568].
- Other Crimes Proved by Preponderance of Evidence. ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [935 P.2d 708, 63 Cal.Rptr.2d 1], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62].

350. Character of Defendant

You have heard ~~character~~ testimony that the defendant (is a _____ <insert character trait relevant to crime[s] committed > person/ [or] has a good reputation for _____ <insert character trait relevant to crime[s] committed > in the community where (he/she) lives or works).

Evidence of the defendant's character for _____ <insert character trait relevant to crime[s] committed > can by itself create a reasonable doubt [whether the defendant committed _____ <insert name[s] of alleged offenses[s] and count[s], e.g., battery, as charged in Count 1>]. However, evidence of the defendant's ~~good~~ character for _____ <insert character trait> may be countered by ~~other~~ evidence of (his/her) ~~bad~~ character for the same trait. You must decide the meaning and importance of the character evidence.

[If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.]

You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.

New January 2006; Revised August 2012, March 2023

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on defendant's character; however, it must be given on request. (*People v. Bell* (1875) 49 Cal. 485, 489–490 [jury should be instructed that evidence of good reputation should be weighed as any other fact established and may be sufficient to create reasonable doubt of guilt]; *People v. Jones* (1954) 42 Cal.2d 219, 222 [266 P.2d 38] [character evidence may be sufficient to create reasonable doubt of guilt]; *People v. Wilson* (1913) 23 Cal.App. 513, 523–524 [138 P. 971] [court erred in failing to give requested instruction or any instruction on character evidence].)

AUTHORITY

- Instructional Requirements. ▶ *People v. Bell*, *supra*, ~~(1875)~~ 49 Cal. ~~At pp.485,~~ 489–490; *People v. Wilson*, *supra*, ~~(1913)~~ 23 Cal.App. ~~513,~~ at pp. 523–524 ~~[138 P.971];~~ *People v. Jones*, *supra*, ~~(1954)~~ 42 Cal.2d at p. ~~219,~~ 222 ~~[266 P.2d 38]~~.
- Character Evidence Must Be Relevant to Offense Charged. ▶ *People v. Taylor* (1986) 180 Cal.App.3d 622, 629 [225 Cal.Rptr. 733].
- Admissibility. ▶ Evid. Code, §§ 1100–1102.

RELATED ISSUES

No Discussion of Character Is Evidence of Good Character

The fact that the defendant’s character or reputation has not been discussed or questioned among those who know him or her is evidence of the defendant’s good character and reputation. (*People v. Castillo* (1935) 5 Cal.App.2d 194, 198 [42 P.2d 682].) However, the defendant must have resided in the community for a sufficient period of time and become acquainted with the community in order for his or her character to have become known and for some sort of reputation to have been established. (See Evid. Code, § 1324 [reputation may be shown in the community where defendant resides and in a group with which he or she habitually associates]; see also *People v. Pauli* (1922) 58 Cal.App. 594, 596 [209 P. 88] [witness’s testimony about defendant’s good reputation in community was inappropriate where defendant was a stranger in the community, working for a single employer for a few months, going about little, and forming no associations].)

Business Community

The community for purposes of reputation evidence may also be the defendant’s business community and associates. (*People v. Cobb* (1955) 45 Cal.2d 158, 163 [287 P.2d 752].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, § 55.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][d], [e][ii], Ch. 83, *Evidence*, § 83.12[1] (Matthew Bender).

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)

<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.” (*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 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], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62].
- 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].

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 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].)

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).

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.]

BENCH NOTES

Instructional Duty

It is an open question whether ~~the~~ the court has a **sua sponte** duty to instruct on the use of a coconspirator's statement to incriminate a defendant. (See *People v. Prieto* (2003) 30 Cal.4th 226, 251–252 [133 Cal.Rptr.2d 18, 66 P.3d 1123]; *People v. Sully* (1991) 53 Cal.3d 1195, 1231–1232 [283 Cal.Rptr. 144, 812 P.2d 163].) On request, the court must give this instruction if the statement has been admitted under Evidence Code section 1223. (See Evid. Code, § 403(c)(1); see also *People v. Carter* (2003) 30 Cal.4th 1166, 1198 [135 Cal.Rptr.2d 553, 70 P.3d 981]; *People v. Lewis* (2001) 26 Cal.4th 334, 362 [110 Cal.Rptr.2d 272, 28 P.3d 34]; *People v. Marshall* (1996) 13 Cal.4th 799, 833 [55 Cal.Rptr.2d 347, 919 P.2d 1280] ~~*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).

540A. Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act (Pen. Code, § 189)

The defendant is charged [in Count __] with murder, under a theory of first degree felony murder.

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

1. The defendant committed [or attempted to commit] _____
<insert felony or felonies from Pen. Code, § 189>;
2. The defendant intended to commit _____ <insert felony or felonies from Pen. Code, § 189>;

AND

3. While committing [or attempting to commit] _____, <insert felony or felonies from Pen. Code, § 189> the defendant **personally committed (an/the) act[s] that directly** caused the death of another person.

A person [who was the actual killer] may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ <insert felony or felonies from Pen. Code, § 189>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder. <Make certain that all appropriate instructions on all underlying felonies are given.>

[The defendant must have intended to commit the (felony/felonies) of _____ <insert felony or felonies from Pen. Code, § 189> before or at the time that (he/she) caused the death.]

<If the facts raise an issue whether the commission of the felony continued while a defendant was fleeing the scene, give the following sentence instead of CALCRIM No. 3261, While Committing a Felony: Defined—Escape Rule.>

[The crime of _____ <insert felony or felonies from Pen. Code, § 189> continues until a defendant has reached a place of temporary safety.]

[It is not required that the person die immediately, as long as the act[s] causing death) occurred while the defendant was committing the (felony/felonies).]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

New January 2006; Revised April 2010, August 2013, September 2019, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

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*.

When giving this instruction with CALCRIM No. 540B or with CALCRIM No. 540C, give the bracketed phrase [who was the actual killer].

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189(a).)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with “The defendant must have intended to commit the felony.” For an instruction specially tailored to

robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with “It is not required that the person die immediately” on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with “It is not required that the person killed be” on request.

There is **no** sua sponte duty to clarify the logical nexus between the felony and the homicidal act. If an issue about the logical nexus requirement arises, the court may give the following language:

There must be a logical connection between the cause of death and the <insert felony or felonies from Pen. Code, § 189> [or attempted <insert felony or felonies from Pen. Code, § 189>]. The connection between the cause of death and the <insert felony or felonies from Pen. Code, § 189> [or attempted <insert felony or felonies from Pen. Code, § 189>] must involve more than just their occurrence at the same time and place.]

People v. Cavitt (2004) 33 Cal.4th 187, 203–204 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Wilkins* (2013) 56 Cal.4th 333, 347 [153 Cal.Rptr.3d 519, 295 P.3d 903].

If the prosecutor is proceeding under both malice and felony-murder theories, also give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Drive-By Shooting

The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony-murder rule. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837].) A finding of a specific intent to kill is required in order to find first degree murder under this clause. (~~*Ibid.*~~)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see [*People v. Garcia* \(2022\) 82 Cal.App.5th 956 \[299 Cal.Rptr.3d 131\]](#) [defendant liable as actual killer for robbing elderly victim who died of heart attack an hour later]; *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

AUTHORITY

- Felony Murder: First Degree. ▶ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▶ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Merger Doctrine Does Not Apply to First Degree Felony Murder. ▶ *People v. Farley* (2009) 46 Cal.4th 1053, 1118–1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- [Meaning of “Actual Killer.”](#) ▶ *People v. Garcia* (2020) 46 Cal.App.5th 123, 151 [259 Cal.Rptr.3d 600]; *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293

Cal.Rptr.3d 272]; *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806]; *People v. Garcia* (2022) 82 Cal.App.5th 956 [299 Cal.Rptr.3d 131].

RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder

If a felony, such as robbery, is committed merely to facilitate an intentional murder, then the felony-murder rule does not apply. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99] [robbery committed to facilitate murder did not satisfy felony-murder special circumstance].) If the defense requests a special instruction on this point, see CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony*.

No Duty to Instruct on Lesser Included Offenses of Uncharged Predicate Felony

“Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine.” (*People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769] [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [122 Cal.Rptr.2d 545] [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary

Auto burglary may form the basis for a first degree felony-murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [150 Cal.Rptr. 515] [noting problems of applying felony-murder rule to nondangerous daytime auto burglary].)

Duress

“[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony.” (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [122 Cal.Rptr.2d 587, 50 P.3d 368] [dictum]; see also CALCRIM No. 3402, *Duress or Threats*.)

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony murder. (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753],

disapproved on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1198-1199 [91 Cal.Rptr.3d 106, 203 P.3d 425].)

Actual Killer vs. Aider and Abettor

The meaning of actual killer is literal. It is not enough that the defendant's act formed part of a series of events that resulted in the death, if the act itself would not cause death. (*People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 151-168.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.13[7] (Matthew Bender).

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

**730. Special Circumstances: Murder in Commission of Felony
(Pen. Code, § 190.2(a)(17))**

The defendant is charged with the special circumstance of murder committed while engaged in the commission of _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> [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) _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>;
2. The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>;

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

- [3. If the defendant did not personally commit [or attempt to commit] _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>, then a perpetrator, (whom the defendant was aiding and abetting before or during the killing/ [or] with whom the defendant conspired), personally committed [or attempted to commit] _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>;]

AND

- (3/4). (The defendant/ _____ <insert name or description of person causing death if not defendant>) **personally committed** ~~did~~ **(an/the) act[s]** that **directly** caused the death of another person.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You

must apply those instructions when you decide whether the People have proved this special circumstance.

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

[The defendant must have (intended to commit[,]/ [or] aided and abetted/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> before or at the time of the act causing the death.]

[In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> independent of the killing. If you find that the defendant only intended to commit murder and the commission of _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.]

New January 2006; Revised August 2006, April 2008, August 2013, March 2021, March 2023

BENCH NOTES

Instructional Duty

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

If the evidence raises the potential for accomplice liability, the court has a **sua sponte** duty to instruct on that issue. Give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)*. If the homicide occurred on or before June 5, 1990, give CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990*.

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 the underlying felony, then select “committed [or attempted to commit]” in

element 1 and “intended to commit” in element 2. In addition, in the paragraph that begins with “To decide whether,” select “the defendant” in the first sentence. Give all appropriate instructions on any underlying felonies.

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

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with “The defendant must have (intended to commit.” For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

In addition, the court must give the final bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Kimble* (1988) 44 Cal.3d 480; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].)

Proposition 115 added Penal Code section 190.41, eliminating the corpus delicti rule for the felony-murder special circumstance. (Pen. Code, § 190.41; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].) If, however, the alleged homicide predates the effective date of the statute (June 6, 1990), then the court must modify this instruction to require proof of the corpus delicti of the underlying felony independent of the defendant’s extrajudicial statements. (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 298.)

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 [197 Cal.Rptr. 79, 672 P.2d 862] and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127 Cal.Rptr.2d 802, 58 P.3d 931]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99

Cal.Rptr.2d 485, 6 P.3d 150].) The court should then modify this instruction to specify intent to kill as an element.

AUTHORITY

- Special Circumstance. ▶ Pen. Code, § 190.2(a)(17).
- Specific Intent to Commit Felony Required. ▶ *People v. Valdez* (2004) 32 Cal.4th 73, 105 [8 Cal.Rptr.3d 271, 82 P.3d 296].
- Provocative Act Murder. ▶ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].
- Concurrent Intent. ▶ *People v. Mendoza* (2000) 24 Cal.4th 130, 183 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Clark* (1990) 50 Cal.3d 583, 608–609 [268 Cal.Rptr. 399, 789 P.2d 127].
- Felony Cannot Be Incidental to Murder. ▶ *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].
- Instruction on Felony as Incidental to Murder. ▶ *People v. Kimble* (1988) 44 Cal.3d 480, 501 [244 Cal.Rptr. 148, 749 P.2d 803]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].
- Proposition 115 Amendments to Special Circumstance. ▶ *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].
- Meaning of “Actual Killer.” ▶ *People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600]; [People v. Lopez \(2022\) 78 Cal.App.5th 1, 4 \[293 Cal.Rptr.3d 272\]](#); [People v. Vang \(2022\) 82 Cal.App.5th 64, 88 \[297 Cal.Rptr.3d 806\]](#); [People v. Garcia \(2022\) 82 Cal.App.5th 956 \[299 Cal.Rptr.3d 131\]](#).

RELATED ISSUES

Applies to Felony Murder and Provocative Act Murder

“The fact that the defendant is convicted of murder under the application of the provocative act murder doctrine rather than pursuant to the felony-murder doctrine is irrelevant to the question of whether the murder qualified as a special-circumstances murder under former section 190.2, subdivision (a)(17). The statute requires only that the murder be committed while the defendant was engaged in the commission of an enumerated felony.” (*People v. Briscoe* (2001) 92

Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].)

Concurrent Intent to Kill and Commit Felony

“Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance.” (*People v. Mendoza* (2000) 24 Cal.4th 130, 183 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Clark* (1990) 50 Cal.3d 583, 608–609 [268 Cal.Rptr. 399, 789 P.2d 127].)

Multiple Special Circumstances May Be Alleged

The defendant may be charged with multiple felony-related special circumstances based on multiple felonies committed against one victim or multiple victims of one felony. (*People v. Holt* (1997) 15 Cal.4th 619, 682 [63 Cal.Rptr.2d 782, 937 P.2d 213]; *People v. Andrews* (1989) 49 Cal.3d 200, 225–226 [260 Cal.Rptr. 583, 776 P.2d 285].)

Actual Killer vs. Aider and Abettor

The meaning of actual killer is literal. It is not enough that the defendant’s act formed part of a series of events that resulted in the death, if the act itself would not cause death. (*People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600].)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 532–534, 536.

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

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

908. Assault Under Color of Authority (Pen. Code, § 149)

The defendant is charged [in Count __] with (assaulting/ [or] beating) a person under color of authority and without lawful necessity [in violation of Penal Code section 149].

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

1. The defendant was a *public officer*;
2. The defendant willfully [and unlawfully] (did an act that by its nature would directly and probably result in the application of force to _____ <insert name of alleged victim>/touched _____ <insert name of alleged victim> in a harmful or offensive manner);

<instruct with elements 3 and 4 for assault>

- [3. When the defendant did the act, (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 did the act, (he/she) had the present ability to apply force to a person;]

(3/5). When the defendant (did the act/touched _____ <insert name of alleged victim> in a harmful or offense manner), the defendant was performing or purporting to perform (his/her) duties as a *public officer*;

[AND]

(4/6). When the defendant (did the act/touched _____ <insert name of alleged victim>), (he/she) acted *without lawful necessity*(;/.)

[AND]

[(5/7). When the defendant (did the act/touched _____ <insert name of alleged victim>), (he/she) did not act in (self-defense/ [or] defense of someone else).]

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

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

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

[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.]

[No one needs to actually have been injured by the 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.]

~~[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.]

Without lawful necessity means more force than was reasonably necessary under the circumstances.

Under color of authority means clothed in the authority of law or when acting under pretense of law.

[Special rules control the use of force by a peace officer.]

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

[A peace officer may use deadly force if (he/she):

1. Reasonably believed, based on the totality of the circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the officer or another person;

OR

2. Reasonably believed, based on the totality of the circumstances, that:

a. _____ <insert name of fleeing felon> was fleeing;

b. The force was necessary to arrest or detain _____ <insert name of fleeing felon > for the crime of _____ <insert name of felony >;

c. The commission of the crime of _____ <insert name of felony> created a risk of or resulted in death or serious bodily injury to another person;

AND

d. _____ <insert name of fleeing felon> would cause death or serious bodily injury to another person unless immediately arrested or detained.]

