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INVITATION TO COMMENT

CALCRIM 11-01

Title	Action Requested
Criminal Jury Instructions (CALCRIM) Revisions	Review and submit comments by February 23, 2011
Proposed Revisions	Proposed Effective Date
Adopt one new instruction and revise others	April 29, 2011
Recommended by	Contact
Advisory Committee on Criminal Jury Instructions	Robin Seeley, Attorney, 415-865-7710 robin.seeley@jud.ca.gov
Hon. Sandra L. Margulies, Chair	

Summary

New and revised instructions reflecting recent developments in the law.

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

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

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

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

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

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

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

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

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

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

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

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

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

You must reach your verdict without any consideration of punishment.

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

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

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

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

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 643.
4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

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

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

Jury Misconduct

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

225. Circumstantial Evidence: Intent or Mental State

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

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

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

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

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

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

Secondary Sources

- 1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 3, 6.
- 5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 652.
- 1 Witkin, *California Evidence* (4th ed. 2000) Circumstantial Evidence, § 117.
- 4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

RELATED ISSUES

General or Specific Intent Explained

A crime is a general-intent offense when the statutory definition of the crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence. A crime is a specific-intent offense when the statutory definition refers to the defendant's intent to do some further act or achieve some additional consequence. (*People v. McDaniel* (1979) 24 Cal.3d 661, 669 [156 Cal.Rptr. 865, 597 P.2d 124]; *People v. Hood* (1969) 1 Cal.3d 444, 456–457 [82 Cal.Rptr. 618, 462 P.2d 370]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768]; see, e.g., *People v. Whitfield* (1994) 7 Cal.4th 437, 449–450 [27 Cal.Rptr.2d 858, 868 P.2d 272] [second degree murder based on implied malice is a specific-intent crime].)

Only One Possible Inference

The fact that elements of a charged offense include mental elements that must necessarily be proved by inferences drawn from circumstantial evidence does not alone require an instruction on the effect to be given to such evidence. (*People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629]; *People v. Wiley* (1976) 18 Cal.3d 162, 174–176 [133 Cal.Rptr. 135, 554 P.2d 881].) When the only inference to be drawn from circumstantial evidence points to the existence of a required specific intent or mental state, a circumstantial evidence instruction need not be given sua sponte, but should be given on request. (*People v. Gordon* (1982) 136 Cal.App.3d 519, 531 [186 Cal.Rptr. 373]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 793–794 [155 Cal.Rptr. 152].)

Direct Evidence, Extrajudicial Admission, or No Substantial Reliance

This instruction should not be given if direct evidence of the mental elements exists (*People v. Wiley* (1976) 18 Cal.3d 162, 175 [133 Cal.Rptr. 135, 554 P.2d 881]), if the only circumstantial evidence is an extrajudicial admission (*People v. Gould* (1960) 54 Cal.2d 621, 629 [7 Cal.Rptr. 273, 354 P.2d 865], overruled on other grounds in *People v. Cuevas* (1995) 12 Cal.4th 252, 271–272 [48 Cal.Rptr.2d 135, 906 P.2d 1290]), or if the prosecution does not substantially rely on circumstantial evidence (*People v. DeLeon* (1982) 138 Cal.App.3d 602, 607–608 [188 Cal.Rptr. 63]).

See the Related Issues section of CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*.

250. Union of Act and Intent: General Intent

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

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

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

Defenses—Instructional Duty

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

AUTHORITY

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

Secondary Sources

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

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

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

RELATED ISSUES

Sex Registration and Knowledge of Legal Duty

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

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

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

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

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

<Repeat next paragraph as needed>

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

New January 2006; Revised June 2007, April 2010

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

Defenses—Instructional Duty

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

AUTHORITY

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

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

Secondary Sources

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

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

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

RELATED ISSUES

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

507. Justifiable Homicide: By Public Officer

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

1. The defendant was (a public officer/obeying a public officer's command for aid and assistance);
2. The [attempted] killing was committed while (taking back into custody a convicted felon [or felons] who had escaped from prison or confinement[,]/ arresting a person [or persons] charged with a felony who (was/were) resisting arrest or fleeing from justice[,]/ overcoming actual resistance to some legal process[,]/ [or] while performing any [other] legal duty);
3. The [attempted] killing was necessary to accomplish (one of those/that) lawful purpose[s];

AND

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

As with a peace officer, the jury must determine whether the defendant was a public officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr.

