



JUDICIAL COUNCIL OF CALIFORNIA

RULES COMMITTEE

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RULES COMMITTEE

MINUTES OF OPEN MEETING

December 9, 2021

3:30 - 4:30 p.m.

Video Conference Meeting

Advisory Body Members Present: Hon. Carin T. Fujisaki, Chair, Hon. Dalila Corral Lyons, Vice-Chair, Hon. Kevin C. Brazile, Hon. Rupert A. Byrdsong, Mr. Shawn C. Landry, and Hon. Glenn Mondo.

Advisory Body Members Absent: Ms. Rachel Hill and Mr. Maxwell Pritt

Others Present: Mr. James Barolo, Ms. Benita Downs, Ms. Tracy Kenny, Ms. Anne M. Ronan, Ms. Jamie Schechter, and Ms. Gabrielle Selden.

OPEN MEETING

Call to Order, Roll Call, and Announcements

Justice Fujisaki called the meeting to order at 3:33 pm, and Ms. Benita Downs took roll call.

No comments had been received on any of the items on the agenda.

Staff provided the committee with an overview of the timing of the Judicial Council rules and forms proposals process.

DISCUSSION AND ACTION ITEMS (ITEMS 1 – 6)

Item 1/(CO-21-03)

Civil Practice and Procedure: Adjustment of Maximum Amount of Imputed Liability of Parent or Guardian for Tort of a Minor (amend Appendix B) (Action required – recommend Judicial Council action)

Action: *The committee gave final approval to the Civil Practice and Procedure proposal, recommending it to the council for action via circulating order, with an effective date of July 1, 2021.*

Item 2/(W22-01)

Protective Orders: Civil Harassment Form Revisions and Rule Amendment (amend rule 3.1160; adopt forms CH-117 and CH-210; approve form CH-205-INFO; revise forms CH-116, CH-200, CH-200-INFO, and CH-250; revoke form CH-260) (Action required: recommend circulation for comment)

Action: The Rules Committee approved rules and forms proposal for circulation, to be posted for public comment through January 21.

Item 3/(W22-02)

Rules and Forms: Enforcement of Judgment Form Implementing Assembly Bill 1580 (revise form AT-138/EJ-125) (Action required: recommend circulation for comment)

Action: The Rules Committee approved rules and forms proposal for circulation, to be posted for public comment through January 21.

Item 4/(W22-03)

Family Law: Changes to Child Custody Evaluation Rule and Forms (amend rule 5.220; revise forms FL-327, FL-327(A), FL-328, and FL-329) (Action required: recommend circulation for comment)

Action: The Rules Committee approved rules and forms proposal for circulation, to be posted for public comment through January 21

Item 5/(W22-04)

Juvenile Law: Nonminor Dependents (amend rules 5.555 and 5.906; adopt forms JV-489 and JV-471) (Action required: recommend circulation for comment)

Action: The Rules Committee approved rules and forms proposal for circulation, to be posted for public comment through January 21.

Item 6

Uniform Bail and Penalty Schedules: 2022 Edition (adopt revised Uniform Bail and Penalty Schedules, 2022 Edition) (Action required – recommend Judicial Council action)

Action: The committee gave final approval to the Uniform Bail and Penalty Schedule, recommending it to the council for action via circulating order, with an effective date of January 1, 2022.

A D J O U R N M E N T

There being no further business, the meeting was adjourned at 4:06 pm.

Approved by the advisory body on enter date.



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RULES COMMITTEE

MINUTES OF OPEN MEETING

December 20, 2021

4:00 - 4:30 PM

Teleconference Meeting

Advisory Body Members Present: Hon. Carin T. Fujisaki, Chair, Hon. Kevin C. Brazile, and Mr. Maxwell V. Pritt.

Advisory Body Members Absent: Hon. Dalila Corral Lyons, Vice-Chair, Hon. Rupert A. Byrdsong, Ms. Rachel W. Hill, Mr. Shawn C. Landry, and Hon. Glenn Mondo

Others Present: Hon. Marsha G. Slough, Mr. James Barolo, Ms. Benita Downs, Ms. Leah Rose-Goodwin, Ms. Anne M. Ronan, Ms. Christy Simons, and Mr. Corby Sturges.

OPEN MEETING

Call to Order, Roll Call and Announcements

The chair called the meeting to order at 4:03, and Ms. Benita Downs took roll call.

Justice Fujisaki noted all the meeting materials were posted on the Rules Committee web page on the California Courts website at least three business days before the meeting, except item 1 which was posted with short notice, due to time constraints in getting the recommendation finalized following the enactment of the legislation and the need to have the new rules and forms in effect by January 1, 2022. One comment was received for item 1, which was circulated to the committee in advance. No other comments were received.

DISCUSSION AND ACTION ITEMS (ITEMS 1-3)

Item 1/CO-21-05

Civil Practice and Procedure: Remote Appearances

Circulating Order Memorandum, in which the Ad Hoc Committee on Civil Remote Appearances Rules recommended adopt rule 3.672; amend rules 3.670, 5.9, 5.324, 5.482, 5.531, and 5.900; adopt forms RA-010 and RA-015; approve forms RA-020, RA-025, and RA-030; and revoke forms CIV 020, FL 679, and FL-679-INFO in order to implement new Code of Civil Procedure section 367.75, (Action required – recommend Judicial Council action via circulating order)

Action: *The committee gave final approval to the Civil Remote Appearance proposal, recommending that the council take action via circulating order, with an effective date of January 1, 2022.*



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RULES COMMITTEE

MINUTES ACTION BY EMAIL

January 6, 2022

Advisory Body Members Present: Hon. Carin T. Fujisaki, Chair, Hon. Dalila Corral Lyons, Vice-Chair, Hon. Kevin C. Brazile, Hon. Rupert A. Byrdsong, Ms. Rachel W. Hill, Mr. Shawn C. Landry, Hon. Glenn Mondo, and Mr. Maxwell V. Pritt.

Advisory Body Members Absent: None

Others Present: Ms. Anne M. Ronan and Ms. Benita Downs

ACTION BY EMAIL

As provided in the California Rules of Court, rule 10.75 (o)(1)(B), the chair concluded that prompt action between scheduled meetings was needed. This action by e-mail concerned a matter that would otherwise be discussed in an open meeting; therefore, in accordance with rule 10.75(o)(2), public notice and the proposal were posted on Wednesday, September 22, 2021, to allow for public comment before the committee took action by email. No public comments were received.

OPEN DISCUSSION AND ACTION ITEMS

The Rules Committee considered the following two items recommending actions to conform rules to the new remote appearance statute:

Item 1. Judicial Branch Administration: Emergency Rules on Juvenile Dependency and Juvenile Delinquency Proceedings (amend Cal. Rules of Court, emergency rules 6 and 7) (Action Required)

Item 2. Civil Practice and Procedure: Technical Changes to Civil Rules (amend Cal. Rules of Court, rules 3.722, 3.1207, and 3.2226) (Action Required)

Action: *The committee unanimously approved both Items 1 and 2 and recommended them to the Judicial Council, for placement on the consent agenda of the January 21, 2022 meeting.*

ADJOURNMENT

The action by e-mail concluded on Friday, January 7, 2022, at 3:00 p.m.

Approved by the advisory body on

Item 2 (SP21-11)

CEQA Actions New Projects and Fees for Expedited Review

The Appellate Advisory Committee and Civil and Small Claims Advisory Committee proposal to implement legislation requiring that the Judicial Council amend rules of court regarding streamlined review of cases under the California Environmental Quality Act. (Action required: recommend circulation for comment)

Action: *The Rules Committee approved the Invitations to Comment to be posted on a shortened cycle through January 14.*

Item 3 (SP21-12)

Judicial Branch Administration: New Data and Information Governance Advisory Committee

The Executive and Planning Committee and the Technology Committee recommendation of new rule 10.68 to establish a data and information governance advisory committee. Also, the committees' proposal to repeal rule 10.66 because the duties and responsibilities of the new proposed advisory body will include those of the Workload Assessment Advisory Committee established by that rule. (Action required: recommend circulation for comment)

Action: *: The Rules Committee approved the Invitations to Comment to be posted on a shortened cycle through January 14.*

A D J O U R N M E N T

There being no further business, the meeting was adjourned at 4:43 pm.

Approved by the advisory body on enter date.

Deferred

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]:
Recommend JC approval (has circulated for comment)

Rules Committee Meeting Date: 02/03/2022

Title of proposal: Jury Instructions: Criminal Jury Instructions (2022 Edition)

Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):

1. Adoption of new CALCRIM Nos. 378, 2749, and 3010; and
2. Revisions to CALCRIM Nos. 224, 250, 253, 315, 331, 372, 505, 510, 511, 523, 524, 571, 736, 860, 862, 863, 875, 890, 982, 983, 1000, 1001, 1002, 1003, 1004, 1005, 1015, 1016, 1030, 1031, 1045, 1046, 1060, 1123, 1200, 1201, 1203, 1215, 1350, 1351, 1352, 1354, 1355, 1400, 1401, 1600, 1830, 2220, 2306, 2503, 2514, 2542, 2670, 2672, 2720, 2721, 3100, 3101, 3130, 3145, 3160, 3404, 3414, 3470; and
3. Addition of a case citation to the Guide for Using Judicial Council of California Criminal Jury Instructions.

Committee or other entity submitting the proposal:
Advisory Committee on Criminal Jury Instructions

Staff contact (name, phone and e-mail): Kara Portnow, 415-895-4961

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by Rules Committee date: 11/2/2021

Project description from annual agenda: Maintenance: Case law and legislation; New instructions and expansion into new areas; technical corrections

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:*
- *List any new forms that require translation by statute or that you will request to be translated:*



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-010

For business meeting on March 10, 2022

Title	Agenda Item Type
Jury Instructions: Criminal Jury Instructions (2022 Edition)	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
<i>Judicial Council of California Criminal Jury Instructions</i>	March 11, 2022
Recommended by	Date of Report
Advisory Committee on Criminal Jury Instructions Hon. Patricia Guerrero, Chair	January 27, 2022
	Contact
	Kara Portnow, 415-865-4961 kara.portnow@jud.ca.gov

Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving for publication the revised criminal jury instructions prepared by the committee under rule 2.1050 of the California Rules of Court. These changes will keep the instructions current with statutory and case authority. Once approved, the revised instructions will be published in the 2022 edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective March 11, 2022, approve the following changes to the criminal jury instructions prepared by the committee:

1. Adoption of new CALCRIM Nos. 378, 2749, and 3010; and
2. Revisions to CALCRIM Nos. 224, 250, 253, 315, 331, 372, 505, 510, 511, 523, 524, 571, 736, 860, 862, 863, 875, 890, 982, 983, 1000, 1001, 1002, 1003, 1004, 1005, 1015, 1016, 1030, 1031, 1045, 1046, 1060, 1123, 1200, 1201, 1203, 1215, 1350, 1351, 1352, 1354, 1355,

1400, 1401, 1600, 1830, 2220, 2306, 2503, 2514, 2542, 2670, 2672, 2720, 2721, 3100, 3101, 3130, 3145, 3160, 3404, 3414, 3470; and

3. Addition of a case citation to the Guide for Using Judicial Council of California Criminal Jury Instructions.

The proposed jury instructions are attached at pages 22–327.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the Advisory Committee on Criminal Jury Instructions and its charge.¹ In August 2005, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court.

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM*. The council approved the last *CALCRIM* release at its October 2021 meeting.

Analysis/Rationale

The committee revised the instructions based on comments and suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law.

Below is an overview of some of the proposed changes.

Circumstantial Evidence: Sufficiency of Evidence (CALCRIM No. 224)

In *People v. Doane* (2021) 66 Cal.App.5th 965, 976–977 [281 Cal.Rptr.3d 594], the court clarified that “innocence” as used in this instruction “refers to being not guilty of the charged crime, not to being not guilty of the charged crime *and* any lesser included offenses.” The committee added a new entry in the Authority section entitled “ ‘Innocence’ Means Not Guilty of the Charged Crime” and added a citation to *Doane*. The committee also moved an existing citation for *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492 [46 Cal.Rptr.2d 645] to this new entry.

Eyewitness Identification (CALCRIM No. 315)

This instruction poses several questions for a jury to consider when deciding whether eyewitness testimony was truthful and accurate. One of these questions is: “How certain was the witness when he or she made the identification?” In *People v. Lemcke* (2021) 11 Cal.5th 644, 647 [278 Cal.Rptr.3d 849, 486 P.3d 1077], the California Supreme Court held that the certainty factor embodied in this question needed to be reevaluated because the instruction “does nothing to

¹ Rule 10.59(a) states: “The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council’s criminal jury instructions.”

disabuse jurors” about a common misconception that eyewitness confidence is a reliable indicator of accuracy of an identification. The Court also articulated several factors identified in research that can affect the correlation between witness certainty and accuracy. (11 Cal.5th at p. 667.) The Court then referred the matter to the Advisory Committee on Criminal Jury Instructions “to evaluate whether or how the instruction might be modified to avoid juror confusion regarding the correlation between certainty and accuracy.” (*Id.* at p. 647.)

The committee reviewed other states’ jury instructions on witness certainty and also considered whether, as *Lemcke* pointed out, highly detailed instructions about witness certainty might further confuse the jury or overcorrect the problem. Ultimately, the committee opted to move the certainty question to the end of the instruction, place brackets around it for optional use, and set forth certain factors the jury should consider in evaluating identification testimony (consistent with *Lemcke*). The committee also added a bench note to explain when trial courts should give the bracketed language.

During the public comment period, the committee reached out to the Criminal Law Advisory Committee (CLAC) and the Appellate Advisory Committee (AAC) for informal feedback. One AAC member observed that the draft appeared to be an appropriate implementation of observations in the *Lemcke* decision. Two other members suggested additional language for the bracketed paragraph that begins with “A witness’s expression of certainty.” Specifically, one member proposed changing a phrase to read “may or may not” in order to be more neutral; another member suggested adding the phrase “the significance of” in front of the phrase “the witness’s certainty” to clarify what the jury is evaluating. The committee agreed with the suggestion to add the phrase “the significance of.” However, the committee decided not to change the phrase to “may or may not” because the committee felt that this modification would be contrary to the guidance in *Lemcke* emphasizing that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy. A member of CLAC suggested that the bench notes clarify the circumstances under which the bracketed language should not be given. The committee declined to make this suggested change, finding that the bench notes already adequately explain when the language should be given.

The committee also received an extensive public comment from the Office of the State Public Defender, requesting that additional language be included. The committee carefully reviewed the comment but decided that the additional language was unnecessary and overly specific. Instead, the committee added a related issues note about Penal Code section 859.7 to highlight the consideration of police practices employed during an eyewitness identification.