[*Deadly force* means any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm.=]

[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 threat of death or serious bodily injury is *imminent* when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the

harm, but is one that, from appearances, must be instantly confronted and addressed.]

Totality of the circumstances means all facts known to the ~~peace officer~~ **defendant** at the time, including the conduct of the defendant and _____ <insert name of ~~alleged victim~~**officer**> leading up to the use of deadly force.

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance.]

New September 2022; Revised March 2023

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 5/7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The court may instruct the jury on the appropriate definition of “public officer” from the statute. However, the court may not instruct the jury that the defendant was a public officer as a matter of law.

The court may give the bracketed sentence that begins “The duties of a _____ <insert title . . . > include” on request.

AUTHORITY

- Elements. ▶ Pen. Code, § 149.
- Objectively Reasonable Force to Effect Arrest. ▶ Pen. Code, § 835a(b).
- Violation of Statute Does Not Include Detention Without Lawful Authority. ▶ *People v. Lewelling* (2017) 16 Cal.App.5th 276, 298 [224 Cal.Rptr.3d 255].
- 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]].
- 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”]; *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421–422 [286 Cal.Rptr. 684]; *In re M.M.* (2012) 54 Cal.4th 530, 536–539 [142 Cal.Rptr.3d 869, 278 P.3d 1221]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Officer Includes De Facto Officer. ▶ *People v. Cradlebaugh* (1914) 24 Cal.App. 489, 491–492.
- Peace Officer Defined. ▶ Pen. Code, § 830 et seq.
- Without Lawful Necessity. ▶ *People v. Dukes* (1928) 90 Cal.App. 657, 661–662; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140 & fn.20 [142 Cal.Rptr.3d 423]; *People v. Lewelling*, *supra*, 16 Cal.App.5th at pp. 298–299; *People v. Perry* (2019) 36 Cal.App.5th 444 [248 Cal.Rptr.3d 522].
- Color of Authority. ▶ *People v. Plesniarski* (1971) 22 Cal.App.3d 108, 114 [99 Cal.Rptr. 196].

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer’s actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham*, but those factors are not exclusive. (See *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry*, *supra*, 36 Cal.App.5th at p. 473, fn. 18.) Conduct and tactical decisions preceding an officer’s use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

RELATED ISSUES

Sexual Battery

Officer convicted of sexually assaulting an arrestee was properly convicted of both sexual battery and assault under color of authority because the latter offense is not a necessarily included offense in the former. (See *People v. Alford* (1991) 235 Cal.App.3d 799, 804–805 [286 Cal.Rptr. 762].)

1156. Loitering: For Prostitution (Pen. Code, § 653.22(a))

The defendant is charged [in Count __] with loitering with the intent to commit prostitution [in violation of Penal Code section 653.22(a)].

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

1. The defendant delayed or lingered in a public place;
2. When the defendant did so, (he/she) did not have a lawful purpose for being there;

AND

3. When the defendant did so, (he/she) intended to commit prostitution.

As used here, a *public place* is (a/an/the) (area open to the public[(,;)]/[or] alley[(,;)]/ [or] plaza [(,;)]/ [or] park[(,;)]/ [or] driveway[(,;)]/ [or] parking lot[(,;)]/ [or] automobile[(,;)]/ [or] building open to the general public, including one that serves food or drink or provides entertainment[(,;)]/ [or] doorway or entrance to a building or dwelling[(,;)]/ [or] grounds enclosing a building or dwelling).

A person *intends to commit prostitution* if he or she intends to engage in sexual conduct with someone else in exchange for money [or other compensation]. *Sexual conduct* means sexual intercourse or touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification. [*Prostitution* does not include sexual conduct engaged in as a part of any stage performance, play, or other entertainment open to the public.]

The intent to commit prostitution may be shown by a person acting in a manner and under circumstances that openly demonstrate the intent to induce, entice, or solicit prostitution or to procure someone else to commit prostitution. In deciding whether the defendant acted with intent to commit prostitution, you may consider whether (he/she):

- [Repeatedly beckoned to, stopped, engaged in conversations with, or attempted to stop or engage in conversations with passersby in a way that indicated the solicitation of prostitution (./;)]
- [Repeatedly stopped or attempted to stop vehicles by hailing, waving, or gesturing, or engaged or attempted to engage drivers or passengers in conversation, in a way that indicated the solicitation of prostitution(./;)]
- [Circled an area in a vehicle and repeatedly beckoned to, contacted, or attempted to contact or stop pedestrians or other motorists in a way that indicated the solicitation of prostitution(./;)]
- [Has engaged in any behavior indicative of prostitution activity within the six months before (his/her) arrest in this case(./;)]
- [Has been convicted of this crime or of any other crime relating to or involving prostitution within five years of (his/her) arrest in this case.]

You should also consider whether any of these activities occurred in an area known for prostitution.

This list of factors is not intended to be a complete list of all the factors you may consider on the question of intent. The factors are provided only as examples to assist you in deciding whether the defendant acted with the intent to commit prostitution. Consider all the evidence presented in this case for whatever bearing you conclude it has on the question of the defendant's intent. Give the evidence whatever weight you decide that it deserves.

New January 2006

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements. ▶ Pen. Code, § 653.22(a).
- Factors to Consider to Prove Intent. ▶ Pen. Code, § 653.22(a), (b) & (c).
- Prostitution Defined. ▶ Pen. Code, § 653.20(a); see also Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195]; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. ▶ Pen. Code, § 653.20(b).
- Loiter Defined. ▶ Pen. Code, § 653.20(b).
- Statute Constitutional. ▶ *People v. Pulliam* (1998) 62 Cal.App.4th 1430, 1434–1439 [73 Cal.Rptr.2d 371].

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, § 74.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, §§ 144.11[1], 144.20 (Matthew Bender).

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

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

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

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

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

AND

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

OR

- b. aiding and abetting a felony offense.

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

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

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

<If criminal street gang has already been defined.>

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

<If criminal street gang has not already been defined in another instruction.>

[A *criminal street gang* is an ongoing organized association or group of three or more persons, whether formal or informal:

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

AND

- 3. Whose members collectively engage in or have engaged in a pattern of criminal gang activity.**

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

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

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

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of) (any combination of two or more of the following crimes/[,] [or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>*;**
- 2. At least one of those crimes was committed after September 26, 1988;**

3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;
4. The crimes were committed on separate occasions or were personally committed by two or more members;
5. The crimes commonly benefitted a criminal street gang;

AND

6. The common benefit from the crimes was more than reputational.

Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

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

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

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

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime.]

[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

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

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

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

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

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

AND

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

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

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

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

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

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

AND

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

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

New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013, February 2014, August 2014, February 2016, March 2022, March 2023

BENCH NOTES

Instructional Duty

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

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].) Note that a defendant’s misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under section 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

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

There is a split in authority over the meaning of “collectively.” (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

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

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

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

If the defendant is charged with other counts that do not require gang evidence as an element, the court must try the Penal Code section 186.22(a) count separately. (Pen. Code, § 1109(b).)

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with “If you conclude that defendant was

present.” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

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

Related Instructions

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

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

AUTHORITY

- Elements. ▶ Pen. Code, § 186.22(a).
- Active Participation Defined. ▶ *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▶ Pen. Code, § 186.22(f).
- Pattern of Criminal Gang Activity Defined. ▶ Pen. Code, § 186.22(e), (g); .
- Examples of Common Benefit. ▶ Pen. Code, § 186.22(g).
- Willful Defined. ▶ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada*, *supra*, ~~(2000) 23 Cal.4th at pp.743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278]~~.
- Felonious Criminal Conduct Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green*, *supra*, ~~(1991) 227 Cal.App.3d at p.692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278]~~.
- Separate Intent From Underlying Felony. ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].

- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Temporal Connection Between Active Participation and Felonious Criminal Conduct. ▶ *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates. ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Conspiracy to Commit This Crime. ▶ *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required. ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

COMMENTARY

The jury may not consider the circumstances of the charged crime to establish a pattern of criminal activity. (Pen. Code, § 186.22(e)(2).) A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. Another offense committed on the same occasion by a fellow gang member may serve as a predicate offense. (*People v. Loewen* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran, supra*, ~~(2002)~~ 97 Cal.App.4th ~~at p. 1448~~, 1458 ~~[119 Cal.Rptr.2d 272]~~ [original italics].) The “felonious criminal conduct” need not be gang-related. (*People v. Albillar, supra*, ~~(2010)~~ 51 Cal.4th ~~at pp. 47~~, 54-59 ~~[119 Cal.Rptr.3d 415, 244 P.3d 1062]~~.)

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

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

RELATED ISSUES

Conspiracy

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

Labor Organizations or Mutual Aid Activities

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

Related Gang Crimes

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

Unanimity

The “continuous-course-of-conduct exception” applies to the “pattern of criminal gang activity” element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes, supra*, 23 Cal.App.4th at pp. 1527–1528.)

SECONDARY SOURCES

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

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

1401. Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those crime[s])][,] [or the lesser offense[s] of _____ <insert lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

To prove this allegation, the People must prove that:

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

AND

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

To benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

<If criminal street gang has already been defined.>

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

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

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

AND

- 3. Whose members collectively engage in or have engaged in a pattern of criminal gang activity.**

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

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

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

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of) (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>*;**
- 2. At least one of those crimes was committed after September 26, 1988;**
- 3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;**

4. **The crimes were committed on separate occasions or were personally committed by two or more members;**
5. **The crimes commonly benefitted a criminal street gang;**

AND

6. **The common benefit from the crimes was more than reputational.**

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

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

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

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group’s primary activities was commission of that crime.]

[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

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

New January 2006; Revised August 2006, June 2007, April 2008, December 2008, August 2012, February 2013, August 2013, February 2014, February 2016, March 2022, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

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

There is a split in authority over the meaning of “collectively.” (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

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

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Gang Evidence*.

The court must bifurcate the trial on the gang enhancement upon request of the defense. (Pen. Code, § 1109(a).) If the trial is bifurcated, give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

Related Instructions

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

AUTHORITY

- Enhancement ▶ Pen. Code, § 186.22(b)(1).
- Specific Intent Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f).
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e), (g); see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- “To Benefit, Promote, Further, or Assist” Defined ▶ Pen. Code, § 186.22(g).
- Active or Current Participation in Gang Not Required ▶ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▶ *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138–1139 [150 Cal.Rptr.3d 533].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81–85 [192 Cal.Rptr.3d 309, 355 P.3d 480].
- Evidence Required for Gang Member Acting Alone. ▶ *People v. Renteria* (2022) 13 Cal.5th 951, 965 [297 Cal.Rptr.3d 344, 515 P.3d 77].

RELATED ISSUES

Commission On or Near School Grounds

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

Enhancements for Multiple Gang Crimes

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

Wobblers

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

Murder—Enhancements Under Penal Code section 186.22(b)(1) May Not Apply at Sentencing

The enhancements provided by Penal Code section 186.22(b)(1) do not apply to crimes “punishable by imprisonment in the state prison for life . . .” (Pen. Code, § 186.22(b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [22 Cal.Rptr.3d 869, 103 P.3d 270].) Thus, the 10-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang may not apply in some sentencing situations involving the crime of murder.

Conspiracy—Alternate Penalty Provisions Under Penal Code section 186.22(b)(4)

The alternate penalty provisions provided by Penal Code section 186.22(b)(4) apply only to completed target offenses, not to conspiracies. (*People v. Lopez* (2022) 12 Cal.5th 957, 975 [292 Cal.Rptr.3d 265, 507 P.3d 925].)

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

SECONDARY SOURCES

2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 40.

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

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

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

The defendant is charged with the special circumstance of committing murder while an active participant in a criminal street gang [in violation of Penal Code section 190.2(a)(22)].

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

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

AND

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

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

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

<If criminal street gang has already been defined>

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

<If criminal street gang has not already been defined in another instruction>

[A *criminal street gang* is an ongoing organized association or group of three or more persons, whether formal or informal:

1. That has a common name or common identifying sign or symbol;

2. That has, as one or more of its primary activities, the commission of _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>;

AND

3. Whose members collectively engage in or have engaged in a pattern of criminal gang activity.

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

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

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)(any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>;
2. At least one of those crimes was committed after September 26, 1988;
3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;
4. The crimes were committed on separate occasions, or by two or more members;
5. The crimes commonly benefitted a criminal street gang;

AND

6. The common benefit from the crimes was more than reputational.

Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group’s primary activities was commission of that crime.]

[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

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

New January 2006; Revised August 2006, June 2007, February 2014, February 2016, March 2022, March 2023

BENCH NOTES

Instructional Duty

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

There is a split in authority over the meaning of “collectively.” (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

On request, give the bracketed paragraph that begins with “If you find the defendant guilty of a crime in this case.” (*People v. Sengpadychith* (2001) 26

Cal.4th 316, =322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Related Instructions

CALCRIM No. 562, *Transferred Intent*.

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

AUTHORITY

- Special Circumstance. ▶ Pen. Code, § 190.2(a)(22).
- Active Participation Defined. ▶ *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▶ Pen. Code, § 186.22(f).
- Transferred Intent Under Penal Code Section 190.2(a)(22). ▶ *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- Pattern of Criminal Gang Activity Defined. ▶ Pen. Code, § 186.22(e), (g).
- Examples of Common Benefit ▶ Pen. Code, § 186.22(g).
- Felonious Criminal Conduct Defined. ▶ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Separate Intent From Underlying Felony. ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Crimes Committed After Charged Offense Not Predicates. ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required. ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

RELATED ISSUES

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

The criminal street gang special circumstance applies when a participant in a criminal street gang intends to kill one person but kills someone else by mistake. *People v. Shabazz*, ~~*supra*, (2006) 38 Cal.4th 55, at p. 66 [40 Cal.Rptr.3d 750, 130 P.3d 519]~~; see CALCRIM No. 562, *Transferred Intent*.

SECONDARY SOURCES

3 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Punishment, § 523.

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

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

**2542. Carrying Firearm: Active Participant in Criminal Street Gang
(Pen. Code, §§ 25400(c)(3), 25850(c)(3))**

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ___], you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang.

To prove this allegation, the People must prove that:

- 1. When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;**
- 2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

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

OR

- b. aiding and abetting a felony offense.**

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

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

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

A *criminal street gang* is an ongoing organized association or group of three or more persons, whether formal or informal:

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

AND

- 3. Whose members collectively engage in or have engaged in a pattern of criminal gang activity.**

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

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

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

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of) (any combination of two or more of the following crimes/[,] [or] two or more occurrences of [one or more of the following crimes]:) _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>;**
- 2. At least one of those crimes was committed after September 26, 1988;**

3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the currently charged offense;
4. The crimes were committed on separate occasions or were personally committed by two or more members;
5. The crimes commonly benefitted a criminal street gang;

AND

6. The common benefit from the crimes was more than reputational.

Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

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

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

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime.]

[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

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

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

To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

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

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

AND

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

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

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

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

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

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

AND

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

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

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

New January 2006; Revised August 2006, June 2007, December 2008, February 2012, August 2013, February 2014, February 2016, March 2022, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176] [now-repealed Pen. Code, § 12031(a)(2)(C) incorporates entire substantive gang offense defined in section 186.22(a)]; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 25400(c)(3) or 25850(c)(3) and the defendant does not stipulate to being an active gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury

with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall*, *supra*, 67 Cal.App.4th at p. 135.)

There is a split in authority over the meaning of “collectively.” (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

Note that a defendant’s misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under sections 25400(c)(3) or 25850(c)(3). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

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

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

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor))*.

For additional instructions relating to liability as an aider and abettor, see series 400, Aiding and Abetting.