604, 758 P.2d 1135].) The court may instruct the jury in the appropriate definition of “public officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are public officers”). (*Ibid.*) However, the court may not instruct the jury that the defendant was a public officer as a matter of law (e.g., “Officer Reed was a public officer”). (*Ibid.*)

Related Instructions

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

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

AUTHORITY

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

Secondary Sources

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

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

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

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

RELATED ISSUES

Killing Committed in Obedience to Judgment

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

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

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

1. The defendant committed the [attempted] killing while lawfully trying to arrest or detain _____ <insert name of decedent> for committing (the crime of _____ <insert forcible and atrocious crime, i.e., ~~or~~ felony that threatened death or ~~great-serious~~ bodily harm>/ _____ <insert crime decedent was suspected of committing, e.g., burglary>, and that crime threatened the defendant or others with death or serious bodily harm);
2. _____ <insert name of decedent> actually committed (the crime of _____ <insert forcible and atrocious crime, i.e., felony that threatened death or serious bodily harm ~~or felony~~>/ _____ <insert crime decedent was suspected of committing, e.g., burglary> , and that crime threatened the defendant or others with death or serious bodily harm);~~};~~
3. The defendant had reason to believe that _____ <insert name of decedent> had committed (the crime of _____ <insert forcible and atrocious crime, i.e., felony that threatened death or serious bodily harm / _____>/ _____ <insert crime decedent was suspected of committing, e.g., burglary> , and that crime threatened the defendant or others with death or serious bodily harm);-
4. ~~[~~The defendant had reason to believe that _____ <insert name of decedent> posed a threat of death or serious physical harm, either to the defendant or to others ~~for knew that _____ <insert name of decedent> had committed _____ <insert forcible and atrocious crime>~~];

AND

5. The [attempted] killing was necessary to prevent _____ 's <insert name of decedent> escape.

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

Related Instructions

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

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

AUTHORITY

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

Secondary Sources

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

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

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

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

RELATED ISSUES

Felony Must Actually Be Committed

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

Felony Committed Must Threaten Death or Great Bodily Injury

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

560. Homicide: Provocative Act by Defendant

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

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

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

AND

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

A provocative act is an act:

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

[AND

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

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

1. A reasonable person in the defendant's position would have foreseen that there was a high probability that his or her act could begin a chain of events resulting in someone's death;
2. The defendant's act was a direct and substantial factor in causing _____'s *insert name of decedent* death;

AND

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

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

<Multiple Provocative Acts>

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

<Independent Criminal Act>

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

<Degree of Murder>

[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.]

<Give if multiple theories alleged.>

[The defendant has been prosecuted for first degree murder under (two/____ *insert number*) theories: (1) _____ *insert first theory, e.g., "the murder was willful, deliberate, and premeditated"* [and] (2) _____ *insert second theory, e.g., "the murder was committed during the defendant's perpetration of an enumerated felony* [_____ *insert additional theories*].

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

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

<A. Deliberation and Premeditation>

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

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

<B. Enumerated Felony>

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

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

AND

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

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

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

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have

not met this burden, you must find the defendant not guilty of first degree murder.]

<Degree of Murder>

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

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

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

~~AND~~

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

AUTHORITY

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

Secondary Sources

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

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

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

RELATED ISSUES

Act “Beyond What is Necessary”

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

Death of a Fetus

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

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

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

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

The defendant committed involuntary manslaughter if:

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

AND

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People*

v. Flood (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

AUTHORITY

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

Secondary Sources

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

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

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

LESSER INCLUDED OFFENSES

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

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

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

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

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

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

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

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

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

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

AND

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

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

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

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

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

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

AND

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

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

2 P.3d 1189].

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

Secondary Sources

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

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

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Due Caution and Circumspection

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

Felonies as Predicate “Unlawful Act”

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

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

No Inherently Dangerous Requirement for Predicate Misdemeanor/Infraction

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

Fetus

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

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

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

<Introductory Sentence: Alternative A—Charged Offense>

[The defendant is charged [in Count __] with vehicular manslaughter [in violation of Penal Code section 192(c)(2)].]