Testimony of Person With Developmental, Cognitive, or Mental Disability (CALCRIM No. 331)

The statutory authority for this instruction is Penal Code section 1127g, which requires that, upon request, the court must instruct the jury about certain factors to evaluate testimony “[i]n any criminal trial or proceeding in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness.” In *People v. Byers* (2021) 61 Cal.App.5th 447, 457–458 [275 Cal.Rptr.3d 661], the court upheld the use of this instruction in a

case where the witness had a speech impediment. The court noted that this instruction had been previously upheld in *People v. Catley* (2007) 148 Cal.App.4th 500, 506–508 [55 Cal.Rptr.3d 786] and further determined that Penal Code section 1127g is not limited to dependent persons, disagreeing with *People v. Keeper* (2011) 192 Cal.App.4th 511, 521 [121 Cal.Rptr.3d 451]. The committee added a bench note pointing out the split in authority between *Byers* and *Keeper* and also added *Catley* to the Authority section.

Defendant’s Flight (CALCRIM No. 372); Consciousness of Guilt: General (proposed new CALCRIM No. 378)

In *People v. Pettigrew* (2021) 62 Cal.App.5th 477, 496 [276 Cal.Rptr.3d 694], the trial court instructed the jury with CALCRIM No. 372 based on the defendant’s two suicide attempts in jail. The court held that it was error to give the flight instruction because the suicide attempts did not constitute substantial evidence of flight. (62 Cal.App.5th at p. 499.) The court further noted that the trial court would have been justified in instructing the jury on the limited use it could make of the defendant’s suicide attempts and proposed that the Advisory Committee on Criminal Jury Instructions “consider drafting a more general instruction that might be used in cases that do not fit within the existing, specific consciousness of guilt instructions.” (*Id.* at p. 500 & fn. 7.) In response to this suggestion, the committee drafted proposed new CALCRIM No. 378. The committee also added a reference to *Pettigrew* in the Related Issues section of CALCRIM No. 372 about the meaning of flight.

Excusable Homicide: Accident (CALCRIM No. 510)

The San Francisco Public Defender’s Office submitted a proposal to harmonize this instruction with Penal Code section 195, which sets forth the statutory definition of excusable homicide. The commenter pointed out that the instruction is written in the conjunctive but the statute is written in the disjunctive. In reviewing the instruction, the committee noted that it appeared to have been originally drafted based, in part, on language in *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 (“ ‘Misfortune’ when applied to a criminal act is analogous with the word ‘misadventure’ and bears the connotation of accident while doing a lawful act”). However, as the commenter pointed out, *People v. Garnett* (1908) 9 Cal.App. 194, 203–204 [98 P. 247] disapproved of an instruction that was similarly worded to No. 510.² The *Garnett* court held: “This instruction is not a clear and correct statement of any principle concerning the law of homicide. It ignores the question as to whether or not the discharge of the pistol was caused by an unlawful act of defendant.” (*Id.*) The court continued to explain: “Under this instruction defendant would not be relieved of responsibility for results from the accidental discharge of the pistol, if it were accidentally discharged, at the time he was engaged in doing an unlawful act, regardless of whether or not the unlawful act had any connection with the discharge other than in point of time.” (*Id.* at p. 204.) The committee ultimately determined that the language in *Gorgol* is not

² The instruction in *Garnett* stated: “If you find to a moral certainty and beyond a reasonable doubt that the revolver introduced in evidence in this case was discharged at the time mentioned, and that the defendant was engaged in the commission of an unlawful act at such time, then as a matter of law he will not be relieved from responsibility for any result which may have followed such discharge, even though such revolver was at such time discharged accidentally.” *Id.* at p. 203.

controlling authority for this instruction and redrafted the instruction to accord with the statutory structure and the holding in *Garnett*.

Sex offense and related instructions (CALCRIM Nos. 890, 1000–1005, 1015–1016, 1030–1031, 1045–1046, 1060, 1123, 1203, 2306)

Assembly Bill 1171 (Stats. 2021, ch. 626) repealed Penal Code section 262 (spousal rape) and amended Penal Code section 261 to expand the definition of rape to include the rape of a spouse, except as specified. This legislation affected 17 instructions, resulting in mostly technical changes.

Hate crime instructions (CALCRIM Nos. 523, 1350, 1351, 1352, 1354, 1355)

Assembly Bill 600 (Stats. 2021, ch. 295) amended Penal Code section 422.56 to clarify that “immigration status” is included in the scope of a hate crime based on nationality. The committee conformed the bracketed definition of nationality in these instructions with the revised statutory wording.

Gang instructions (CALCRIM Nos. 736, 1400, 1401, 2542)

Assembly Bill 333 (Stats. 2021, ch. 699) amended Penal Code section 186.22 and added Penal Code section 1109. The amendments to Penal Code section 186.22 include revised definitions of “criminal street gang” and “pattern of criminal street gang activity.” The legislation also reduced the types of qualifying predicate offenses and prohibited using the charged offense to establish the pattern of gang activity. The committee incorporated these statutory changes into the instructions and also removed several citations to cases whose holdings were based on the former statute.

Robbery (CALCRIM No. 1600)

In *People v. Collins* (2021) 65 Cal.App.5th 333, 341 [279 Cal.Rptr.3d 407], the prosecutor had repeatedly argued that the law employs an objective standard for evaluating fear. In evaluating the prejudicial effect of these legally incorrect statements, the court noted that the CALCRIM instruction for robbery failed to contradict or refute the statements because the instruction “does not specify whether the victim must himself actually, subjectively be afraid or whether it will suffice if an objective person in the victim’s shoes would have been afraid.” (*Id.*) As a result, the court suggested that the instruction be clarified to include the specific standard for evaluating fear. In response, the committee added the following language after the definition of fear: “An act is accomplished by *fear* if the other person is actually afraid. The other person’s actual fear may be inferred from the circumstances.”

Extortion by Threat or Force (CALCRIM No. 1830)

An appellate attorney notified the committee that this instruction had not yet been updated to reflect a 2017 legislative amendment that expanded the scope of the crime to include not only “property” but also “other consideration” as the object of extortion. (Sen. Bill 518; Stats. 2017, ch. 518, § 1.) Specifically, the statute was amended to include “other consideration” and defined “consideration” to mean anything of value, including enumerated sexual acts or sexual images. The committee added the language to the instructional elements.

Lawful Performance (CALCRIM Nos. 2670 & 2672)

The San Francisco Public Defender’s Office, the Alameda County Public Defender’s Office, and the California Public Defender’s Association submitted a proposal to revise several instructions governing “lawful performance” and police officers’ use of force in light of Assembly Bill 392 (Stats. 2019, ch. 170). This legislation redefined the circumstances for justifiable homicide by a peace officer by restricting the use of deadly force to when the officer reasonably believes that deadly force is necessary to defend against an imminent threat of death or serious bodily injury to the officer or to another person, or to apprehend a fleeing person for a felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless the person is immediately apprehended. (See Pen. Code, § 835a.) In April 2020, CALCRIM No. 507, *Justifiable Homicide: By Peace Officer*, was substantially revised in accordance with this legislation. The committee revised Nos. 2670 and 2672 by incorporating language from No. 507 to clarify when a peace officer may use deadly force in the context of determining lawful performance.

Bringing or Sending Controlled Substance or Paraphernalia Into Penal Institution (proposed new CALCRIM No. 2749)

In *People v. Blanco* (2021) 61 Cal.App.5th 278, 286–288 [275 Cal.Rptr.3d 558], the court overturned a conviction for Penal Code section 4573 because the jury was not instructed about usable quantity. The opinion pointed out that no standard jury instruction for this offense exists. (61 Cal.App.5th at p. 282, fn. 4.) In response, the committee drafted this new instruction by adapting instructional language from CALCRIM No. 2747, *Bringing or Sending Firearm, Deadly Weapon, or Explosive Into Penal Institution*, and CALCRIM No. 2748, *Possession of Controlled Substance or Paraphernalia in Penal Institution*.

Eavesdropping or Recording Confidential Communication (proposed new CALCRIM No. 3010)

In *People v. Lyon* (2021) 61 Cal.App.5th 237, 242 [275 Cal.Rptr.3d 581], the defendant was convicted of recording confidential information, in violation of Penal Code section 632(a). On appeal, the defendant argued that the trial court misinstructed the jury on the elements of this offense. The court found no error but invited the Advisory Committee on Criminal Jury Instructions to draft a new instruction for this offense. (61 Cal.App.5th at p. 250, fn. 5.) The committee accepted this invitation and drafted a new instruction. During the comment period, a committee member raised a concern that the draft uses the term “willfully” while the statute uses the term “intentionally.” This member also pointed out *People v. Superior Court of Los Angeles County* (1969) 70 Cal.2d 123, 132–133 [74 Cal.Rptr. 294, 449 P.2d 230], which held that the statute requires that the defendant intentionally record a confidential communication, and not merely that the defendant intended to make a recording. In response, the committee replaced the word “willfully” with “intentionally” and removed the definition of willfully from the instructional text and the Authority section. The committee also added a Related Issues note that cites *People v. Superior Court of Los Angeles County*.

Great Bodily Injury (CALCRIM No. 3160)

In *People v. Olo* (2021) 11 Cal.5th 682, 684 [279 Cal.Rptr.3d 668, 487 P.3d 981], a jury found true a great bodily injury enhancement, based on the defendant’s act of furnishing drugs to a victim who subsequently overdosed. The Court of Appeal affirmed the finding, holding that, as a matter of law, furnishing drugs to a victim who later overdoses is sufficient for a great bodily injury enhancement. (*Id.*) The California Supreme Court reversed, holding that “the act of furnishing is not by itself sufficient to establish personal infliction.” (11 Cal.5th at p. 685.) The committee added a related issues note to this instruction that describes the holding in this case.

Coercion (CALCRIM No. 3414)

Assembly Bill 124 (Stats. 2021, ch. 695) added Penal Code section 236.24 to create an affirmative defense for victims of intimate partner violence or sexual violence. The committee expanded this instruction to incorporate the new affirmative defense. In the Authority section, the committee also added a citation to *In re D.C.* (2021) 60 Cal.App.5th 915, 920 [275 Cal.Rptr.3d 191], which held that Penal Code section 236.23 does not require a showing that the accused was coerced directly by the trafficker to commit the specific crime.

Policy implications

Rule 2.1050 of the California Rules of Court requires the Advisory Committee on Criminal Jury Instructions to regularly update, amend, and add topics to *CALCRIM* and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

Comments

The proposed additions and revisions to *CALCRIM* circulated for public comment from November 22 through December 27, 2021. The committee received responses from four commenters. The text of all comments received and the committee’s responses are included in a chart of comments attached at pages 9–18.

Alternatives considered

The proposed changes are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee considered no alternative actions.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council’s contract with West Publishing provides additional royalty revenue.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and document assembly software. With respect to commercial publishers, the council will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys,

and the public, the council provides a broad public license for their noncommercial use and reproduction.

Attachments and Links

1. Chart of comments, at pages 9–18
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 19–327

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
224, 250, 253, 315, 331, 372, NEW 378, 505, 510, 511, 523, 524, 571, 736, 860, 862, 863, 875, 890, 982, 983, 1200, 1203, 1215, 1350, 1351, 1352, 1354, 1355, 1400, 1401, 1600, 1830, 2220, 2503, 2514, 2542, 2670, 2672, 2720, 2721, NEW 2749, NEW 3010, 3100, 3101, 3130, 3145, 3160, 3404, 3414, 3470	Orange County Bar Association by Larissa M. Dinsmoor, President	Agree The OCBA agrees with above-referenced instructions.	No response necessary.
315	Office of the State Public Defender by Kathleen Scheidel, Assistant Chief Counsel	<p>This letter is written on behalf of the State Public Defender in response to the invitation to comment issued by the Judicial Council of California, agreeing with proposed changes to CALCRIM No. 315 of modified as set forth below. The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to “engage in . . . efforts for the purpose of improving the quality of indigent defense.” (Gov. Code, § 15420, subd. (b).) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crimes.</p> <p>In <i>People v. Lemcke</i> (2021) 11 Cal.5th 644 (<i>Lemcke</i>), the California Supreme Court ordered that the provision of CALCRIM No. 315 which provided that, in determining the reliability of an eyewitness identification, the jury consider “How certain was the witness when he or she made an identification” be omitted. (<i>Id.</i> at p. 648.) In so doing, the court acknowledge the wealth of scientific evidence that had been developed in the</p>	

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		<p>last 30 years indicating that certainty did not necessarily correlate with accuracy. (<i>Id.</i> at p. 647.) The court referred the matter to the Judicial Council and its Advisory Committee on Criminal Jury Instructions to evaluate whether they jury should consider a witness’s level of certainty. (<i>Id.</i> at pp. 647-648.)</p> <p>The Judicial Council has invited the public to comment on proposed changes to CALCRIM jury instructions, including changes to CALCRIM No. 315 in light of <i>Lemcke, supra</i>. The proposed changes are to add the following to the considerations in the place of the certainty criterion whenever a witness has expressed certainty about an identification:¹</p> <p>[How certain was the witness when he or she made an identification?] [A witness’s expression of certainty about an identification, whether the identification was made before or at the trial, may not be a reliable indicator of accuracy. Among the factors you may consider when evaluating the witness’s certainty in the identification are the following:</p> <ul style="list-style-type: none"> [• How soon after the event did the witness express certainty about the identification?] [• If the witness made an identification before trial, did the witness express certainty at the time of that identification?] [• Before the identification, did the witness express confidence in being able to make an identification?] [• How confident was the witness in making the identification?] [• Did the witness receive information before or after the identification that increased the witness’s level of confidence?] [• Did the police use procedures that increased the witness’s level of confidence about the identification?] [• _____ <insert other relevant factors raised by the evidence>.] <p>First, the introductory sentence of the proposed instruction, “A witness’s expression of certainty about an identification, whether the identification was made before or at the trial, may not be a reliable indicator of accuracy” does little to explain or rebut the common lay person’s belief that the more certain a witness is, the accurate his or her</p>	<p>The committee disagrees with this suggested additional language. The draft, as written,</p>

¹ The bench notes instruct that whenever there is evidence a witness has expressed doubt about an identification, the bracketed language beginning with “How certain was the witness” upon request should be given, but not the bracketed paragraph that begins with “A witness’s expression of certainty” nor any of the factors that follow.