AUTHORITY

- Factors. ▶ Pen. Code, §§ 25400(c)(3), 25850(c)(3)
- Sentencing Factors, Not Elements. ▶ *People v. Hall*, *supra*, ~~(1998)~~ 67 Cal.App.4th ~~128~~, at p. 135 ~~[79 Cal.Rptr.2d 690]~~.
- Elements of Gang Factor. ▶ Pen. Code, § 186.22(a); *People v. Robles*, *supra*, ~~(2000)~~ 23 Cal.4th at p. ~~1106~~, 1115 ~~[99 Cal.Rptr.2d 120, 5 P.3d 176]~~.
- Active Participation Defined. ▶ *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▶ Pen. Code, § 186.22(f).
- Pattern of Criminal Gang Activity Defined. ▶ Pen. Code, §§ 186.22(e), (g).
- Examples of Common Benefit. ▶ Pen. Code, § 186.22(g).
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].

- Crimes Committed After Charged Offense Not Predicates. ▶ *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required. ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81–85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

RELATED ISSUES

Gang Expert Cannot Testify to Defendant’s Knowledge or Intent

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

[The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.... ¶... [The gang expert] simply informed the jury of his belief of the suspects’ knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert’s] beliefs were irrelevant.

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

See also the Commentary and Related Issues sections of the Bench Notes for CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 31–46, 204, 249-250.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, §§ 144.01[1], 144.03 (Matthew Bender).

1520. Attempted Arson (Pen. Code, § 455)

The defendant is charged [in Count __] with the crime of attempted arson [in violation of Penal Code section 455].

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

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

AND

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

A person *attempts to set fire to or burn* (a structure/forest land/property) when he or she places any flammable, explosive, or combustible material or device in or around it with the intent to set fire to it.

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* is any brush-covered land, cut-over land, forest, grasslands, or woods.]

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

New January 2006; Revised September 2018, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Attempted arson is governed by Penal Code section 455, not the general attempt statute found in section 664. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427–1428 [37 Cal.Rptr.2d 401] [defendant was convicted under §§ 451 and 664; the higher sentence was reversed because § 455 governs attempted arson].)

AUTHORITY

- Elements ▶ Pen. Code, § 455.
- Structure, Forest Land, and Maliciously Defined ▶ Pen. Code, § 450.
- This Instruction Upheld ▶ *People v. Rubino* (2017) 18 Cal.App.5th 407, 412–413 [227 Cal.Rptr.3d 75].

SECONDARY SOURCES

5 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).

1521–1529. Reserved for Future Use

2181 Evading Peace Officer (Veh. Code, §§ 2800.1(a), 2800.2)

The defendant is charged [in Count __] with evading a peace officer [in violation of Vehicle Code section[s] (2800.1(a)/ [or] 2800.2)].

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

1. A peace officer driving a motor vehicle was pursuing the defendant;
2. The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer;

<Give the appropriate paragraph[s] of element 3 when the defendant is charged with a violation of Vehicle Code section 2800.2>

[3A. During the pursuit, the defendant drove with willful or wanton disregard for the safety of persons or property;]

[OR]

[3B. During the pursuit, the defendant caused damage to property while driving;]

[OR]

[3C. During the pursuit, the defendant committed three or more violations, each of which would make the defendant eligible for a traffic violation point;]

AND

[3/4]. All of the following were true:

- (a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;
- (b) The defendant either saw or reasonably should have seen the lamp;

(c) The peace officer's vehicle was sounding a siren as reasonably necessary;

(d) The peace officer's vehicle was distinctively marked;

AND

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

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

[A person employed by _____ <insert name of agency that employs peace officer, e.g., "the Department of Fish and 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">.]

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

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

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

A vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.

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

New January 2006; Revised August 2006, September 2018, March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Elements. ▶ Veh. Code, §§ 2800.1(a), 2800.2.
- Willful or Wanton Disregard. ▶ *People v. Schumacher* (1961) 194 Cal.App.2d 335, 339–340 [14 Cal.Rptr. 924].
- Three Violations or Property Damage as Wanton Disregard—Definitional. ▶ *People v. Taylor* (2018) 19 Cal.App.5th 1195, 1202–1203 [228 Cal.Rptr.3d 575]; *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393 [5 Cal.Rptr.3d 274].
- Distinctively Marked Vehicle. ▶ *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].
- Distinctive Uniform. ▶ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine Status as Peace Officer. ▶ *People v. Flood*, *supra*, ~~(1998)~~ 18 Cal.4th at p. 470, 482 ~~[76 Cal.Rptr.2d 180, 957 P.2d 869]~~.
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved. ▶ ~~People v. Hudson~~, *supra*, ~~(2006)~~ 38 Cal.4th

~~1002~~, at p. 1013 ~~[44 Cal.Rptr.3d 632]~~; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 908].

- Defendant Need Not Receive Violation Points for Conduct. ▶ *People v. Leonard* (2017) 15 Cal.App.5th 275, 281 [222 Cal.Rptr3d 868].
- Statute Does Not Require Lawful Performance of a Duty. ▶ *People v. Fuentes* (2022) 78 Cal.App.5th 670, 679–680 [294 Cal.Rptr.3d 43].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Inherently Dangerous Felony

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

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

SECONDARY SOURCES

7 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, § 306.

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

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

2622. Intimidating a Witness (Pen. Code, § 136.1(a) & (b))

The defendant is charged [in Count __] with intimidating a witness [in violation of Penal Code section 136.1].

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

<Alternative 1A—attending or giving testimony>

[1. The defendant maliciously (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from (attending/ [or] giving testimony at) _____ *<insert type of judicial proceeding or inquiry authorized by law>;*]

<Alternative 1B—report of victimization>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from making a report that (he/she/someone else) was a victim of a crime to _____ *<insert type of official specified in Pen. Code, § 136.1(b)(1)>;*]

<Alternative 1C—causing prosecution>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from cooperating or providing information so that a (complaint/indictment/information/probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]

<Alternative 1D—causing arrest>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from (arresting[,]/ [or] (causing/ [or] seeking) the arrest of [,]) someone in connection with a crime;]

2. _____ *<insert name/description of person defendant allegedly sought to influence>* was a (witness/ [or] crime victim);

AND

3. The defendant knew (he/she) was (trying to (prevent/ [or] discourage)/(preventing/ [or] discouraging)) _____ <insert name/description of person defendant allegedly sought to influence> from _____ <insert appropriate description from element 1> and intended to do so.

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- [Who knows about the existence or nonexistence of facts relating to a crime(;/.)]

[OR]

- [Whose declaration under oath has been or may be received as evidence(;/.)]

[OR]

- [Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]

[OR]

- [Who has been served with a subpoena issued under the authority of any state or federal court.]]

[A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.]

[It is not a defense that the defendant was not successful in preventing or discouraging the (victim/ [or] witness).]

[It is not a defense that no one was actually physically injured or otherwise intimidated.]

New January 2006; Revised September 2020, March 2023

BENCH NOTES

Instructional Duty

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

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits “knowingly and maliciously” preventing or attempting to prevent a witness or victim from giving testimony. If the court instructs with alternative 1A, the court should also give the bracketed definition of “maliciously.” (See *People v. Serrano* (2022) 77 Cal.App.5th 902 912–913 [292 Cal.Rptr.3d 865].)

Alternatives 1B through 1D apply to charges under Penal Code section 136.1(b). Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].)

If the defendant is charged with one of the sentencing factors in Penal Code section 136.1(c), give CALCRIM No. 2623, *Intimidating a Witness: Sentencing Factors*. If the defendant is charged with the sentencing factor based on a prior conviction, the court must give both CALCRIM No. 2623 and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction.

Note that Penal Code section 136.1(a)(3) states, “For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.” It is unclear whether the court must instruct on this presumption.

AUTHORITY

- Elements. ▶ Pen. Code, § 136.1(a) & (b).
- Malice Defined. ▶ Pen. Code, § 136(1).
- Witness Defined. ▶ Pen. Code, § 136(2).