<Introductory Sentence: Alternative B—Lesser Included Offense>

[Vehicular manslaughter with ordinary negligence is a lesser crime than (gross vehicular manslaughter while intoxicated/ [and] gross vehicular manslaughter/ [and] vehicular manslaughter with ordinary negligence while intoxicated.)]

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

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

- ~~1. While (driving a vehicle/operating a vessel), the defendant committed (a misdemeanor[,]/ [or] an infraction/ [or] a lawful act with ordinary negligence);~~**
- ~~2. The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) was dangerous to human life under the circumstances of its commission;~~**

~~AND~~

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

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

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

AND

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

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

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

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

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

Ordinary negligence[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).

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

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

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

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

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

New January 2006; Revised December 2008, October 2010

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

AUTHORITY

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

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

Secondary Sources

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

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

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

RELATED ISSUES

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

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

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

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

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

AND

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

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

[A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder.]

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

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

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

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

New January 2006; Revised December 2008, August 2009

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the crime of attempted murder when charged, or if not charged, when the evidence raises a question whether all the elements of the charged offense are present. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on lesser included offenses in homicide generally].)

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

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

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

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

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

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

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

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

AUTHORITY

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

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



Secondary Sources

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Specific Intent Required

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

In instructing upon the crime of attempt to commit murder, there should never be any reference whatsoever to implied malice. Nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do. (*People v. Santascy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709].)

Solicitation

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

Single Bullet, Two Victims

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

No Attempted Involuntary Manslaughter

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

Transferred and Concurrent Intent

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

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

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

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

New April 2010

BENCH NOTES

Instructional Duty

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

AUTHORITY

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

- *Secondary Sources*

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

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

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

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

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

<Alternative 1A—defendant touched child>

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

[OR]

<Alternative 1B—child touched defendant>

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

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

AND

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

AUTHORITY

- Elements ▶ Pen. Code, § 288(a).
- Actual Arousal Not Required ▶ *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse ▶ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Child’s Consent Not a Defense ▶ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].
- Child Touching Own Body Parts at Defendant’s Instigation ▶ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] [“constructive” touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Lewd Defined ▶ *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court 25* (1979) Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Child Under 14 ▶ Pen. Code, §§ 664, 288(a); *People v. Imler* (1992) 9 Cal.App.4th 1178, 1181–1182 [11 Cal.Rptr.2d 915]; *People v. Herman* (2002) 97 Cal.App.4th 1369, 1389–1390 [119 Cal.Rptr.2d 199].
- Simple Assault ▶ Pen. Code, § 240.
- Simple Battery ▶ Pen. Code, § 242.

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

RELATED ISSUES

Any Act That Constitutes Sexual Assault

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

Calculating Age

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

Minor Perpetrator

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

Solicitation to Violate Section 288

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

Mistaken Belief About Victim’s Age

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

Multiple Lewd Acts

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

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

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

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

<Alternative 1A—defendant touched child>

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

[OR]

<Alternative 1B—child touched defendant>

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

Defenses—Instructional Duty

Lack of consent by a minor is not an element of lewd act or lascivious act against a child under 14 in violation of Penal Code section 288, subdivision (b), whether accomplished by force, duress, or otherwise. Likewise, consent by the child is not an affirmative defense to such a charge. (*People v. Soto* (2011) ___ Cal.4th ___ .)

The bracketed paragraph that begins “It is not a defense that the child” may be given on request if there is evidence of consent.

Defenses—Instructional Duty

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

AUTHORITY

- Elements ▶ Pen. Code, § 288(b)(1).
- Duress Defined ▶ *People v. Soto* (2011) ___ Cal.4th ___ ; *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Menace Defined ▶ Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required ▶ *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse ▶ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67]

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

- Child Touching Own Body Parts at Defendant’s Instigation ▶ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] [“constructive” touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined ▶ *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined ▶ *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- Lewd Defined ▶ *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

Secondary Sources

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

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

COMMENTARY

The instruction includes definitions of “force” and “fear” because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The definition of “force” as used in Penal Code section 288(b)(1) is different from the meaning of “force” as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, “force” does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, “force” means force “*substantially* different from or *substantially* greater than” the physical force

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Evidence of Duress

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

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

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

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

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

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

<Alternative 2A—held or detained>

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

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

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

AND

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

[AND]

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

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

[AND]

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

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

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

<Defense: Good Faith Belief in Consent>

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

<Defense: Consent Given>

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

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

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

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

<Sentencing Factor>

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

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

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

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

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

AND

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

Give the bracketed definition of “consent” on request.