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		<p>identification. This office recommends that the first sentence of the proposed instruction be replaced with the following:</p> <p style="padding-left: 40px;">Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.</p> <p>(<i>State v. Henderson</i> (N.J. 2011) 27 A.3d 872, 891 (<i>Henderson</i>) [citation to <i>Henderson</i> to be omitted in proposed instruction].)</p> <p>Second, the proposed revisions to the instruction fail sufficiently to explain how law enforcement procedures used in eyewitness identifications can affect accuracy. As explained in <i>Lemcke</i>, “[t]he relevance of the last two factors, in turn, requires further understanding of the type of law enforcement conduct that may be suggestive or confirmatory.” (<i>Lemcke, supra</i>, 11 Cal.5th at p. 667.) Without further elaboration, jurors will have no idea what these last two factors mean. Further explanation is required, or they should be omitted. These factors are known as "system variables." These variables may include blind administration, pre-identification instructions, lineup construction, avoiding feedback and recording confidence, multiple viewings, simultaneous v. sequential lineups, use of composites, and show-ups. (<i>Henderson, supra</i> 27 A.3d at pp. 896-902 [in depth discussion of scientific studies identifying systemic variables influencing eyewitness identifications].))</p> <p>The California Legislature recognized the importance system variables to ensuring reliable and accurate suspect identification in enacting Penal Code section 859.7, effective on January 1, 2020, which provides as follows:</p> <p>(a) All law enforcement agencies and prosecutorial entities shall adopt regulations for conducting photo lineups and live lineups with eyewitnesses. The regulations shall be developed to ensure reliable and accurate suspect identifications. In order to ensure reliability and accuracy, the regulations shall comply with, at a minimum, the following requirements:</p>	<p>appropriately balances the concerns outlined in <i>Lemcke</i> while using neutral language.</p> <p>The committee agrees that a reference to Penal Code section 859.7 is appropriate and added a related issues. However, the committee does not agree that the additional instructional language is necessary. In a given case, a defendant can request more specific language related to police procedures, when relevant and appropriate.</p>

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		<p>(1) Prior to conducting the identification procedure, and as close in time to the incident as possible, the eyewitness shall provide the description of the perpetrator of the offense.</p> <p>(2) The investigator conducting the identification procedure shall use blind administration or blinded administration during the identification procedure.</p> <p>(3) The investigator shall state in writing the reason that the presentation of the lineup was not conducted using blind administration, if applicable.</p> <p>(4) An eyewitness shall be instructed of the following, prior to any identification procedure:</p> <p>(A) The perpetrator may or may not be among the persons in the identification procedure.</p> <p>(B) The eyewitness should not feel compelled to make an identification.</p> <p>(C) An identification or failure to make an identification will not end the investigation.</p> <p>(5) An identification procedure shall be composed so that the fillers generally fit the eyewitness' description of the perpetrator. In the case of a photo lineup, the photograph of the person suspected as the perpetrator should, if practicable, resemble his or her appearance at the time of the offense and not unduly stand out.</p> <p>(6) In a photo lineup, writings or information concerning any previous arrest of the person suspected as the perpetrator shall not be visible to the eyewitness.</p> <p>(7) Only one suspected perpetrator shall be included in any identification procedure.</p> <p>(8) All eyewitnesses shall be separated when viewing an identification procedure.</p> <p>(9) Nothing shall be said to the eyewitness that might influence the eyewitness' identification of the person suspected as the perpetrator.</p> <p>(10) If the eyewitness identifies a person he or she believes to be the perpetrator, all of the following shall apply:</p> <p>(A) The investigator shall immediately inquire as to the eyewitness' confidence level in the accuracy of the identification and record in writing, verbatim, what the eyewitness says.</p> <p>(B) Information concerning the identified person shall not be given to the eyewitness prior to obtaining the eyewitness' statement of confidence level and documenting the exact words of the eyewitness.</p> <p>(C) The officer shall not validate or invalidate the eyewitness' identification.</p> <p>(11) An electronic recording shall be made that includes both audio and visual representations of the identification procedures. Whether it is feasible to make a</p>	

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		<p>recording with both audio and visual representations shall be determined on a case-by-case basis. When it is not feasible to make a recording with both audio and visual representations, audio recording may be used. When audio recording without video recording is used, the investigator shall state in writing the reason that video recording was not feasible.</p> <p>(b) Nothing in this section is intended to affect policies for field show up procedures.</p> <p>(c) For purposes of this section, the following terms have the following meanings:</p> <p>(1) “Blind administration” means the administrator of an eyewitness identification procedure does not know the identity of the suspect.</p> <p>(2) “Blinded administration” means the administrator of an eyewitness identification procedure may know who the suspect is, but does not know where the suspect, or his or her photo, as applicable, has been placed or positioned in the identification procedure through the use of any of the following:</p> <p>(A) An automated computer program that prevents the administrator from seeing which photos the eyewitness is viewing until after the identification procedure is completed.</p> <p>(B) The folder shuffle method, which refers to a system for conducting a photo lineup by placing photographs in folders, randomly numbering the folders, shuffling the folders, and then presenting the folders sequentially so that the administrator cannot see or track which photograph is being presented to the eyewitness until after the procedure is completed.</p> <p>(C) Any other procedure that achieves neutral administration and prevents the lineup administrator from knowing where the suspect or his or her photo, as applicable, has been placed or positioned in the identification procedure.</p> <p>(3) “Eyewitness” means a person whose identification of another person may be relevant in a criminal investigation.</p> <p>(4) “Field show up” means a procedure in which a suspect is detained shortly after the commission of a crime and who, based on his or her appearance, his or her distance from the crime scene, or other circumstantial evidence, is suspected of having just committed a crime. In these situations, the victim or an eyewitness is brought to the scene of the detention and is asked if the detainee was the perpetrator.</p> <p>(5) “Filler” means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.</p> <p>(6) “Identification procedure” means either a photo lineup or a live lineup.</p> <p>(7) “Investigator” means the person conducting the identification procedure.</p>	

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		<p>(8) “Live lineup” means a procedure in which a group of persons, including the person suspected as the perpetrator of an offense and other persons not suspected of the offense, are displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.</p> <p>(9) “Photo lineup” means a procedure in which an array of photographs, including a photograph of the person suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense, are displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.</p> <p>(d) Nothing in this section is intended to preclude the admissibility of any relevant evidence or to affect the standards governing the admissibility of evidence under the United States Constitution.</p> <p>(e) This section shall become operative on January 1, 2020.</p> <p>The proposed instruction purports to address system variables that can affect the accuracy and reliability of eyewitness identifications with the following provision:</p> <p>[• Did the police use procedures that increased the witness’s level of confidence about the identification?]</p> <p>This instruction fails to provide enough information to inform the jury as to what procedures can lead to increased confidence on the part of the witness. With regard to a witness’s apparent certainty, “a biased lineup may inflate a witness' confidence in the identification because the selection process seemed easy.” (<i>Henderson</i>, 27 A.3d at p. 898.) In order to ensure that jurors are informed of all the variable relevant to an eyewitness’s certainty and accuracy, this office recommends that the entire instruction be revised to reflect best practices, and that the following be added to the proposed instruction:</p> <p>The following factors relating to identification procedures used by police are relevant factors to be considered:</p> <p>(1) Prior to conducting the identification procedure, and as close in time to the incident as possible, did law enforcement ask the eyewitness to provide the description of the perpetrator of the offense.</p>	

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		<p>(2) Did the investigator conducting the identification procedure use blind administration or blinded administration during the identification procedure. If not, did that investigator state in writing the reason that the presentation of the lineup was not conducted using blind administration.</p> <p>(3) Was the eyewitness instructed of the following, prior to any identification procedure:</p> <p>(A) The perpetrator may or may not be among the persons in the identification procedure.</p> <p>(B) The eyewitness should not feel compelled to make an identification.</p> <p>(C) An identification or failure to make an identification will not end the investigation.</p> <p>(4) Was the identification procedure composed so that the fillers generally fit the eyewitness' description of the perpetrator.</p> <p>(5) In a photo lineup, were writings or information concerning any previous arrest of the person suspected as the perpetrator visible to the eyewitness.</p> <p>(6) Was only one suspected perpetrator included in any identification procedure.</p> <p>(7) Were all eyewitnesses separated when viewing an identification procedure.</p> <p>(8) Was anything said to the eyewitness that might influence the eyewitness' identification of the person suspected as the perpetrator.</p> <p>(9) If the eyewitness identifies a person he or she believes to be the perpetrator, all of the following shall apply: confidence level in the accuracy of the identification and record in writing, verbatim, what the eyewitness says.</p> <p>(B) Was information concerning the identified person given to the eyewitness prior to obtaining the eyewitness' statement of confidence level and documenting the exact words of the eyewitness.</p> <p>(C) Did the officer validate or invalidate the eyewitness' identification.</p> <p>(10) Was an electronic recording made that includes both audio and visual representations of the identification procedures.</p> <p>Given that mistaken eyewitness identifications are the leading factor in wrongful convictions,² it is critical for jurors to be informed of all of the factors that can lead to mistaken identifications. The proposed instruction, while better than former CALCRIM</p>	

² Mistaken eyewitness identifications contributed to approximately 69% of the more than 375 wrongful convictions in the United States overturned by post-conviction DNA evidence. <https://innocenceproject.org/eyewitness-identification-reform/>

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		No. 315, fails in this regard, but it can be amended to fully address all the factors jurors should consider in determining the accuracy and reliability of eyewitness identifications. Thank you for your consideration in this matter.	
315	Professor Kathy Pezdek, Ph.D. Department of Psychology Claremont Graduate University	<p>Disagree</p> <p>[• How soon after the event did the witness express certainty about the identification?] The recommendation is to “immediately” take the confidence judgment. In light of the recommendations in SB 923, the identification confidence should always be taken right after the identification has been made.</p> <p>[• Before the identification, did the witness express confidence in being able to make an identification?] *THIS IS MY MOST IMPORTANT SUGGESTION. The point here is irrelevant and should be excluded. Confidence expressed before an identification is irrelevant. I have attached a copy of a paper we published recently showing that confidence expressed BEFORE an identification (this is “predictive confidence”) is NOT predictive of accuracy although confidence expresses AFTER an identification (this is “postdictive confidence”) IS predictive of accuracy.</p> <p>[• How confident was the witness in soon after making the identification?]</p> <p>[• Did the witness receive information before or after the identification that might have increased the witness’s level of confidence?]</p>	<p>The committee decided not to change the wording of the sentence but instead added a related issues note referencing Penal Code section 859.7 (enacted by S.B. 923).</p> <p>The committee disagrees with this suggestion because it is contrary to the factors articulated in <i>Lemcke</i>.</p> <p>The committee disagrees with this suggestion because it is contrary to the factors articulated in <i>Lemcke</i>.</p> <p>The committee agrees with this suggestion and added “may have” to the sentence.</p>
1000, 1001, 1002, 1003, 1004, 1005, 1015, 1016, 1030, 1031, 1045, 1046, 1060, 1123, 2306	Orange County Bar Association, by Larissa M. Dinsmoor, President	<p>Agree as Modified</p> <p>A comment is also added to the Bench notes under Instructional Duty: Penal Code section 261, as amended by Statutes 2021, ch. 626 (A.B. 1171), became effective on January 1, 2022. If the defendant’s act occurred before this date, the court should give the prior version of this instruction.</p> <p>*Suggested modification to comment: Substitute “<i>alleged act</i>” for “defendant’s act” in the second sentence of the comment.</p>	The committee agrees with this comment and substituted “defendant’s alleged act” for “defendant’s act” in the four instructions (Nos. 1000, 1002, 1003, 1005) that contain this bench note.

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
1003 & 1005	Orange County Bar Association, by Larissa M. Dinsmoor, President	<p>Agree as Modified.</p> <p>*Additional suggested modification to CALCRIM 1003 and 1005:</p> <p>The following language was proposed to be deleted from the Bench Note Instructional Duty section in the proposed changes: Penal Code section 261(a)(5) was amended effective September 9, 2013, in response to <i>People v. Morales</i> (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].</p> <p><i>People v. Morales</i> is still relevant and does not relate to the repeal of Penal Code section 262 Spousal Rape. This comment should remain in the Bench Notes section of 1005 and replace the language relating to <i>People v. Morales</i> in 1003.</p>	<p>The committee disagrees with this comment.</p> <p>Although <i>Morales</i> does not relate to the repeal of Penal Code section 262, the specific references to the case in these two instructions is no longer necessary.</p>
1201	Orange County Bar Association, by Larissa M. Dinsmoor, President	<p>Agree as Modified</p> <p>Updated Instructional Duty based on recent case law regarding whether deceit alone substitutes for force or fear requirement of general kidnapping under PC 207:</p> <p>Deceit Alone Does Not May Substitute for Force. <i>People v. Nieto</i> (2021) 62 Cal.App.5th 188, 195 [276 Cal.Rptr.3d 379] <i>People v. Dalerio</i> (2006) 144 Cal.App.4th 775, 783 [50 Cal.Rptr.3d 724] [taking requirement satisfied when defendant relies on deception to obtain child's consent and through verbal directions and his constant physical presence takes the child substantial distance].</p> <p>*Suggested modification by adding:</p> <p>See also <i>People v Lewis</i>, 2021 Cal. App. LEXIS 1004 (Petition for Rehearing pending); <i>People v Daniels</i> (2009) 176 Cal.App.4th 304, 331 (victim was highly intoxicated), <i>People v. Dejourney</i> (2011) 192 Cal App.4th 1091 (victim had cerebral palsey); involving incapacitated adult victims.</p>	<p>The committee declines to add these additional cases because they are unnecessary or not directly relevant.</p>
1300	Hon. Alexander R. Martinez, San Bernadino County	<p>I have a proposal to finally modify CALCRIM 1300 (<i>Criminal Threats</i>) to reflect the now long established case law in the following way:</p> <p>Element 4 of Criminal threats in its current form reads as follows: “The threat was so clear, immediate, unconditional, and specific that it communicated to _____ a serious intention and the immediate prospect that the threat would be carried out.”</p>	<p>The committee does not currently have a proposed modification for this instruction and will consider this comment at its next meeting.</p>

CALCRIM-2021-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		<p>The problem with this element is that a criminal threat does NOT require it to be unconditional and that conditional threats can indeed be criminal threats under the law</p> <p>You don't have to look any further than the use notes of Calcrim 1300 itself. Right in the use notes is the following language and citations:</p> <p>“Threat not required to be Unconditional. <i>People v. Bolin</i> (1998) 18 Cal.4th 297, 339-340, disapproving <i>People v. Brown</i> (1993) 20 Cal.App.4th 1251, 1256; <i>People v. Stanfield</i> (1995) 32 Cal.App.4th 1152, 1162”</p> <p>So my proposal is to at last ELIMINATE the word “unconditional” from Element 4 of Calcrim 1300, and it should now just read: “The threat was so clear, immediate, and specific....”</p>	

CALCRIM Proposed Changes

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253	Union of Act and Intent: Criminal Negligence
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331	Testimony of Person With Developmental, Cognitive, or Mental Disability
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NEW 378	Consciousness of Guilt: General
505	Justifiable Homicide: Self-Defense or Defense of Another
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511	Excusable Homicide: Accident in the Heat of Passion
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3145	Personally Used Deadly Weapon
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3404	Accident
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Guide

Guide for Using Judicial Council of California Criminal Jury Instructions (CALCRIM)

The Judicial Council jury instructions are accurate, designed to be easy to understand, and easy to use. This guide provides an introduction to the instructions and explains conventions and features that will assist in their use.

In order to fulfill its mandate pursuant to ~~R~~rule 10.59 of the California Rules of Court¹ to maintain the criminal jury instructions, members of the advisory committee meet several times a year to consider changes in statutes, appellate opinions, and suggestions from practitioners. *It bears emphasis that when the committee proposes changing a jury instruction, that does not necessarily mean the previous version of the instruction was incorrect.* Often the committee proposes changes for reasons of style, consistency among similar instructions, and to improve clarity.