- Victim Defined. ▶ Pen. Code, § 136(3).
- Specific Intent Required. ▶ *People v. Ford*, supra, ~~(1983)~~ 145 Cal.App.3d 985, p. 990 [~~193 Cal.Rptr. 684~~]; see also *People v. Womack*, supra, ~~(1995)~~ 40 Cal.App.4th at pp. 926, 929–930 [~~47 Cal.Rptr.2d 76~~].
- Malice Not Required For Violations of Penal Code Section 136.1(b). ▶ *People v. Brackins* (2019) 37 Cal.App.5th 56, 66-67 [249 Cal.Rptr.3d 261].

LESSER INCLUDED OFFENSES

A violation of Penal Code section 136.1(a) or (b) is a felony-misdemeanor, punishable by a maximum of three years in state prison. If the defendant is also charged with one of the sentencing factors in Penal Code section 136.1(c), then the offense is a felony punishable by two, three, or four years. If the defendant is charged under Penal Code section 131.6(c), then the offenses under subdivisions (a) and (b) are lesser included offenses. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense.

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of Penal Code section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot “influence” the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which requires that a defendant prevent, rather than influence, testimony. (*People v. Womack*, supra, ~~(1995)~~ 40 Cal.App.4th 926, at p. 931 [~~47 Cal.Rptr.2d 76~~].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 5, 6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.07, Ch. 84, *Motions at Trial*, § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4][b]; Ch. 144, *Crimes Against Order*, § 144.03[2], [4] (Matthew Bender).

2623. Intimidating a Witness: Sentencing Factors (Pen. Code, § 136.1(c))

If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegation[s] that the defendant [acted maliciously] [and] [(acted in furtherance of a conspiracy/ [or] used or threatened to use force/ [or] acted to obtain money or something of value)].

To prove (this/these) allegation[s], the People must prove that:

[1. The defendant acted maliciously(;/.)]

[AND]

<Alternative A—furtherance of a conspiracy>

[(2A/1). The defendant acted with the intent to assist in a conspiracy to intimidate a witness(;/.)]

<Alternative B—used or threatened force>

[(2B/2). The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property of ~~ta~~ (witness[,]/ [or] victim[,]/ [or] ~~any other~~ person other than (him/her)self)(;/.)]

<Alternative C—financial gain>

[(2C/3). The defendant acted (in order to obtain (money/ [or] something of value)/ [or] at the request of someone else in exchange for something of value).]

[Instruction[s] __ <insert instruction number[s]> explain[s] when someone is acting in a conspiracy to intimidate a witness. You must apply (that/those) instruction[s] when you decide whether the People have proved this additional allegation. <The court must modify and give Instruction 415, et seq., explaining the law of conspiracy as it applies to the facts of the particular case.>]

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

The People have the burden of proving (this/each) allegation beyond a reasonable doubt. If the People have not met this burden [for any allegation], you must find that (this/the) allegation has not been proved.

New January 2006; Revised September 2020, March 2023

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on Penal Code section 136.1(c), the court has a **sua sponte** duty to instruct on the alleged sentencing factor. This instruction **must** be given with CALCRIM No. 2622, *Intimidating a Witness*.

As noted in the Bench Notes to CALCRIM No. 2622, the court will instruct the jury that knowledge and malice are elements of a violation of Penal Code section 136.1(a). If the court has given the malice element in CALCRIM No. 2622, the court may delete it here. If the court has not already given this element and the defendant is charged under subdivision (c), the court must give the bracketed element requiring malice here, as well as the bracketed definition of maliciously. (See *People v. Serrano* (2022) 77 Cal.App.5th 902, 912–913 [292 Cal.Rptr.3d 865].)

If the defendant is charged with the sentencing factor based on a prior conviction, the court must give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction. In such cases, the court should also give this instruction, CALCRIM No. 2623, only if the court has not already instructed the jury on malice or the defendant is also charged with another sentencing factor.

The court must provide the jury with a verdict form on which the jury will indicate if each alleged sentencing factor has or has not been proved.

If the court instructs on furtherance of a conspiracy, give the appropriate corresponding instructions on conspiracy. (See CALCRIM No. 415, *Conspiracy*.)

AUTHORITY

- Factors. ▶ Pen. Code, § 136.1(c).
- Malice Defined. ▶ Pen. Code, § 136(1).
- Statutory Meaning of Third Person Excludes Defendant. ▶ *People v. Johnson* (2022) 79 Cal.App.5th 1093, 1110 [295 Cal.Rptr.3d 353].

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Governmental Authority, § 6.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 82, *Witnesses*, § 82.07, Ch. 84, *Motions at Trial*, § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.13[4][b], Ch. 144, *Crimes Against Order*, § 144.03[2], [4] (Matthew Bender).

3224. Aggravating Factor: Great Violence, Great Bodily Harm, or High Degree of Cruelty, Viciousness, or Callousness

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the crime[s] [in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the crime[s] [in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

To prove this allegation, the People must prove that:

- 1. During the commission of the crime[s], the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed (other/an) act[s] showing a high degree of cruelty, viciousness, or callousness);**

AND

- 2. The (type/level) of (violence[,]/ [or]bodily harm[,]/ [or]threat of bodily harm[,]/ [or]cruelty, viciousness, or callousness) was distinctively worse than what was necessary to commit the crime[s].**

[For the crime to have been committed with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness), no one needs to actually have been injured by the 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 the crime with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness).]

[*Great bodily harm* means significant or substantial physical injury, as opposed to minor or moderate harm.]

[*Threat of great bodily harm* means the threat of significant or substantial physical injury. It is a threatened injury that would result in greater than minor or moderate harm.]

[*Viciousness* is not the same as violence. For example, many acts which may be described as vicious do not involve violence at all, but rather involve acts such as deceit and slander. On the other hand, many violent acts do not indicate viciousness, but instead show frustration, justifiable rage, or self-defense.]

[An act discloses *cruelty* when it demonstrates the deliberate infliction of physical or mental suffering.]

[An act discloses *callousness* when it demonstrates a lack of sympathy for the suffering of, or harm to, the victim[s].]

[You may not find the allegation proven unless all of you agree that the People have proved at least one of the following: that the defendant (used great violence[,]/ [or] inflicted great bodily harm[,]/ [or] threatened to inflict great bodily harm[,]/ [or] committed [other] acts showing a high degree of cruelty, viciousness, or callousness). However, you need not all agree on the act[s] or conduct which constitute[s] the (use of great violence[,]/ [or] infliction of great bodily harm[,]/ [or] threat to inflict great bodily harm[,]/ [or] [other] act[s] showing a high degree of cruelty, viciousness, or callousness.)

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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 March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(1).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Force, Violence, or Threat Beyond What is Necessary to Accomplish Criminal Purpose. ▶ *People v. Karsai* (1982) 131 Cal.App.3d 224, 239 [182 Cal.Rptr. 406]; see also *People v. Cortez* (1980) 103 Cal.App.3d 491, 496 [163 Cal.Rptr. 1]; *People v. Harvey* (1984) 163 Cal.App.3d 90, [208 Cal.Rptr. 910]; *People v. Garcia* (1989) 209 Cal.App.3d 790, 793–794 [257 Cal.Rptr. 495].
- Viciousness Not Equivalent To Violence. ▶ *People v. Reed* (1984) 157 Cal.App.3d 489, 492 [203 Cal.Rptr. 659].
- Actual Bodily Harm Not Required. ▶ *People v. Duran* (1982) 130 Cal.App.3d 987, 990 [182 Cal.Rptr. 17].

3225. Aggravating Factor: Armed or Used Weapon

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the defendant was armed with or used a weapon, to wit: _____ *<insert description of weapon>* during commission of the crime[s] in Count[s] _____.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the defendant was armed with or used a weapon, to wit: _____ *<insert description of weapon>* during commission of the crime[s] [in Count[s] ____].]