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

AUTHORITY

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

Secondary Sources

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

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

COMMENTARY

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

LESSER INCLUDED OFFENSES

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

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

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

RELATED ISSUES

Extortion Target

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

No Good-Faith Exception

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

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

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

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

1. The defendant [unlawfully] possessed an object ~~that can be used to~~ **for** unlawfully injecting or smoking a controlled substance;
2. The defendant knew of the object's presence;

AND

3. The defendant knew ~~that it was an object it to be an object that the object could be~~ used ~~to for~~ unlawfully injecting or smoking a controlled substance.

[Two or more people may possess something at the same time.]

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

[The People allege that the defendant possessed the following items:

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

<Defense: Authorized Possession for Personal Use>

[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

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

[AND]

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

[AND

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

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

New January 2006; Revised October 2010

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

Defenses—Instructional Duty

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

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

AUTHORITY

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

Secondary Sources

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

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

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

RELATED ISSUES

Marijuana Paraphernalia Excluded

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

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

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

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

1. (He/She) has been convicted of committing sexually violent offenses against one or more victims;
2. (He/She) has a diagnosed mental disorder;

[AND]

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

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

[AND]

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

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

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

The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

_____ <Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)> (is/are) [a] *sexually violent offense[s]* when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person or threatening to retaliate in the future against the victim or any other person.

[_____ <Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)> (is/are) also [a] *sexually violent offense[s]* when the offense[s] (is/are) committed on a child under 14 years old.]

As used here, a *conviction* for committing a sexually violent offense is one of the following:

<Give the appropriate bracketed description[s] below.>

<A. *Conviction With Fixed Sentence*>

[A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]

<B. *Conviction With Indeterminate Sentence*>

[A conviction for an offense that I have just described to you that resulted in an indeterminate sentence.]

<C. *Conviction in Another Jurisdiction*>

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

<D. *Conviction Under Previous Statute*>

[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

<E. *Conviction With Probation*>

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

<F. Acquittal Based on Insanity Defense>

[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>

[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

<H. Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5 >

[A prior conviction for one of the offenses that I have just described to you for which the respondent was committed to the Department of Youth Authority pursuant to Welfare and Institutions Code section 1731.5.]

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

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

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

BENCH NOTES

Instructional Duty

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

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra*, 124 Cal.App.4th at 93.)

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

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

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

AUTHORITY

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

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

Secondary Sources

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

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

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings

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

Masturbation Does Not Require Skin-to-Skin Contact

Substantial sexual conduct with a child under 14 years old includes masturbation when the touching of the minor's genitals is accomplished through his or her clothing. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 [20 Cal.Rptr.3d 801]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [6 Cal.Rptr.3d 389].) “[T]he trial court properly instructed the jury when it told the jury that ‘[t]o constitute masturbation, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.’ ” (*People v. Lopez, supra*, 123 Cal.App.4th at p. 1312.)

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

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

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

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

[AND]

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

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

[AND]

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

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

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

The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

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

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

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

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

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

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 3. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra*, 124 Cal.App.4th at 93.)

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

AUTHORITY

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

Secondary Sources

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

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

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

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

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

[AND]

2. (He/She) ~~indicated~~, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) ~~wanted~~ to stop fighting and that (he/she) ~~has~~ stopped fighting(;/.)

<Give element 3 in cases of mutual combat.>

[AND]

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

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

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

~~[However, if you decide that the the~~ defendant

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

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

New January 2006; Revised April 2008, December 2008

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

AUTHORITY

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

Secondary Sources

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

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

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

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

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

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

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

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

New January 2006; Revised June 2007, October 2010

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

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

Secondary Sources

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

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

RELATED ISSUES

Dual Conviction May Not Be Based on Necessarily Included Offenses

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

Dual Conviction—Examples of Offense Where Prohibited or Permitted

The courts have held that dual conviction is *prohibited* for the following offenses:

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

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

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

Joy Riding and Receiving Stolen Property

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

Accessory and Principal

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

3550. Pre-Deliberation Instructions

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

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

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

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

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

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

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

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

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

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

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

You must reach your verdict without any consideration of punishment.

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

New January 2006; Revised April 2008, October 2010

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

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

Secondary Sources

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

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

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

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

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

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

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

3551–3574. Reserved for Future Use