Judicial Council Instructions Endorsed by Rule of Court

Rule 2.1050 of the California Rules of Court provides:

The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California ... ~~[¶] The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law ... [¶] Use of the Judicial Council instructions is strongly encouraged.~~

~~The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law ...~~

~~Use of the Judicial Council instructions is strongly encouraged.~~

The California Supreme Court acknowledged CALCRIM's status as the state's official pattern jury instructions in *People v. Ramirez* (2021) 10 Cal.5th 983, 1008, fn.5 [274 Cal.Rptr.3d 309, 479 P.3d 797].

Using the Instructions

Bench Notes

The text of each instruction is followed by a section in the Bench Notes titled “Instructional Duty,” which alerts the user to any *sua sponte* duties to instruct and special circumstances raised by the instruction. It may also include references to other instructions that should or should not be used. In some instances, the directions include suggestions for modification. In the “Authority” section, all of the pertinent sources for the instruction are listed. Some of the instructions also have sections containing “Related Issues” and “Commentary.” The Bench Notes also refer to any relevant lesser included offenses. Secondary sources appear at the end of instructions. The official publisher, and not the Judicial Council, is responsible for updating the citations for secondary sources. Users should consult the Bench Notes before using an instruction. Italicized notes between angle brackets in the language of the instruction itself signal important issues or choices. For example, in instruction 1750, Receiving Stolen Property, optional element 3 is introduced thus: *<Give element 3 when instructing on knowledge of presence of property; see Bench Notes>*.

¹Rule 10.59(a) states: “The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council’s criminal jury instructions.”

Multiple-Defendant and Multiple-Count Cases

These instructions were drafted for the common case in which a single defendant is on trial. The HotDocs document assembly program from the Judicial Council's official publisher, LexisNexis, will modify the instructions for use in multi-defendant cases. It will also allow the user to name the defendants charged in a particular instruction if the instruction applies only to some of the defendants on trial in the case.

It is impossible to predict the possible fact combinations that may be present when a crime is charged multiple times or committed by different defendants against different victims involving different facts. Thus, when an instruction is being used for more than one count and the factual basis for the instruction is different for the different counts, the user will need to modify the instruction as appropriate.

Related California Jury Instructions, Criminal (CALJIC)

The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Mixing the two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy. Nevertheless, for convenient reference this publication includes tables of related CALJIC instructions.

Titles and Definitions

The titles of the instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. The title is not a part of the instruction. The titles may be removed before presentation to the jury.

The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions in which the terms appear. When a definition is lengthy, a cross-reference to that definition is provided.

Defined terms are printed in italics in the text of the definition.

Alternatives vs. Options

When the user must choose one of two or more options in order to complete the instruction, the choice of necessary alternatives is presented in parentheses thus: *When the defendant acted, George Jones was performing (his/her) duties as a school employee.*

The instructions use brackets to provide optional choices that may be necessary or appropriate, depending on the individual circumstances of the case: *[If you find that George Jones threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]*

Finally, both parentheses and brackets may appear in the same sentence to indicate options that arise depending on which necessary alternatives are selected: *[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).]*

General and Specific Intent

The instructions do not use the terms general and specific intent because while these terms are very familiar to judges and lawyers, they are novel and often confusing to many jurors. Instead, if the defendant must specifically intend to commit an act, the particular intent required is expressed without using the term of art "specific intent." Instructions 250–254 provide jurors with additional guidance on specific vs. general intent crimes and the union of act and intent.

Organization of the Instructions

The instructions are organized into 24 series, which reflect broad categories of crime (e.g., Homicide) and other components of the trial (e.g., Evidence). The series, and the instructions within each series, are presented in the order in which they are likely to be given in an actual trial. As a result, greater offenses (like DUI with injury) come before lesser offenses (DUI). All of the defenses are grouped together at the end of the instructions, rather than dispersed throughout. The misdemeanors are placed within the category of instructions to which they belong, so simple battery is found with the other battery instructions rather than in a stand-alone misdemeanor section.

Lesser Included Offenses

Users may wish to modify instructions used to explain lesser included offenses by replacing the standard introductory sentence, "The defendant is charged with ~~A~~ _____" with "The crime of _____"

(e.g., false imprisonment) is a lesser offense than the crime of _____ (e.g., kidnapping)” to amplify the explanation provided in instructions 3517–3519: “_____ <insert crime> is a lesser crime of _____ <insert crime> [charged in Count _____].”

When giving the lesser included offense instructions 640 and 641 (homicide) or instructions 3517–3519 (non-homicide), no further modification of the corresponding instructions on lesser crimes is necessary to comply with the requirements of *People v. Dewberry* (1959) 51 Cal.2d 548.

Burden of Production/Burden of Proof

The instructions never refer to the “burden of producing evidence.” The drafters concluded that it is the court’s decision whether the party has met the burden of production. If the burden is not met, no further instruction is necessary. The question for the jury is whether a party has met its properly allocated burden based on the evidence received.

Instruction 103 on Reasonable Doubt states, “Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].” Thus, when the concept of reasonable doubt is explained and defined, the jury is told that it is the standard that applies to every issue the People must prove, unless the court specifically informs the jury otherwise.

Sentencing Factors and Enhancements

Because the law is rapidly evolving regarding when sentencing factors and enhancements must be submitted to the jury, we have provided “template” instructions 3250 and 3251 so that the court may tailor an appropriate instruction that corresponds to this emerging body of law.

Personal pPronouns

Many instructions include an option to insert the personal pronouns "he/she," "his/her," or "him/her." The committee does not intend these options to be limiting. It is the policy of the State of California that nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should ensure that they are using preferred personal pronouns.

224. Circumstantial Evidence: Sufficiency of 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 find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

New January 2006; Revised February 2013, March 2022

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 any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629].)

There is no sua sponte duty to give this instruction when the circumstantial evidence is incidental to and corroborative of direct evidence. (*People v. Malbrough* (1961) 55 Cal.2d 249, 250–251 [10 Cal.Rptr. 632, 359 P.2d 30]; *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243]; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270–1271 [46 Cal.Rptr.2d 388].) This is so even when the corroborative circumstantial evidence is essential to the prosecution’s case, e.g., when corroboration of an accomplice’s testimony is required under Penal Code section 1111. (*People v. Williams* (1984) 162 Cal.App.3d 869, 874 [208 Cal.Rptr. 790].)

If intent is the only element proved by circumstantial evidence, do not give this instruction. Give CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental*

State. (People v. Marshall (1996) 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347, 919 P.2d 1280].)

AUTHORITY

- Direct Evidence Defined. ▶ Evid. Code, § 410.
- Inference Defined. ▶ Evid. Code, § 600(b).
- Between Two Reasonable Interpretations of Circumstantial Evidence, Accept the One That Points to Innocence. ▶ *People v. Merkouris* (1956) 46 Cal.2d 540, 560–562 [297 P.2d 999] [error to refuse requested instruction on this point]; *People v. Johnson* (1958) 163 Cal.App.2d 58, 62 [328 P.2d 809] [sua sponte duty to instruct]; ~~see *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492 [46 Cal.Rptr.2d 645].~~
- “Innocence” Means Not Guilty of the Charged Crime. ▶ *People v. Doane* (2021) 66 Cal.App.5th 965, 976–977 [281 Cal.Rptr.3d 594]; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1493 [46 Cal.Rptr.2d 645].
- Circumstantial Evidence Must Be Entirely Consistent With a Theory of Guilt and Inconsistent With Any Other Rational Conclusion. ▶ *People v. Bender* (1945) 27 Cal.2d 164, 175 [163 P.2d 8] [sua sponte duty to instruct]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [same].
- Difference Between Direct and Circumstantial Evidence. ▶ *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [155 P. 477] [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [293 P.2d 495] [sua sponte duty to instruct].
- Each Fact in Chain of Circumstantial Evidence Must Be Proved. ▶ *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243] [error to refuse requested instruction on this point].
- Sua Sponte Duty When Prosecutor’s Case Rests Substantially on Circumstantial Evidence. ▶ *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802].
- This Instruction Upheld. ▶ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186–1187 [67 Cal.Rptr.3d 871].
- This Instruction Cited With Approval. ▶ *People v. Livingston* (2012) 53 Cal.4th 1145, 1166 [140 Cal.Rptr.3d 139, 274 P.3d 1132].

RELATED ISSUES

Extrajudicial Admissions

Extrajudicial admissions are not the type of indirect evidence requiring instruction on circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–175 [133 Cal.Rptr. 135, 554 P.2d 881].)

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, § 3.
- 5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 737.
- 1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, § 121.
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.01[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

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, April 2011, March 2022

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*. ([See *People v. Southard* \(2021\) 62 Cal.App.5th 424, 437 \[276 Cal.Rptr.3d 656\] \[discussing Pen. Code, § 148, Pen. Code, § 69, and Health & Saf. Code, § 11377\]; *People v. Barker* \(2004\) 34 Cal.4th 345, 360 \[18 Cal.Rptr.3d 260\] \[discussing Pen. Code, § 290\].](#))

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].
- This Instruction Upheld. ▶ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].

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.

SECONDARY SOURCES

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

253. Union of Act and Intent: Criminal Negligence

For you to find a person guilty of the crime[s] of _____ <insert name[s] of alleged offense[s]> [or to find the allegation[s] of _____ <insert name[s] of enhancement[s]> true], a person must do an act [or fail to do an act] with (criminal/gross/ordinary) negligence.

[(Criminal/Gross/Ordinary) negligence is defined in the instructions on that crime.]

[(Criminal/Gross) negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with (criminal/gross) 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/gross) 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.]

[Ordinary negligence 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).]

New January 2006; Revised June 2007, March 2022

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on an offense for which criminal, ~~or~~ gross, or ordinary negligence is an element. **Do not** give this instruction if only general or specific-intent offenses are presented to the jury.

(*People v. Lara* (1996) 44 Cal.App.4th 102, 110 [51 Cal.Rptr.2d 402].) Although no case has held that the court has a sua sponte duty to give this instruction, the committee recommends that the instruction be given, if applicable, as a matter of caution.

The court must specify for the jury which offenses require criminal negligence 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].)

The court should select ~~either~~ “criminal,” ~~or~~ “gross” or “ordinary” based on the words used in the instruction on the elements of the underlying offense. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1175–1176 [214 Cal.Rptr.3d 467].)

Give the bracketed definition of criminal, gross, or ordinary negligence unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

AUTHORITY

- Statutory Authority. ▶ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Criminal or Gross Negligence Defined. ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Ordinary Negligence Defined. ▶ Pen. Code, § 7, subd. 2; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1174–1175 [214 Cal.Rptr.3d 467].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, § 21.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [4] (Matthew Bender).

315. Eyewitness Identification

You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.

In evaluating identification testimony, consider the following questions:

- **Did the witness know or have contact with the defendant before the event?**
- **How well could the witness see the perpetrator?**
- **What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation[, and _____ <insert any other relevant circumstances>]?**
- **How closely was the witness paying attention?**
- **Was the witness under stress when he or she made the observation?**
- **Did the witness give a description and how does that description compare to the defendant?**
- **How much time passed between the event and the time when the witness identified the defendant?**
- **Was the witness asked to pick the perpetrator out of a group?**
- **Did the witness ever fail to identify the defendant?**
- **Did the witness ever change his or her mind about the identification?**
- ~~**How certain was the witness when he or she made an identification?**~~
- **Are the witness and the defendant of different races?**
- **[Was the witness able to identify other participants in the crime?]**

- [Was the witness able to identify the defendant in a photographic or physical lineup?]
- [_____ <insert other relevant factors raised by the evidence>.]
- Were there any other circumstances affecting the witness’s ability to make an accurate identification?

- [How certain was the witness when he or she made an identification?]

[A witness’s expression of certainty about an identification, whether the identification was made before or at the trial, may not be a reliable indicator of accuracy. Among the factors you may consider when evaluating the significance of the witness’s certainty in the identification are the following:

- [• How soon after the event did the witness express certainty about the identification?]
- [• If the witness made an identification before trial, did the witness express certainty at the time of that identification?]
- [• Before the identification, did the witness express confidence in being able to make an identification?]
- [• How confident was the witness in making the identification?]
- [• Did the witness receive information before or after the identification that may have increased the witness’s level of confidence?]
- [• Did the police use procedures that increased the witness’s level of confidence about the identification?]
- [• _____ <insert other relevant factors raised by the evidence>.]

The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.

New January 2006; Revised June 2007, March 2022

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on eyewitness testimony. (*People v. Richardson* (1978) 83 Cal.App.3d 853, 863 [148 Cal.Rptr. 120], disapproved on other grounds by *People v. Saddler* (1979) 24 Cal.3d 671, 682 [156 Cal.Rptr. 871, 597 P.2d 130].) An instruction relating eyewitness identification to reasonable doubt, including any relevant “pinpoint” factors, must

be given by the trial court on request “[w]hen an eyewitness identification of the defendant is a key element of the prosecution’s case but is not substantially corroborated by evidence giving it independent reliability.” (*People v. Wright* (1988) 45 Cal.3d 1126, 1143–1144 [248 Cal.Rptr. 600, 755 P.2d 1049], quoting *People v. McDonald* (1984) 37 Cal.3d 351, 377 [208 Cal.Rptr. 236, 690 P.2d 709], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914 [98 Cal.Rptr.2d 431, 4 P.3d 265]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [31 Cal.Rptr.2d 321, 875 P.2d 36]; *People v. Palmer* (1984) 154 Cal.App.3d 79, 89 [203 Cal.Rptr. 474] [error to refuse defendant’s requested instruction on eyewitness testimony].)

Whenever there is evidence a witness has expressed certainty about an identification, give the bracketed language beginning with “How certain was the witness” and the bracketed paragraph that begins with “A witness’s expression of certainty” along with any applicable bracketed factors.

Whenever there is evidence a witness has expressed doubt about an identification, give the bracketed language beginning with “How certain was the witness” upon request, and do not give the bracketed paragraph that begins with “A witness’s expression of certainty” nor any of the factors that follow.

AUTHORITY

- Factors ▶ *People v. Wright* (1988) 45 Cal.3d 1126, 1139, fn. 9, 1141 [248 Cal.Rptr. 600, 755 P.2d 1049]; *People v. West* (1983) 139 Cal.App.3d 606, 609 [189 Cal.Rptr. 36].
- Certainty Factor ▶ *People v. Lemcke* (2021) 11 Cal.5th 644 [278 Cal.Rptr.3d 849, 486 P.3d 1077].
- Reasonable Doubt ▶ *People v. Hall* (1980) 28 Cal.3d 143, 159–160 [167 Cal.Rptr. 844, 616 P.2d 826], overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 422, fn.6 [87 Cal.Rptr.2d 474, 981 P.2d 98].
- ~~This Instruction Upheld~~ ▶ ~~*People v. Golde* (2008) 163 Cal.App.4th 101, 119 [77 Cal.Rptr.3d 120].~~

COMMENTARY

The court should give the unbracketed factors, if requested, in every case in which identity is disputed. ~~The bracketed factors should be given if requested and factually appropriate.~~ A blank space has also been provided for the court to

include any factual circumstances relevant to eyewitness identification that have not been addressed in the preceding list of factors.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1139 [248 Cal.Rptr. 600, 755 P.2d 1049], the court suggested that the trial court select factors from an approved list of eyewitness identification factors and then give counsel the opportunity to supplement with any additional relevant factors. (*Id.* at pp. 1126, 1143.) Additional “pinpoint” factors should be neutrally written, brief, and nonargumentative. (*Ibid.*; see also *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302–1303 [32 Cal.Rptr.2d 169], overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 903, 908 P.2d 1037].)