To prove this allegation, the People must prove that the defendant, while committing the crime[s] [in Count[s] __] (knowingly carried a weapon[,]/ [or] knowingly had a weapon available for use[,]/ [or] intentionally displayed a weapon in a menacing manner[,]/ [or] intentionally (fired/ [or] attempted to fire) a weapon[,]/ [or] intentionally (struck[,]/ [or] stabbed[,]/ [or] slashed[,]/ [or] hit)[,]/ [or] attempted to (strike[,]/ [or] stab[,]/ [or] slash[,]/ [or] hit) another person with a weapon.)]

[A *weapon* means any device, instrument, or object that is capable of being used to inflict injury or death. You may consider the totality of the circumstances in determining whether the _____ *<insert description of weapon>* was a weapon.]

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant was either armed or used a weapon. However, all of you do not need to agree on which act[s] or conduct constitute[s] the arming or use of a weapon.]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S.270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

Give the bracketed portion that defines weapon if the object is not a weapon as a matter of law and is capable of innocent uses.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(2).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Arming Includes Available For Use. ▶ *People v. Garcia* (1986) 183 Cal.App.3d 335, 350 [228 Cal.Rptr. 87].

COMMENTARY

Consistent with the language of rule 4.421(a)(2), the instruction has been drafted with the assumption that the defendant is personally armed. The armed enhancement contained in Penal Code section 12022(a)(1) provides: “This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.”

Whether there is a relationship between the rule of court and Penal Code section 12022(a)(1) has not been addressed by case law.

3226. Aggravating Factor: Particularly Vulnerable Victim

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that _____ *<insert name of victim>* was a particularly vulnerable victim[s].]

<Introductory paragraph for bifurcated trial>

[The People have alleged [in Count[s] __] that _____ *<insert name of victim>* was a particularly vulnerable victim.]

To prove this allegation, the People must prove that:

1. _____ *<insert name of victim>* (suffered[,]/ [or]was threatened with suffering), a loss, injury, or harm as the result of the crime[s];

AND

2. _____ *<insert name of victim>* was particularly vulnerable.

***Particularly vulnerable* includes being defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a special or unusual degree.**

In determining whether _____ *<insert name of victim>* was *particularly vulnerable*, you should consider all of the circumstances surrounding the commission of the crime, including the characteristics of _____ *<insert name of victim>* and the manner and setting in which the crime was committed.

[You may not find vulnerability based solely on _____ *<insert element of the offense>* which is an element of _____ *<insert offense>*.]

[You may not find the allegation proven unless all of you agree that the People have proved that the victim was particularly vulnerable. However, you do not have to agree on which facts show that the victim was particularly vulnerable.]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime [and for each 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 March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Pen. Code section 1170.85(b) states: “Upon conviction of any felony it shall be considered a circumstance in aggravation in imposing a term under subdivision (b) of Section 1170 if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability.” If this section is applicable, the instruction should be modified to reflect the victim’s alleged inability to defend himself or herself based on age or significant disability.

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crime and victim the aggravating factor pertains to if it applies to one or more specific counts or victims.

The court must bifurcate the jury’s determination of the aggravating factors upon the defendant’s request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(3).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179

Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].

- Victim Defined. ▶ *People v. Simon* (1983) 144 Cal.App.3d 761, 765 [193 Cal.Rptr. 28].
- Particularly Vulnerable Defined. ▶ *People v. DeHoyos* (2013) 57 Cal.4th 79, 154–155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223 [59 Cal.Rptr.2d 627]; *People v. Price* (1984) 151 Cal.App.3d 803, 814 [199 Cal.Rptr. 99]; *People v. Ramos* (1980) 106 Cal.App.3d 591, 607 [165 Cal.Rptr. 179]; *People v. Smith* (1979) 94 Cal.App.3d 433, 436 [156 Cal.Rptr. 502].
- Vulnerability Cannot Be Based Solely on Age If Age is Element of Offense. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 [249 Cal.Rptr. 435], disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 244–245 [119 Cal.Rptr.3d 775, 245 P.3d 410]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 476–477 [175 Cal.Rptr. 383]; *People v. Flores* (1981) 115 Cal.App.3d 924, 927 [171 Cal.Rptr. 777].

3227. Aggravating Factor: Induced Others to Participate or Occupied Position of Leadership or Dominance

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

<Introductory paragraph for bifurcated trial>

[The People have alleged [in Count[s] ___] that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

To prove this allegation, the People must prove that:

- 1. The defendant induced others to participate in the commission of the crime[s];**

OR

- 2. The defendant occupied a position of leadership or dominance over other participants during commission of the crime[s].**

***Induced* means persuaded, convinced, influenced, or instructed.**

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant either induced others to participate or occupied a position of leadership or dominance. However, all of you do not need to agree on which act[s] or conduct constitute[s] inducing others to participate or occupying a position of leadership or dominance.]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(4).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- More Than One Participant Required. ▶ *People v. Berry* (1981) 117 Cal.App.3d 184, 198 [172 Cal.Rptr. 756, 763–764].
- Leadership Not Equivalent to Dominance. ▶ *People v. Kellett* (1982) 134 Cal.App.3d 949, 961 [185 Cal.Rptr. 1].
- Factor Requires More Than Being Willing Participant. ▶ *People v. Searle* (1989) 213 Cal.App.3d 1091, 1097 [261 Cal.Rptr. 898].

3228. Aggravating Factor: Induced Minor to Commit or Assist

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the defendant induced a minor to commit or assist in the commission of the crime[s] [in Count[s] __].]

<Introductory paragraph for bifurcated trial>

[The People have alleged [in Count[s] __] that the defendant induced a minor to commit or assist in the commission of the crime[s].]

To prove this allegation, the People must prove that:

- 1. The defendant induced a minor to commit the crime[s];**

OR

- 2. The defendant induced a minor to assist in the commission of the crime[s].**

***Induced* means persuaded, convinced, influenced, or instructed.**

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

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

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant induced a minor either to commit the crime or to assist in the commission of the crime. However, all of you do not need to agree on which act[s] or conduct constitute[s] the inducement.]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(5).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].

3229. Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the defendant [in Count[s] __] (threatened witnesses[,/ [or]unlawfully prevented or dissuaded witnesses from testifying[,/ [or]suborned perjury[,/ [or] _____ *<insert other illegal activity that interfered with the judicial process>*).]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the defendant [in Count[s] __] (threatened witnesses[,/ [or]unlawfully prevented or dissuaded witnesses from testifying[,/ [or]suborned perjury[,/ [or] _____ *<insert other illegal activity that interfered with the judicial process>*).]

To prove this allegation, the People must prove that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/[or] _____ *<insert other illegal activity that interfered with the judicial process>*).

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

[OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

[OR]

- [Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]

[OR

- Who has been served with a subpoena issued under the authority of any state or federal court.]]

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

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

[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].]

[*Dissuaded* means persuaded or advised not to do something.]

[*Suborned perjury* means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. *Induced* means persuaded, convinced, influenced, or instructed.]

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/[or]_____ <insert other illegal activity that interfered with the judicial process>). However, all of you do not need to agree on which act[s] or conduct constitute[s] (threatening [a]witness[es]/ [or]preventing [a]witness[es] from testifying/ [or]dissuading [a]witness[es] from testifying/ [or]suborning perjury/[or]_____ <insert other illegal activity that interfered with the judicial process>).]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Penal Code section 1170.85(a) states: “Upon conviction of any felony assault or battery offense, it shall be considered a circumstance in aggravation of the crime in imposing a term under subdivision (b) of Section 1170 if the offense was committed to prevent or dissuade a person who is or may become a witness from attending upon or testifying at any trial, proceeding, or inquiry authorized by law, or if the offense was committed because the person provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal or juvenile court proceeding.” If this section is applicable, the bracketed catch-all provision of the instruction related to other illegal activity should be modified to reflect the defendant’s alleged conduct.

If it is alleged the defendant interfered with the judicial process by committing perjury, the bracketed catch-all provision for other illegal activity should be modified and the trial court should also instruct with CALCRIM No. 2640, *Perjury*. (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002–1004 [21 Cal.Rptr.2d 676].)