RELATED ISSUES

Police Procedures in Conducting Eyewitness Identifications

In *People v. Lemcke, supra*, 11 Cal.5th at pp. 664–665, the Supreme Court recognized that the jury may require a further understanding of the type of police procedures that may be suggestive or confirmatory of an eyewitness’s identification. Penal Code section 859.7 sets forth standards for law enforcement when conducting photo lineups and live lineups in order to ensure reliable and accurate eyewitness identifications.

Unreliability of Eyewitness Identification

An instruction to view eyewitness testimony with caution and that “mistaken identification is not uncommon” should not be given because it improperly singles out this testimony as suspect. (*People v. Wright* (1988) 45 Cal.3d 1126, 1153 [248 Cal.Rptr. 600, 755 P.2d 1049] [special cautionary instruction unnecessary as duplicative of required eyewitness “factors” instruction]; see also *People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12 [276 Cal.Rptr. 827, 802 P.2d 330].) If a defendant wants to present information on the unreliability of eyewitness identifications under a particular set of circumstances, he or she must use means other than a jury instruction, such as expert testimony. (*People v. Wright, supra*, 45 Cal.3d at pp. 1153–1154.)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 720-722.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 31, *Eyewitness Identification*, §§ 31.01–31.07 (Matthew Bender).

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

331. Testimony of Person With Developmental, Cognitive, or Mental Disability

In evaluating the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment), consider all of the factors surrounding that person’s testimony, including his or her level of cognitive development.

Even though a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness.

You should not discount or distrust the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental [,]/ [or] communication) impairment)[,] solely because he or she has such a (disability/ [or] impairment).

New January 2006; Revised March 2022

BENCH NOTES

Instructional Duty

This instruction must be given on request in any case “in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness” (Pen. Code, § 1127g.)

The court should consider whether this instruction is appropriate if the witness has a communication impairment that is not related to a deficiency in cognitive functioning. [Compare *People v. Byers* \(2021\) 61 Cal.App.5th 447, 457–458 \[275 Cal.Rptr.3d 661\] \[approving use of instruction for a nondependent witness\] with *People v. Keeper* \(2011\) 192 Cal.App.4th 511, 521 \[121 Cal.Rptr.3d 451\] \[holding that Penal Code section 1127g is limited to a dependent person\].](#)

AUTHORITY

- [Statutory Authority](#) ▶ Pen. Code, § 1127g.
- [This Instruction Upheld](#) ▶ *People v. Catley* (2007) 148 Cal.App.4th 500, 506–508 [55 Cal.Rptr.3d 786].

SECONDARY SOURCES

5 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Criminal Trial, § 725.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 82, *Witnesses*, §§ 82.05[2][a], 82.07, 82.22[3][c] (Matthew Bender).

372. Defendant's Flight

If the defendant fled [or tried to flee] (immediately after the crime was committed/ [or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself.

New January 2006; Revised March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on flight whenever the prosecution relies on evidence of flight to show consciousness of guilt. (*People v. Williams* (1960) 179 Cal.App.2d 487, 491 [3 Cal.Rptr. 782].) There is, however, no reciprocal duty to instruct on the significance of the absence of flight, even on request. (*People v. Staten* (2000) 24 Cal.4th 434, 459 [101 Cal.Rptr.2d 213, 11 P.3d 968]; *People v. Williams* (1997) 55 Cal.App.4th 648, 651 [64 Cal.Rptr.2d 203].)

If the defendant's flight did not occur immediately after the crime was committed, the trial court should give the second option in the parenthetical. (*People v. Carrera* (1989) 49 Cal.3d 291, 313 [261 Cal.Rptr. 348, 777 P.2d 121] [flight from county jail]; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1712 [53 Cal.Rptr.2d 702] [when flight was from custody, the instructional language "immediately after the commission of a crime" was irrelevant but harmless].)

AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 1127c; *People v. Williams* (1960) 179 Cal.App.2d 487, 491 [3 Cal.Rptr. 782]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1054–1055 [60 Cal.Rptr.2d 225, 929 P.2d 544]; see *People v. Mendoza* (2000) 24 Cal.4th 130, 179–180 [99 Cal.Rptr.2d 485, 6 P.3d 150].
- This Instruction Upheld ▶ *People v. Paysinger* (2009) 174 Cal.App.4th 26, 29–32 [93 Cal.Rptr.3d 901]; *People v. Rios* (2007) 151 Cal.App.4th 1154, 1159–1160 [60 Cal.Rptr.3d 591].

RELATED ISSUES

Flight, Meaning

Flight does not require a person to physically run from the scene or make an escape. What is required is acting with the purpose of avoiding observation or arrest. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055 [60 Cal.Rptr.2d 225, 929 P.2d 544] [defendant fled when he left victim’s apartment after killing her, told the assistant manager, “I really got to get the hell out of here,” returned to his apartment, packed his belongings, asked a former girlfriend who lived out of the area if he could stay with her, and repeatedly pleaded with his roommate to drive him out of town].) However, a suicide attempt that does not involve a departure from the crime scene is not flight. (*People v. Pettigrew* (2021) 62 Cal.App.5th 477, 499 [276 Cal.Rptr.3d 694].)

Identity at Issue

If evidence identifies the defendant as the person who fled, and this evidence is relied on as tending to show guilt, then it is not error to instruct the jury on flight. (*People v. Mason* (1991) 52 Cal.3d 909, 943 [277 Cal.Rptr. 166, 802 P.2d 950].)

SECONDARY SOURCES

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

1 Witkin, California Evidence (5th ed. 2012) Hearsay, §§ 107–110.

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

378. Consciousness of Guilt: General

If the defendant _____ [or tried to _____] <insert post-offense conduct>, that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant _____ [or tried to _____] <insert post-offense conduct>, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant _____ [or tried to _____] <insert post-offense conduct> cannot prove guilt by itself.

New March 2022

BENCH NOTES

Instructional Duty

No authority imposes a duty to give this instruction sua sponte.

AUTHORITY

- Instructional Requirements ▶ Evid. Code, § 355; *People v. Pettigrew* (2021) 62 Cal.App.5th 477, 497–500 [276 Cal.Rptr.3d 694]; *People v. Butler* (1970) 12 Cal.App.3d 189, 193 [90 Cal.Rptr. 497].

505. Justifiable Homicide: Self-Defense or Defense of Another

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) was justified in (killing/attempting to kill) someone in (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <insert name or description of third party>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed/ _____ <insert other forcible and atrocious crime>)];
2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the [attempted] killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <insert name of decedent/victim> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <insert name of decedent/victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <insert name of decedent/victim>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/great bodily injury/ _____ <insert forcible and atrocious crime>) has passed. This is so even if safety could have been achieved by retreating.]

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

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 (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter).

New January 2006; Revised February 2012, August 2012, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense 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.” (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant’s testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra*, 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats and assaults against the defendant on the reasonableness of defendant’s conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337].)

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 233, 526 P.2d 241].) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select “raped,” “maimed,” or “robbed,” or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM Nos. 506–511, Justifiable and Excusable Homicides.

CALCRIM Nos. 3470–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another–Lesser Included Offense*.

AUTHORITY

- Justifiable Homicide. ▶ Pen. Code, §§ 197–199.
- Fear. ▶ Pen. Code, § 198.
- Lawful Resistance. ▶ Pen. Code, §§ 692–694.
- Burden of Proof. ▶ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. ▶ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241].
- Imminence. ▶ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142].
- No Duty to Retreat. ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. ▶ Pen. Code, § 198.
- This Instruction Upheld. ▶ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that

although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be “some atrocious crime attempted to be committed by force.” (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

RELATED ISSUES

Imperfect Self-Defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant’s belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where defendant’s version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor’s version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1997) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in rape prosecution, no mistake-of-fact instruction was required when two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim’s legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.)

Transferred Intent Applies

“[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander.” (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628]; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [37 Cal.Rptr.2d 304].) There is no sua sponte duty to instruct on this principle, although such an instruction must be given on request when substantial evidence supports it. (*People v. Mathews, supra*, 91 Cal.App.3d at p. 1025; see also CALCRIM No. 562, *Transferred Intent*.)

Definition of “Imminent”

In *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1], the jury requested clarification of the term “imminent.” In response, the trial court instructed:

“Imminent peril,” as used in these instructions, means that the peril must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. In other words, the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.

(*Ibid.*)

The Court of Appeal agreed with this definition of “imminent.” (*Id.* at pp. 1187–1190 [citing *People v. Scoggins* (1869) 37 Cal. 676, 683–684].)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. “The common law does not take account of a person’s mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds ‘the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.’ (Prosser & Keeton, *Torts* (5th ed. 1984) § 32, p. 177.)” (*Ibid.*; see also Rest.2d *Torts*, § 283B.)

Reasonable Person Standard and Physical Limitations

A defendant’s physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, §§ 67–85.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, §§ 73.11, 73.12 (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).

510. Excusable Homicide: Accident

The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone ~~as a result of accident or misfortune. Such a killing is excused, and therefore not unlawful, if:~~

1. By accident and misfortune;

OR

1. If ~~T~~the defendant was doing a lawful act in a lawful way;

~~1.2.~~ The defendant was acting with usual and ordinary caution;

AND

~~2.3.~~ The defendant was acting without any unlawful intent to commit (murder/ [or] manslaughter).

A person acts with *usual and ordinary caution* if he or she acts in a way that a reasonably careful person would act in the same or similar situation.

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

New January 2006; Revised August 2012, March 2022

BENCH NOTES

Instructional Duty

The court has no **sua sponte** duty to instruct on accident. (*People v. Anderson* (2011) 51 Cal.4th 989, 997-998 [125 Cal.Rptr.3d 408, 252 P.3d 968].)

When this instruction is given, it should always be given in conjunction with CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged* or CALCRIM No. 580, *Involuntary Manslaughter: Lesser Included Offense*, unless vehicular manslaughter with ordinary negligence is charged. (*People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].) A lawful act can be the basis of involuntary manslaughter, but only if that act is committed with *criminal* negligence (“in an unlawful manner or without due caution and circumspection”).

(Pen. Code, § 192(b).) The level of negligence described in this instruction, 510, is *ordinary* negligence. While proof of ordinary negligence is sufficient to prevent a killing from being excused under Penal Code section 195, subd. 1, proof of ordinary negligence is not sufficient to find a defendant guilty of involuntary manslaughter under Penal Code section 192(b). (*People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926].)

Related Instructions

CALCRIM No. 3404, *Accident*.

AUTHORITY

- Excusable Homicide ~~If Committed by Lawful Act~~. ▶ Pen. Code, § 195, subd. 1; *People v. Garnett* (1908) 9 Cal.App. 194, 203–204 [98 P. 247], disapproved on other grounds by *People v. Collup* (1946) 27 Cal.2d 829, 838–839 [167 P.2d 714] and *People v. Bouchard* (1957) 49 Cal.2d 438, 441–442 [317 P.2d 971].
- Burden of Proof. ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Instructing With Involuntary Manslaughter.- ▶ *People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].
- ~~Misfortune as Accident.~~ ▶ ~~*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69]~~.

RELATED ISSUES

Traditional Self-Defense

In *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1358–1359 [37 Cal.Rptr.2d 304], the court held that the claim that a killing was accidental bars the defendant from relying on traditional self-defense not only as a defense, but also to negate implied malice. However, in *People v. Elize* (1999) 71 Cal.App.4th 605, 610–616 [84 Cal.Rptr.2d 35], the court reached the opposite conclusion, holding that the trial court erred in refusing to give self-defense instructions where the defendant testified that the gun discharged accidentally. *Elize* relies on two Supreme Court opinions, *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531], and *People v. Breverman* (1998) 19 Cal.4th 142 [77 Cal.Rptr.2d 870, 960 P.2d 1094]. Because *Curtis* predates these opinions, *Elize* appears to be the more persuasive authority.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 274.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.01[5], 73.16 (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).

511. Excusable Homicide: Accident in the Heat of Passion

The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone by accident while acting in the heat of passion. Such a killing is excused, and therefore not unlawful, if, at the time of the killing:

1. The defendant acted in the heat of passion;
2. The defendant was (suddenly provoked by _____ <insert name of decedent>/ [or] suddenly drawn into combat by _____ <insert name of decedent>);
3. The defendant did not take undue advantage of _____ <insert name of decedent>;
4. The defendant did not use a dangerous weapon;
5. The defendant did not kill _____ <insert name of decedent> in a cruel or unusual way;
6. The defendant did not intend to kill _____ <insert name of decedent> and did not act with conscious disregard of the danger to human life;

AND

7. The defendant did not act with criminal negligence.

A person acts *in the heat of passion* when he or she is provoked into doing a rash act under the influence of intense emotion that obscures his or her reasoning or judgment. The provocation must be sufficient to have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for the killing to be excused on this basis, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote

provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment.

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

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

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 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 how 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.

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

New January 2006; Revised April 2011, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

The trial court has a **sua sponte** duty to instruct on accident and heat of passion that excuses homicide when there is evidence supporting the defense. (*People v. Hampton* (1929) 96 Cal.App. 157, 159–160 [273 P. 854] [court erred in refusing defendant’s requested instruction].)

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM No. 510, *Excusable Homicide: Accident*.

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion –Lesser Included Offense*.

AUTHORITY

- Excusable Homicide if Committed in Heat of Passion. ▶ Pen. Code, § 195, subd. 2.
- Burden of Proof. ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Deadly Weapon Defined. ▶ See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

- [Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* \(2019\) 8 Cal.5th 1, 6 \[251 Cal.Rptr.3d 371, 447 P.3d 277\] \[box cutter\]; *People v. Perez* \(2018\) 4 Cal.5th 1055, 1065 \[232 Cal.Rptr.3d 51, 416 P.3d 42\] \[vehicle\]; *People v. McCoy* \(1944\) 25 Cal.2d 177, 188 \[153 P.2d 315\] \[knife\].](#)

RELATED ISSUES

Distinguished From Voluntary Manslaughter

Under Penal Code section 195, subd. 2, a homicide is “excusable,” “in the heat of passion” if done “by accident,” or on “sudden . . . provocation . . . or . . . combat.” (Pen. Code, § 195, subd. 2.) Thus, unlike voluntary manslaughter, the killing must have been committed without criminal intent, that is, accidentally. (See *People v. Cooley* (1962) 211 Cal.App.2d 173, 204 [27 Cal.Rptr. 543], disapproved on other grounds in *People v. Lew* (1968) 68 Cal.2d 774, 778, fn. 1 [69 Cal.Rptr. 102, 441 P.2d 942]; Pen. Code, § 195, subd. 1 [act must be without criminal intent]; Pen. Code, § 26, subd. 5 [accident requires absence of “evil design [or] intent”].) The killing must also be on “sudden” provocation, eliminating the possibility of provocation over time, which may be considered in cases of voluntary manslaughter. (See Bench Notes to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.)

Distinguished From Involuntary Manslaughter

Involuntary manslaughter requires a finding of gross or criminal negligence. (See Bench Notes to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*; Pen. Code, § 26, subd. 5 [accident requires no “culpable negligence”].)

SECONDARY SOURCES

- 1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, § 274.
- 1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, § 230.
- 3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.16 (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], [g], 142.02[2][a] (Matthew Bender).

523. First Degree Murder: Hate Crime (Pen. Code, § 190.03)

If you find the defendant guilty of first degree murder [as charged in Count ___], you must then decide whether the People have proved the additional allegation that the murder was a hate crime.

To prove this allegation the People must prove that the defendant committed the murder, in whole or in part, because of the deceased person's actual or perceived (disability[,]/[or] gender[,]/[or] nationality[,]/[or] race or ethnicity[,]/[or] religion[,]/[or] sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]).

The defendant acted, *in whole or in part, because of* the actual or perceived characteristic[s] of the deceased person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged murder.

If you find that the defendant had more than one reason to commit the alleged murder, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality*, as used here, means ~~includes citizenship~~, country of origin, immigration status, including citizenship, and national origin.]

[Race or ethnicity includes ancestry, color, and ethnic background.]

[Religion, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[Sexual orientation means heterosexuality, homosexuality, or bisexuality.]

[Association with a person or group with (this/one or more of these) actual or perceived characteristic[s] includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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

New January 2006; Revised March 2017, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

This statute was substantially revised, effective January 1, 2005. Prior to that time, the statute was limited to murder committed because of the decedent’s disability, gender, or sexual orientation.

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

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

AUTHORITY

- Murder That is a Hate Crime. ▶ Pen. Code, § 190.03(a).
- Hate Crime Defined. ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined. ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. ▶ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(l).
- Gender Defined. ▶ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined. ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. ▶ Pen. Code, § 422.56(f).
- Religion Defined. ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined. ▶ Pen. Code, § 422.56(h).
- Association With Defined. ▶ Pen. Code, § 422.56(a).

SECONDARY SOURCES

3 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Punishment, § 542.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.01[4][a][ii] (Matthew Bender).

524. Second Degree Murder: Peace Officer (Pen. Code, § 190(b), (c))

If you find the defendant guilty of second degree murder [as charged in Count __], you must then decide whether the People have proved the additional allegation that (he/she) murdered a peace officer.

To prove this allegation the People must prove that:

1. _____ *<insert officer's name, excluding title>* was a peace officer lawfully performing (his/her) duties as a peace officer;

[AND]

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

<Give element 3 when defendant charged with Pen. Code, § 190(c)>

[AND]

3. The defendant (intended to kill the peace officer/ [or] intended to inflict great bodily injury on the peace officer/ [or] personally used a (deadly or dangerous weapon/ [or] firearm) in the commission of the offense).]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

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

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

1. Displays the weapon in a menacing manner;
2. Hits someone with the weapon;

OR

3. Fires the weapon.]

[The People allege that the defendant _____ <insert all of the factors from element 3 when multiple factors are alleged>. You may not find the defendant guilty unless you all agree that the People have proved at least one of these alleged facts and you all agree on which fact or facts were proved. You do not need to specify the fact or facts in your verdict.]

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

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

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

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

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

New January 2006; Revised August 2009, February 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186,

193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged under Penal Code section 190(b), give only elements 1 and 2. If the defendant is charged under Penal Code section 190(c), give all three elements, specifying the appropriate factors in element 3, and give the appropriate definitions, which follow in brackets. Give the bracketed unanimity instruction if the prosecution alleges more than one factor in element 3.

In order to be “engaged in the performance of his or her duties,” a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) “[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element.” (*Ibid.*) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

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

“Peace officer,” as used in this statute, means “as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5.” (Pen. Code, § 190(b) & (c).)

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

729, 800 P.2d 1159].)

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Second Degree Murder of a Peace Officer. ▶ Pen. Code, § 190(b) & (c).
- Personally Used Deadly or Dangerous Weapon. ▶ Pen. Code, § 12022.
- Personally Used Firearm. ▶ Pen. Code, § 12022.5.
- Personal Use. ▶ Pen. Code, § 1203.06(b)(2).
- Inherently Deadly Defined. ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 186.

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

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142,
Crimes Against the Person, § 142.01[4][c] (Matthew Bender).

571. Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense (Pen. Code, § 192)

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another).

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and (imperfect self-defense/ [or] imperfect defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if:

1. The defendant actually believed that (he/she/ [or] someone else/ _____ <insert name of third party>) was in imminent danger of being killed or suffering great bodily injury;

AND

2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

BUT

3. At least one of those beliefs was unreasonable.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

<The following definition may be given if requested>

[A danger is *imminent* if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.]

[Imperfect self-defense does not apply when the defendant, through (his/her) own wrongful conduct, has created circumstances that justify (his/her) adversary’s use of force.]

[If you find that _____ <insert name of decedent/victim> threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant’s beliefs.]

[If you find that the defendant knew that _____ <insert name of decedent/victim> had threatened or harmed others in the past, you may consider that information in evaluating the defendant’s beliefs.]

[If you find that the defendant received a threat from someone else that (he/she) associated with _____ <insert name of decedent/victim>, you may consider that threat in evaluating the defendant’s beliefs.]

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

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.

New January 2006; Revised August 2012, February 2015, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is “substantial enough to merit consideration” by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

See discussion of imperfect self-defense in **r**elated **i**ssues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-

535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived*.

AUTHORITY

- Elements. ▶ Pen. Code, § 192(a).
- Imperfect Self-Defense Defined. ▶ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. ▶ *People v. Randle* (2005) 35 Cal.4th 987, 995–1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim’s Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense. ▶ *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433].
- Imperfect Self-Defense Does Not Apply When Defendant’s Belief in Need for Self-Defense is Entirely Delusional. ▶ *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- This Instruction Upheld. ▶ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim. ▶ *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337] [in dicta].

LESSER INCLUDED OFFENSES

- Attempted Voluntary Manslaughter. ▶ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

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

RELATED ISSUES

Battered Woman's Syndrome

Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].)

Blakeley Not Retroactive

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra*, 23 Cal.4th at p. 93.)

Inapplicable to Felony Murder

Imperfect self-defense does not apply to felony murder. “Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant.” (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753]; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1666 [285 Cal.Rptr. 523]; *People v. Loustana* (1986) 181 Cal.App.3d 163, 170 [226 Cal.Rptr. 216].)

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.*)

See also the Related Issues [Section](#) to CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. “The common law does not take account of a person’s mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds ‘the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.’ (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)” (*Ibid.*; see also Rest.2d Torts, § 283B.)

Reasonable Person Standard and Physical Limitations

A defendant’s physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 242–244.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.11[1][c], [2][a] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.04[1][c] (Matthew Bender).

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

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

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

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

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

AND

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

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

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

<If criminal street gang has already been defined>

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

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

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

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

2. That has, as one or more of its primary activities, the commission of _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

AND

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

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

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

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of): ~~<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>~~ **1A.** (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

~~{OR}~~

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

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

AND

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

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

4. The crimes were committed on separate occasions, or by two or more ~~members~~persons;.

5. The crimes commonly benefitted a criminal street gang;

AND

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

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

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

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

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

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

[Other instructions explain what is necessary for the People to prove that a member of the gang [or the defendant] committed _____ *<insert crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>.*]

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d

573, 941 P.2d 752].) The effective date of this special circumstance was March 8, 2000.

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

~~In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)~~

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

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

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

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

Related Instructions

CALCRIM No. 562, *Transferred Intent*.

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

AUTHORITY

- Special Circumstance. ▶ Pen. Code, § 190.2(a)(22).
- Active Participation Defined. ▶ ~~Pen. Code, § 186.22(i);~~ *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▶ Pen. Code, § 186.22(f); ~~see *People v. Duran*, supra, 97 Cal.App.4th at pp. 1464–1465.~~
- Transferred Intent Under Penal Code Section 190.2(a)(22). ▶ *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- Pattern of Criminal Gang Activity Defined. ▶ Pen. Code, § 186.22(e), (g); ~~*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].~~
- Examples of Common Benefit ▶ Pen. Code, § 186.22(g).
- Felonious Criminal Conduct Defined. ▶ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [~~abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].~~]
- Separate Intent From Underlying Felony. ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Crimes Committed After Charged Offense Not Predicates. ▶ *People v. Duran*, supra, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required. ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

RELATED ISSUES

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

The criminal street gang special circumstance applies when a participant in a criminal street gang intends to kill one person but kills someone else by mistake.

People v. Shabazz (2006) 38 Cal.4th 55, 66 [40 Cal.Rptr.3d 750, 130 P.3d 519]; see CALCRIM No. 562, *Transferred Intent*.

SECONDARY SOURCES

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

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

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

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

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

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

<Alternative 1A—force with weapon>

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

[OR]

<Alternative 1B—force without weapon>

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

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

- 2. The defendant did that act willfully;**
- 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
- 4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon/with a firearm/with a semiautomatic firearm/with a machine gun/with an assault weapon/with a .50 BMG rifle) to a person;**
- 5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer);**

[AND]

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

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

[AND]

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it is designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

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

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

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

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

AND

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

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

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

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

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

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

New January 2006; Revised April 2011, February 2012, February 2013, September 2019, April 2020, September 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

The court may give the bracketed sentence that begins, “The duties of a _____ <insert title> include,” on request. The court may insert a description of the officer’s duties such as “the correct service of a facially valid

search warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- Assault Weapon Defined ▶ Pen. Code, §§ 30510, 30515.
- Firearm Defined ▶ Pen. Code, § 16520.
- Machine Gun Defined ▶ Pen. Code, § 16880.
- Semiautomatic Pistol Defined ▶ Pen. Code, § 17140.
- .50 BMG Rifle Defined ▶ Pen. Code, § 30530.
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Firefighter Defined ▶ Pen. Code, § 245.1.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

Dual Convictions Prohibited

Penal Code [section](#) § 245(c) describes a single offense. (*In re C.D.* (2017) 18 Cal.App.5th 1021, 1029 [227 Cal.Rptr.3d 360] [“Aggravated assault against a peace officer under section 245, subdivision (c), remains a single offense, and multiple violations of the statute cannot be found when they are based on the same act or course of conduct.”].) See CALCRIM No. 3516, *Multiple Counts: Alternative Charges For One Event—Dual Conviction Prohibited*.

If both theories of assault are included in the case, the jury must unanimously agree which theory or theories are the basis for the verdict.

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, § 69.

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

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

New January 2006; Revised April 2011, February 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the bracketed definition of “local detention facility,” do not insert the name of a specific detention facility. Instead, insert a description of the type of detention facility at issue in the case. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869] [jury must determine if alleged victim is a peace officer]; see Penal Code section 6031.4 [defining local detention facility].)

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245, 245.3.
- Custodial Officer Defined ▶ Pen. Code, § 831.
- Local Detention Facility Defined ▶ Pen. Code, § 6031.4.

- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

SECONDARY SOURCES

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

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

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

2. The defendant did that act willfully;

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

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

<Alternative 5A—transportation personnel>

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

<Alternative 5B—passenger>

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

[AND]

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

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

[AND]

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

New January 2006; Revised February 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245, 245.2.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, § 79.

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

864–874. Reserved for Future Use

875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)–(4), (b))

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

[AND]

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

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

[AND]

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

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

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

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

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

AND

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

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

New January 2006; Revised June 2007, August 2009, October 2010, February 2012, February 2013, August 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

If the charging document names more than one victim, modification of this instruction may be necessary to clarify that each victim must have been subject to the application of force. (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176–1177 [150 Cal.Rptr.3d 612].) The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v.*

Medellin (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements ▶ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon ▶ *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- This Instruction Affirmed ▶ *People v. Golde* (2008) 163 Cal.App.4th 101, 122-123 [77 Cal.Rptr.3d 120].
- Assault Weapon Defined ▶ Pen. Code, §§ 30510, 30515.
- Semiautomatic Pistol Defined ▶ Pen. Code, § 17140.
- Firearm Defined ▶ Pen. Code, § 16520.
- Machine Gun Defined ▶ Pen. Code, § 16880.
- .50 BMG Rifle Defined ▶ Pen. Code, § 30530.
- Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.

Assault with a firearm is a lesser included offense of assault with a semiautomatic firearm. (*People v. Martinez* (2012) 208 Cal.App.4th 197, 199 [145 Cal.Rptr.3d 141].)

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 41.

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

890. Assault With Intent to Commit Specified Crimes [While Committing First Degree Burglary] (Pen. Code, § 220(a), (b))

The defendant is charged [in Count __] with assault with intent to commit _____ *<insert crime specified in Penal Code section 220(a)>* [while committing first degree burglary] [in violation of Penal Code section 220((a)/ [and] (b))].

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

1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;
2. The defendant did that act willfully;
3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;
4. When the defendant acted, (he/she) had the present ability to apply force to a person;

[AND]

5. When the defendant acted, (he/she) intended to commit _____ *<insert crime specified in Pen. Code, ' 220(a)>*;

[AND

6. When the defendant acted, (he/she) was committing a first degree burglary.]

<If the court concludes that the first degree burglary requirement in Pen. Code, § 220(b) is a penalty allegation and not an element of the offense, give the bracketed language below in place of element 6.>

[If you find the defendant guilty of the charged crime, you must then decide whether the People have proved the additional allegation that the crime was committed in the commission of a first degree burglary.]

[First degree burglary is defined in another instruction to which you should refer.]

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

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

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

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

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

To decide whether the defendant intended to commit _____ <insert crime specified in Pen. Code, § 220(a)> please refer to Instruction[s] _____ which define[s] (that/those) crime[s].

New January 2006; Revised April 2010, October 2010, August 2012, March 2022

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 give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense

raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124–125 [261 Cal.Rptr. 502]; see *People v. Mayberry* (1975) 15 Cal.3d 143 [125 Cal.Rptr. 745, 542 P.2d 1337]; see also CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats* [alternative paragraph on reasonable and actual belief in consent].)

The court has a **sua sponte** duty to instruct on the sex offense or offense alleged. (*People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].) In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 287 [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape; ~~spousal rape~~, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged.

The court should also give CALCRIM Nos. 1700 and 1701 on burglary, if defendant is charged with committing the offense during a first degree burglary, as well as the appropriate CALCRIM instruction on the target crime charged pursuant to Penal Code section 220.

If the specified crime is mayhem, give CALCRIM No. 891, *Assault With Intent to Commit Mayhem*.

Element 6 is in brackets because there is no guidance from courts of review regarding whether the first degree burglary requirement in Penal Code section 220(b) is an element or an enhancement.