The catch-all provision of other illegal activity can include attempts to dissuade or prevent a witness from testifying. (See *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury’s determination of the aggravating factors upon the defendant’s request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(6); see also
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Witness Defined. ▶ Pen. Code, § 136(2).
- Threat Defined. ▶ Pen. Code, § 76(5).
- Attempted Subornation of Perjury. ▶ *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].

COMMENTARY

Perjury committed by the defendant can constitute “an illegal activity that interfered with the judicial process.” (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002 [21 Cal.Rptr.2d 676].) If it is alleged that the defendant committed perjury, the jury must find all the elements of a perjury violation. *Howard, supra*, 17 Cal.App.4th at p. 1004 [holding that the court is constitutionally required to make findings encompassing the elements of perjury: “a willful statement, under oath, of any material matter which the witness knows to be false.”]; see also *United States v. Dunnigan* (1993) 507 U.S. 87, 96 [113 S.Ct. 1111, 122 L.Ed.2d 445].) The concern, essentially, is that a sentence may be aggravated if the defendant actually committed perjury by being untruthful, but not if the defendant merely gave inaccurate testimony due to confusion, mistake, faulty memory or some other reason besides a willful attempt to impede justice. (*Howard, supra*, 17 Cal.App.4th at p.1005; *Dunnigan, supra*, 507 U.S. at pp. 95–96.)

3230. Aggravating Factor: Planning, Sophistication, or Professionalism

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the offense was carried out with planning, sophistication, or professionalism.]

<Introductory paragraph for bifurcated trial>

[The People have alleged [in Count[s] __] that the offense was carried out with planning, sophistication, or professionalism.]

To prove this allegation, the People must prove that the defendant's manner of committing the crime involved planning, sophistication, or professionalism.

Whether the manner of committing the crime involves *planning, sophistication or professionalism* depends on the totality of the circumstances surrounding the offense.

***Planning* refers to conduct before the crime preparing for its commission.**

***Sophistication* refers to conduct demonstrating knowledge or awareness of the complexities or details involved in committing the crime.**

***Professionalism* refers to conduct demonstrating experience or expertise.**

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant's manner of committing the crime involved planning, sophistication, or professionalism. However, all of you do not need to agree on which act[s] or conduct demonstrate[s] that the manner of committing the crime involve[s] planning, sophistication, or professionalism.]

[You must decide whether the People have proved (this/these) allegation[s] for each crime and return a separate finding for each crime.]

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

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. ▶ California Rules of Court, rule 4.421(a)(8).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Planning, Sophistication, Professionalism Defined. ▶ *People v. Mathews* (1980) 102 Cal.App.3d 704, 710 [162 Cal.Rptr. 615]; *People v. Stewart* (1983) 140 Cal.App.3d 11, 17 [189 Cal.Rptr. 141]; *People v. Charron* (1987) 193 Cal.App.3d 981, 994–995 [238 Cal.Rptr. 660]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* ((1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986].

3231. Aggravating Factor: Great Monetary Value

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the crime[s] [in Count[s] __] involved [(a/an)] [attempted] [or] [actual] (taking/ [or] damage) of great monetary value.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the crime[s] [in Count[s] __] involved [(a/an)] [attempted] [or] [actual] (taking/ [or] damage) of great monetary value.]

To prove this allegation, the People must prove that:

- 1. During the commission of the crime[s], the defendant (attempted to take/ [or] actually took/damaged) _____ *<insert description of item>*;**

AND

- 2. The monetary value of the _____ *<insert description of item or damage to item>* was great.**

[In determining whether the *monetary value* was *great*, you may consider all evidence presented on the issue of value.]

[You may not find the allegation proven unless all of you agree that the People have proved that the (item/damage) that the defendant (attempted to take/took / [or] caused) was of great monetary value. However, all of you do not need to agree on a specific monetary value.]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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.

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BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(9).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Great Monetary Value. *People v. Wright* (1982) 30 Cal.3d 705, 707 & 714 [180 Cal.Rptr. 196, 639 P.2d 267] [losses of \$2300 and \$3250 did not qualify]; *People v. Berry* (1981) 117 Cal.App.3d 184, 197 [172 Cal.Rptr. 756] [damage of \$450 did not qualify]; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 705–706 [173 Cal.Rptr. 71] [loss of rifle, shotgun, and television did not qualify].

3232. Aggravating Factor: Large Quantity of Contraband

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the crime[s] [in Count[s] __] involved a large quantity of contraband.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the crime[s] [in Count[s] __] involved a large quantity of contraband.]

To prove this allegation, the People must prove that:

1. The _____ *<insert description of contraband>* was contraband;

AND

2. The quantity of _____ *<insert description of contraband>* was large.

[*Contraband* means illegal or prohibited items.]

In determining whether the quantity was *large*, you may consider all evidence presented on the issue of amount.

[You may not find the allegation proven unless all of you agree that the People have proved that the quantity of contraband was large. However, all of you do not need to agree on the specific quantity.]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(10).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].

3233. Aggravating Factor: Position of Trust or Confidence

<Introductory paragraph for nonbifurcated trial>

[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[, for each crime,] the People have proved the additional allegation[s] that the defendant took advantage of a position of trust or confidence to commit the crime.]

<Introductory paragraph for bifurcated trial>

[The People have alleged [in Count[s]__] that the defendant took advantage of a position of trust or confidence to commit the crime.]

To prove this allegation, the People must prove that:

- 1. (Prior to/During) the commission of the crime, the defendant (had/developed) a relationship to _____ *<insert name of victim or other person>*;**
- 2. This relationship allowed the defendant to occupy a position of trust or caused _____ *<insert name of victim or other person>* to have confidence in the defendant;**

AND

- 3. The defendant took advantage of this position of trust or confidence to commit the crime.**

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant took advantage of a position of trust or confidence with the victim to commit the crime. However, all of you do not need to agree on which act[s] or conduct constitute[s] the taking advantage of a position of trust or confidence to commit the crime.]

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▶ California Rules of Court, rule 4.421(a)(11).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Factor Focuses on Special Status to Victim. ▶ *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262–1263 [131 Cal.Rptr.2d 628] [quasi-paternal relationship]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694–1695 [53 Cal.Rptr.2d 282] [defendant intentionally cultivated friendship], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 337–338 [30 Cal.Rptr.2d 376] [stepfather entrusted with care]; *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [15 Cal.Rptr.2d 709] [stepfather entrusted with care]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [14 Cal.Rptr.2d 9] [legal parent].

3234. Aggravating Factor: Serious Danger to Society

<Introductory paragraph for nonbifurcated trial>

[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 _____ *<insert name of defendant>* has engaged in violent conduct, to wit: _____ *<insert description of conduct>* which indicates (he/she) is a serious danger to society.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that _____ *<insert name of defendant>* has engaged in violent conduct, to wit: _____ *<insert description of conduct>* which indicates (he/she) is a serious danger to society.]

To prove this allegation, the People must prove that:

- 1. The defendant has engaged in violent conduct;**

AND

- 2. The violent conduct, considered in light of all the evidence presented [and the defendant's background], show[s] that the defendant is a serious danger to society.**

[To determine whether the defendant is a serious danger to society, you may consider the defendant's conduct before or after commission of the crime [as well as evidence about the defendant's background].]

[You may not find the allegation proven unless all of you agree that the People have proved that the defendant engaged in violent conduct that shows (he/she) is a serious danger to society. However, all of you do not need to agree on which violent conduct shows that the defendant is a serious danger to society.]

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.

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BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as set forth in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify the crime(s) to which the aggravating factor pertains.

The court must bifurcate the jury's determination of the aggravating factors upon the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. ▶ California Rules of Court, rule 4.421(b)(1).
- Aggravating Fact Defined. ▶ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Danger to Society: Subsequent Conduct Can Be Considered. ▶ *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [256 Cal.Rptr. 669].