Related Instructions

CALCRIM No. 915, *Simple Assault*.

AUTHORITY

- Elements ▶ Pen. Code, § 220.
- Elements for Assault ▶ Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Court Must Instruct on Elements of Intended Crime ▶ *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502] [in context of assault to commit rape].

LESSER INCLUDED OFFENSES

- Simple Assault ▶ Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [110 Cal.Rptr. 160] [in context of charged assault with intent to commit rape].

Both assault with intent to commit rape and first degree burglary are lesser included offenses of assault with intent to commit rape during first degree burglary (Pen. Code, § 220(b); (*People v. Dyser* (2012) 202 Cal.App.4th 1015, 1021 [135 Cal.Rptr.3d 891].)

There is no crime of attempted assault to commit an offense. (See *People v. Duens* (1976) 64 Cal.App.3d 310, 314 [134 Cal.Rptr. 341] [in context of assault to commit rape].)

RELATED ISSUES

Abandonment

An assault with intent to commit another crime is complete at any point during the incident when the defendant entertains the intent to commit the crime. “It makes no difference whatsoever that he later abandons that intent.” (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223 [207 Cal.Rptr. 165]; *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847] [both in context of assault to commit rape].)

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 28–34.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.60 (Matthew Bender).

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

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

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

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

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

AND

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

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

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

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

New January 2006; Revised February 2012, February 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

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

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

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

AUTHORITY

- Elements ▶ Pen. Code, § 417.8.
- Firearm Defined ▶ Pen. Code, § 16520; see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [7 Cal.Rptr.2d 44] [pellet gun not a “firearm” within meaning of Pen. Code, § 417(a)].
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204] [hands and feet not deadly weapons]; see, e.g., *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [50 Cal.Rptr.2d 351] [screwdriver was capable of being used as a deadly weapon and defendant intended to use it as one if need be]; *People v. Henderson* (1999) 76 Cal.App.4th 453, 469–470 [90 Cal.Rptr.2d 450] [pit bulls were deadly weapons under the circumstances].
- Lawful Performance of Duties Not an Element ▶ *People v. Simons* (1996) 42 Cal.App.4th 1100, 1109–1110 [50 Cal.Rptr.2d 351].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 8-10.

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

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

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

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

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

[AND]

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

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

<Alternative 2B—used in fight>

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

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

[AND]

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

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

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

New January 2006; Revised October 2010, February 2012, February 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements ▶ Pen. Code, § 417(a)(1) & (2).
- Firearm Defined ▶ Pen. Code, § 16520.
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Victim’s Awareness of Firearm Not a Required Element ▶ *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891].
- Weapon Need Not Be Pointed Directly at Victim ▶ *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

SECONDARY SOURCES

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

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

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

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

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

1. The defendant had sexual intercourse with a woman;

~~2. He and the woman were (not married/married) to each other at the time of the intercourse;~~

~~23.~~ The woman did not consent to the intercourse;

AND

~~34.~~ The defendant accomplished the intercourse by

<Alternative ~~34A~~—force or fear>

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

<Alternative ~~34B~~—future threats of bodily harm>

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

<Alternative ~~34C~~—threat of official action>

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

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

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

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

- 1. She communicated through words or acts to the defendant that she no longer consented to the act of intercourse;**
- 2. A reasonable person would have understood that her words or acts expressed her lack of consent;**

AND

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

[It is not required that she physically resist or fight back in order to communicate her lack of consent.]

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

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

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

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

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

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

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

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

<Defense: Reasonable Belief in Consent>

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

New January 2006; Revised February 2013, February 2014, March 2022

BENCH NOTES

Instructional Duty

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

Penal Code section 261, as amended by Assembly Bill 1171 (Stats. 2021, ch. 626), became effective on January 1, 2022. If the defendant’s alleged act occurred before this date, the court should give the prior version of this instruction.

The court should select the appropriate alternative in element 34 describing how the sexual intercourse was allegedly accomplished.

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

The defendant must continue to actually and reasonably believe in the victim’s consent throughout the act. If the act of intercourse begins consensually and the victim then changes her mind, the victim must clearly and unequivocally communicate to the defendant her withdrawal of consent to the act. If, however, the defendant initiates the use of nonconsensual duress, menace, or force during the act, the victim’s subsequent withdrawal of consent to the act may be inferred

from the circumstances and need not be expressed. (*People v. Ireland* (2010) 188 Cal.App.4th 328, 338 [114 Cal.Rptr.3d 915]). If there is an issue regarding the defendant’s continued belief in the victim’s consent, give the second optional first sentence in the definition of “*Defense: Reasonable Belief in Consent.*”

Defenses—Instructional Duty

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

Related Instructions

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

AUTHORITY

Rape:

- Elements ▶ Pen. Code, § 261(a)(2), (6) & (7).
- Consent Defined ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined ▶ Pen. Code, § 261(b).
- Menace Defined ▶ Pen. Code, § 261(c).
- Penetration Defined ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Fear Defined ▶ *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [level of fear].
- Force Defined ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Mistake of Fact Regarding Consent ▶ *People v. Mayberry, supra*, 15 Cal.3d at pp. 153–158; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].
- Circumstances Requiring *Mayberry* Instruction ▶ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866].

- Withdrawal of Consent ▶ *In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].
- Inferring Lack of Consent From Circumstances ▶ *People v. Ireland* (2010) 188 Cal.App.4th 328, 338 [114 Cal.Rptr.3d 915].
- Victim Need Not Resist ▶ *People v. Barnes* (1986) 42 Cal.3d 284, 297-302 [228 Cal.Rptr. 228, 721 P.2d 110].

Spousal Rape:

- ~~Elements ▶ Pen. Code, § 262(a)(1), (4) & (5).~~
- ~~Duress Defined ▶ Pen. Code, § 262(b).~~
- ~~Menace Defined ▶ Pen. Code, § 262(c).~~
- ~~Mistake of Fact Regarding Consent ▶ *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1148–1149 [222 Cal.Rptr. 630, 542 P.2d 1337]; see *People v. Mayberry, supra*, 15 Cal.3d at pp. 153–158; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].~~

COMMENTARY

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

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

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

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

The term “force” as used in the rape statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin, supra*, 33 Cal.4th at pp. 1023–1024.) In *People v. Griffin*, the Supreme Court further stated,

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

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

The committee has provided a bracketed definition of “force,” consistent with *People v. Griffin, supra*, 33 Cal.4th at pp. 1023-1024, that the court may give on request.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Consent Obtained by Fraudulent Representation

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

Minor Victim and Unanimity

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

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

Mistake-of-Fact Defense and Developmental Disability

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

Multiple Rapes

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

Resistance Is Not Required

Resistance by the victim is not required for rape; any instruction to that effect is erroneous. (*People v. Barnes, supra*, 42 Cal.3d at pp. 292, 302.)

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–15, 20, 178.

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

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:1~~86~~, 12:1~~97~~ (The Rutter Group).

1001. Rape ~~or Spousal Rape~~ in Concert (Pen. Code, § 264.1)

The defendant[s] [_____ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count __] with committing rape by acting in concert [with _____ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code section 264.1].

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

<Alternative A—defendant committed rape>

[1.] [The defendant personally committed forcible rape and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<Alternative B—defendant aided and abetted>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed forcible rape.]

To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] committed rape, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted rape, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved rape in concert.

<Make certain that all appropriate instructions on rape and aiding and abetting are given.>

[To prove the crime of rape in concert, the People do not have to prove a prearranged plan or scheme to commit rape.]

New January 2006; Revised October 2021, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 264.1; *People v. Ramirez* (1987) 189 Cal.App.3d 603,

621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on rape. Give one or more of the following instructions defining rape: CALCRIM No. 1000, or CALCRIM Nos. 1005–1114.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

Related Instructions

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

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. ▶ Pen. Code, § 264.1; see *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Forcible Rape Defined. ▶ Pen. Code, § 261(a)(2).
- ~~Spousal Rape Defined. ▶ Pen. Code, § 262(a)(1).~~
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

COMMENTARY

There is conflicting authority whether all types of forcible rape may be the basis for charging a rape in concert. (Compare *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [rape by duress, menace, and fear unavailable under Pen. Code, § 264.1] and *People v. Mom* (2000) 80 Cal.App.4th 1217, 1222–1223 [96 Cal.Rptr.2d 172] [§ 264.1 only includes rape involving “force” and “violence”], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089], with *People v. Wheeler* (1977) 71 Cal.App.3d 902, 907 [139 Cal.Rptr. 737] [§ 264.1 includes any unlawful use of

force, including threat of harm].) The instruction addresses rape accomplished by force or violence. (See Pen. Code, §§ 261(a)(2), 264.1.) If another basis for charging rape in concert is argued, for example, rape by duress, menace, fear, or threats (see Pen. Code, § 261(a)(2), (6), & (7)), see CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats* for appropriate language that may be included on request.

Penal Code section 264.1 deals with a crime of substance, and is not an enhancement statute, as discussed in *People v. Best* (1983) 143 Cal.App.3d 232, 237 [191 Cal.Rptr. 614].

LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Rape. ▶ Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape. ▶ Pen. Code, §§ 664, 261.
- Battery. ▶ Pen. Code, § 242.
- Rape. ▶ Pen. Code, §§ 261, ~~262~~.

RELATED ISSUES

Need Not Personally Participate

A defendant may be convicted of rape in concert if he or she was at the general scene of the rape and aided and abetted another person in accomplishing the act, even if the defendant did not personally participate in the act or was not personally present at the exact scene of the act. (See *People v. Lopez* (1981) 116 Cal.App.3d 882, 887–888 [172 Cal.Rptr. 374]; *People v. Barnett* (1976) 54 Cal.App.3d 1046, 1049 [127 Cal.Rptr. 88] [oral copulation in concert although not in room when act took place]; *People v. Champion* (1995) 9 Cal.4th 879, 933 [39 Cal.Rptr.2d 547] [rape in concert by holding victim’s family at gun point in another room].)

However, the Supreme Court has not resolved whether a person acts in concert when his accomplice assists in the commission of the crime, but is not present at the general scene (for example, when the accomplice provides the rapist with information about the victim, or pays the rapist to commit the act). (*People v. Champion* (1995) 9 Cal.4th 879, 933, fn. 22 [891 P.2d 93].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 21.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:1~~86~~, 12:1~~97~~ (The Rutter Group).

**1002. Rape of Intoxicated Woman ~~or Spouse~~ (Pen. Code, §§ 261(a)(3),
262(a)(2))**

The defendant is charged [in Count __] with raping ~~(a woman/his wife)~~ while she was intoxicated [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant had sexual intercourse with a woman;
- ~~2. He and the woman were (not married/married) to each other at the time of the intercourse;~~
- ~~3.2.~~ 3.2. The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting;

AND

- ~~4.3.~~ 4.3. The defendant knew or reasonably should have known that the effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting.

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

A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ <If appropriate, insert controlled substance> (is/are) [a] controlled substance[s].]

<Defense: Reasonable Belief Capable of Consent>

[The defendant is not guilty of this crime if he actually and reasonably believed that the woman was capable of consenting to sexual intercourse, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

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

Penal Code section 261, as amended by Assembly Bill 1171 (Stats. 2021, ch. 626), became effective on January 1, 2022. If the defendant's alleged act occurred before this date, the court should give the prior version of this instruction.

A space is provided to identify controlled substances, if the parties agree.

Defenses—Instructional Duty

There is no sua sponte duty to instruct on the defense of reasonable belief that the person was capable of consent. (*People v. Lujano* (2017) 15 Cal.App.5th 187 [223 Cal.Rptr.3d 105].)

Related Instructions

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

AUTHORITY

- Elements. ▶ Pen. Code, §§ 261(a)(3), ~~262(a)(2)~~.
- Consent Defined. ▶ Pen. Code, § 261.6.
- Controlled Substances. ▶ Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Penetration Defined. ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Anesthetic Effect. ▶ See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- General Intent and Knowledge Requirements. ▶ *People v. Linwood* (2003) 105 Cal.App.4th 59, 67–72 [129 Cal.Rptr.2d 73] [statute is not impermissibly vague and uses appropriate criminal negligence standard].

- “Prevented From Resisting” Defined. ▶ *People v. Lujano* (2017) 15 Cal.App.5th 187, 192-193 [223 Cal.Rptr.3d 105] [CALCRIM 1032 has correct definition]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315].
- Reasonable Belief in Capacity to Consent. ▶ *People v. Lujano* (2017) 15 Cal.App.5th 187, 191-192 [223 Cal.Rptr.3d 105]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471-472 [98 Cal.Rptr.2d 315].
- This Instruction Upheld. ▶ *People v. Smith* (2010) 191 Cal.App.4th 199, 204–205 [120 Cal.Rptr.3d 52].

COMMENTARY

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

LESSER INCLUDED OFFENSES

- Attempted Rape. ▶ Pen. Code, §§ 663, 261(a)(3).
- ~~Attempted Rape of Intoxicated Spouse. ▶ Pen. Code, §§ 663, 262(a)(2).~~
- Assault. ▶ Pen. Code, § 240.
- Battery. ▶ Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].

RELATED ISSUES

Administering Drugs to Assist Commission of Felony

A person who administers to someone else any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating agent, with the intent to enable or assist himself or herself or any other person to commit a felony is guilty of a felony. (Pen. Code, § 222.)

See the Related Issues section to CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

SECONDARY SOURCES

6 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–8, 18, 20, 178.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][a], [5], 142.23[1][e] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:1~~86~~, 12:1~~97~~ (The Rutter Group).

**1003. Rape of Unconscious Woman ~~or Spouse~~ (Pen. Code, §§
261(a)(4), ~~262(a)(3)~~)**

The defendant is charged [in Count __] with raping ~~(a woman/his wife)~~ who was unconscious of the nature of the act [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant had sexual intercourse with a woman;
- ~~2. He and the woman were (not married/married) to each other at the time of the intercourse;~~
- ~~3.2.~~ 3.2. The woman was unable to resist because she was unconscious of the nature of the act;

AND

- ~~4.3.~~ 4.3. The defendant knew that the woman was unable to resist because she was unconscious of the nature of the act.

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

A woman is *unconscious of the nature of the act* if she is (unconscious or asleep/ [or] not aware that the act is occurring/ [or] not aware of the essential characteristics of the act because the perpetrator tricked, lied to, or concealed information from her/ [or] not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the sexual penetration served a professional purpose when it served no professional purpose).

New January 2006; Revised August 2012, August 2013, March 2022

BENCH NOTES

Instructional Duty

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

~~If spousal rape is charged, include the appropriate language throughout the instruction to indicate that the parties were married.~~

Penal Code section 261, as amended by Assembly Bill 1171 (Stats. 2021, ch. 626), became effective on January 1, 2022. If the defendant’s alleged act occurred before this date, the court should give the prior version of this instruction.

Select the appropriate language defining “unconscious of the nature of the act” based on the facts of the case.

Related Instructions

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

AUTHORITY

- Elements. ▶ Pen. Code, §§ 261(a)(4), ~~262(a)(3)~~.
- Penetration Defined. ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Unconscious of Nature of Act. ▶ *People v. Howard* (1981) 117 Cal.App.3d 53, 55 [172 Cal.Rptr. 539] [total unconsciousness is not required]; see *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1229–1231 [210 Cal.Rptr. 122] [rape victim not unconscious of nature of act; fraud in the inducement].
- Assault. ▶ Pen. Code, § 240.
- Battery. ▶ Pen. Code, § 242; *People v. Guitierrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].
- ~~Perpetrator Must Impersonate Spouse of Married Woman Under Current Statute. ▶ *People v. Morales* (2013) 212 Cal.App.4th 583, 594-595 [150 Cal.Rptr.3d 920].~~

COMMENTARY

The statutory language describing unconsciousness includes “was not aware, knowing, perceiving, or cognizant that the act occurred.” (See Pen. Code, §§

261(a)(4)(B)–(D), ~~262(a)(3)(B), (C).~~) The committee did not discern any difference among the statutory terms and therefore used “aware” in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

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

LESSER INCLUDED OFFENSES

- Attempted Rape of Unconscious Woman. ▶ Pen. Code, §§ 663, 261(a)(4).
- ~~Attempted Rape of Unconscious Spouse. ▶ Pen. Code, §§ 663, 262(a)(3).~~

RELATED ISSUES

Advance Consent

Neither a woman’s actual “advance consent” nor a man’s belief in “advance consent” eliminates the wrongfulness of a man’s conduct in knowingly depriving an unconscious woman of her freedom of choice both at the initiation of and during sexual intercourse. A person who commits the prohibited act necessarily acts with a wrongful intent. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 37 [124 Cal.Rptr.2d 898].)

See the Related Issues section in CALCRIM No. 1000, *Rape-or-Spousal Rape by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–8, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [5] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:186, 12:197 (The Rutter Group).

1004. Rape of a Disabled Woman (Pen. Code, § 261(a)(1))

The defendant is charged [in Count __] with raping a mentally or physically disabled woman [in violation of Penal Code section 261(a)(1)].

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

1. The defendant had sexual intercourse with a woman;
2. He and the woman were not married to each other at the time of the intercourse;
3. The woman had a (mental disorder/developmental or physical disability) that prevented her from legally consenting;

AND

4. The defendant knew or reasonably should have known that the woman had a (mental disorder/developmental or physical disability) that prevented her from legally consenting.

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

A woman is *prevented from legally consenting* if she is unable to understand the act, its nature, and possible consequences.

New January 2006; Revised August 2012, March 2022

BENCH NOTES

Instructional Duty

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

Related Instructions

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

AUTHORITY

- Elements. ▶ Pen. Code, § 261(a)(1).
- Consent Defined. ▶ Pen. Code, § 261.6; *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Penetration Defined. ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Assault. ▶ Pen. Code, § 240.
- Battery. ▶ Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].
- This Instruction Completely Explains Inability to Give Legal Consent. ▶ *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1419, fn. 13 [132 Cal.Rptr.3d 315] [in dicta].

COMMENTARY

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

LESSER INCLUDED OFFENSES

- Attempted Rape. ▶ Pen. Code, §§ 663, 261.

RELATED ISSUES

No Duty to Define “Developmental Disability”

There is no sua sponte duty to define “developmental disability” under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in

any particular case. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation].)

See the Related Issues section under CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–8, 19, 178.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [5] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:186, 12:197 (The Rutter Group).

1005. Rape by Fraud (Pen. Code, § 261(a)(5))

The defendant is charged [in Count __] with rape by fraud [in violation of Penal Code section 261(a)(5)].

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

1. The defendant had sexual intercourse with a woman;
- ~~2. The defendant and the woman were not married to each other at the time of the intercourse;~~
- ~~3.2.~~ 2. The woman submitted to the intercourse because she believed the defendant was someone she knew, other than the defendant;

AND

- ~~4.3.~~ 4. The defendant tricked her, lied to her, [used an artifice or pretense,] or concealed information from her, intending to make her believe he was someone she knew, while intending to hide his own identity.

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

New January 2006; Revised February 2015, March 2022

BENCH NOTES

Instructional Duty

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

Penal Code section 261, as amended by Assembly Bill 1171 (Stats. 2021, ch. 626), became effective on January 1, 2022. If the defendant's alleged act occurred before this date, the court should give the prior version of this instruction.

~~Penal Code section 261(a)(5) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

AUTHORITY

- Elements. ▶ Pen. Code, § 261(a)(5).
- Penetration Defined. ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].

COMMENTARY

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

LESSER INCLUDED OFFENSES

- Attempted Rape. ▶ Pen. Code, §§ 663, 261.

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 16–17.

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

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:186, 12:197 (The Rutter Group).

1006-1014 Reserved for Future Use

1015. Oral Copulation by Force, Fear, or Threats (Pen. Code, § 287(c)(2) & (3), (k))

The defendant is charged [in Count __] with oral copulation by force [in violation of Penal Code section 287].

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

1. The defendant committed an act of oral copulation with someone else;
2. The other person did not consent to the act;

AND

3. The defendant accomplished the act by

<Alternative 3A—force or fear>

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

<Alternative 3B—future threats of bodily harm>

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

<Alternative 3C—threat of official action>

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

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

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

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

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

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

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that 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 other person and (his/her) relationship to the defendant.]

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

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

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

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

New January 2006; Revised August 2006, October 2021, March 2022

BENCH NOTES

Instructional Duty

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

Select the appropriate alternative in element 3 to instruct how the act was allegedly accomplished.

Related Instructions

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. ▶ Pen. Code, § 287(c)(2) & (3), (k).
- Consent Defined. ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. ▶ Pen. Code, § 261(c) [in context of rape].
- Oral Copulation Defined. ▶ Pen. Code, § 287(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Threatening to Retaliate Defined. ▶ Pen. Code, § 287(1).
- Fear Defined. ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826].
- Threatening to Retaliate. ▶ *People v. White* (2005) 133 Cal.App.4th 473, 484–485 [34 Cal.Rptr.3d 848]; *People v. Ward* (1986) 188 Cal.App.3d 459, 468 [233 Cal.Rptr. 477].

COMMENTARY

Penal Code section 287 requires that the oral copulation be “against the will” of the other person. (Pen. Code, § 287(c)(2) & (3), (k).) “Against the will” has been defined as “without consent.” (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of “fear” because that term has meaning in the context of forcible oral copulation that is technical and may not

be readily apparent to jurors. (See *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 287~~8a~~ does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of “duress” is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of “menace” is based on the statutory definitions contained in Penal Code sections 261 ~~and 262~~ [(rape)]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal*, *supra*, 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of “duress” contained in Penal Code sections 261 and ~~former~~ 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of “menace.” The court should consider the *Leal* opinion before giving the definition of “menace.”

The term “force” as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826]). In *People v. Griffin*, *supra*, the Supreme Court further stated,

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

(*People v. Griffin*, *supra*, 33 Cal.4th at pp. 1023–1024 [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826] [*Griffin* reasoning applies to violation of Pen. Code, § 287(c)(2)].)

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

LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Oral Copulation. ▶ Pen. Code, §§ 663, 287.
- Battery. ▶ Pen. Code, § 242.

RELATED ISSUES

Consent Obtained by Fraudulent Representation

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

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to oral copulation was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Multiple Acts of Oral Copulation

An accused may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446–1447 [278 Cal.Rptr. 452] [defendant properly convicted of multiple violations of former Pen. Code, § 288a where he interrupted the acts of copulation and forced victims to change positions].)

Sexual Organ

A man’s “sexual organ” for purposes of Penal Code section 287 includes the penis and the scrotum. (Pen. Code, § 287; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448–1449 [278 Cal.Rptr. 452].)

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35–38, 178.

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

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:1~~86~~, 12:1~~97~~ (The Rutter Group).

1016. Oral Copulation in Concert (Pen. Code, § 287(d))

The defendant[s] [_____ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count __] with committing oral copulation by acting in concert [with _____ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code section 287(d)].

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

<Alternative A—defendant committed oral copulation>

[1.] [The defendant personally committed oral copulation and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<Alternative B—defendant aided and abetted>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed oral copulation.]

To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] committed oral copulation, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted oral copulation, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved oral copulation in concert.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ORAL COPULATION AND AIDING AND ABETTING ARE GIVEN.>

[To prove the crime of oral copulation in concert, the People do not have to prove a prearranged plan or scheme to commit oral copulation.]

New January 2006; Revised October 2021, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 287(d).) The court also has a **sua sponte** duty to instruct on oral copulation. Give one or more of the following instructions defining oral copulation: CALCRIM No. 1015 or CALCRIM Nos. 1017–1022.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

Related Instructions

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

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. ▶ Pen. Code, § 287(d).
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658] [in context of sodomy in concert].
- Consent Defined. ▶ *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].

LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [when forcible crime is charged].
- Attempted Oral Copulation. ▶ Pen. Code, §§ 664, 287.
- Attempted Oral Copulation in Concert. ▶ Pen. Code, §§ 663, 287(d).
- Battery. ▶ Pen. Code, § 242.

- Oral Copulation. ▶ Pen. Code, § 287.

RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape ~~or Spousal Rape~~ in Concert*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35, 40, 178.

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

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:186, 12:197 (The Rutter Group).

1030. Sodomy by Force, Fear, or Threats (Pen. Code, § 286(c)(2), & (3), (k))

The defendant is charged [in Count __] with sodomy by force [in violation of Penal Code section 286].

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

1. The defendant committed an act of sodomy with another person;
2. The other person did not consent to the act;

AND

3. The defendant accomplished the act:

<Alternative 3A—force or fear>

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

<Alternative 3B—future threats of bodily harm>

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

<Alternative 3C—threat of official action>

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

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

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

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

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

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

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that 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 other person and (his/her) relationship to the defendant.]

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

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

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

[The other person must be alive at the time of the act for the crime of sodomy to occur.]

<Defense: Reasonable Belief in Consent>

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

New January 2006; Revised August 2006, February 2012, October 2021, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of sodomy. (Pen. Code, § 286(c)(2), (3), (k); *People v. Martinez* (1986) 188

Cal.App.3d 19, 24–26 [232 Cal.Rptr. 736]; *People v. Moore* (1989) 211 Cal.App.3d 1400, 1407 [260 Cal.Rptr. 134].)

The court should select the appropriate alternative in element 3 to instruct how the sodomy was accomplished.

Sodomy requires that the victim be alive at the moment of the act. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175–1177 [270 Cal.Rptr. 286, 791 P.2d 965]; If this is an issue in the case, give the bracketed sentence that begins with “The other person must be alive . . .”

Defenses—Instructional Duty

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

Related Instructions

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. ▶ Pen. Code, § 286(c)(2), (3), (k).
- Consent Defined. ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. ▶ Pen. Code, § 261(c) [in context of rape].
- Sodomy Defined. ▶ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Threatening to Retaliate Defined. ▶ Pen. Code, § 286(l).
- Fear Defined. ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].

COMMENTARY

Penal Code section 286 requires that the sodomy be “against the will” of the other person. (Pen. Code, § 286(c)(2), (3), (k).) “Against the will” has been defined as “without consent.” (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

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

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 286 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, supra*, 170 Cal.App.3d at 50. The definition of “menace” is based on the statutory definitions contained in Penal Code sections 261 and 262 [(rape)]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra*, 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of “duress” contained in Penal Code sections 261 and former 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of “menace.” The court should consider the *Leal* opinion before giving the definition of “menace.”

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

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

subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

(*Ibid.* [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].)

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

LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Forcible Sodomy. ▶ Pen. Code, §§ 664, 286.
- Battery. ▶ Pen. Code, § 242; *People v. Hughes* (2002) 27 Cal.4th 287, 366 [116 Cal.Rptr.2d 401, 39 P.3d 432].

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

RELATED ISSUES

Consent Obtained by Fraudulent Representation

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

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sodomy was withdrawn, see CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Victim Must Be Alive

Sodomy requires that the victim be alive at the moment of penetration. (*People v. Davis* (1995) 10 Cal.4th 463, 521, fn. 20 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176 [270 Cal.Rptr. 286, 791 P.2d 965].) Sodomy with a deceased victim can constitute attempted sodomy if the defendant attempted an act of forcible sodomy while the victim was alive or with the mistaken belief that the victim was alive. (*People v. Davis, supra*, 10 Cal.4th at p. 521, fn. 20; *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683].)

Penetration May Be Through Victim's Clothing

If there is penetration into a victim's anus by a perpetrator's sexual organ, it is sodomy, even if the victim is wearing clothing at the time. (*People v. Ribera* (2005) 133 Cal.App.4th 81, 85–86 [34 Cal.Rptr.3d 538].)

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 27, 28, 30, 178.

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

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:186, 12:197 (The Rutter Group).

1031. Sodomy in Concert (Pen. Code, § 286(d))

The defendant[s] [_____ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count __] with committing sodomy by acting in concert [with _____ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code section 286(d)].

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

<Alternative A—defendant committed sodomy >

[1.] [The defendant personally committed sodomy and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<Alternative B—defendant aided and abetted>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sodomy.]

To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] committed sodomy, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted sodomy, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sodomy in concert.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SODOMY AND AIDING AND ABETTING ARE GIVEN.>

[To prove the crime of sodomy in concert, the People do not have to prove a prearranged plan or scheme to commit sodomy.]

New January 2006; Revised October 2021, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404])

[rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sodomy. Give one or more of the following instructions defining sodomy: CALCRIM No. 1030 or CALCRIM Nos. 1032–1037.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

Related Instructions

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

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. ▶ Pen. Code, § 286(d).
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].

LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Sodomy. ▶ Pen. Code, §§ 664, 286.
- Attempted Sodomy in Concert. ▶ Pen. Code, §§ 663, 286(d).
- Battery. ▶ Pen. Code, § 242.

- Sodomy. ▶ Pen. Code, §§ 663, 286.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or ~~Spousal Rape~~ in Concert*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 34.

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

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:186, 12:197 (The Rutter Group).

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

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

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

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

AND

4. The defendant accomplished the act:

<Alternative 4A—force or fear>

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

<Alternative 4B—future threats of bodily harm>

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

<Alternative 4C—threat of official action>

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

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

[A ***foreign object, substance, instrument, or device*** includes any part of the body except a sexual organ.] [An ***unknown object*** includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

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

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

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

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

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

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

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

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

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

<Defense: Reasonable Belief in Consent>

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

New January 2006; Revised August 2016, April 2020, October 2021, March 2022

BENCH NOTES

Instructional Duty

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

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

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.” (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].) The statutory presumption that a minor over 14 is incapable of legal consent does not apply to a violation of Penal Code section 289(a)(1)(C). (*People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, 339 [262 Cal.Rptr.3d 774].)

Related Instructions

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. ▶ Pen. Code, § 289(a)(1), (2), (g).
- Specific Intent Crime. ▶ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Consent Defined. ▶ Pen. Code, §§ 261.6, 261.7.

- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Foreign Object, Substance, Instrument, or Device Defined. ▶ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a “foreign object”].
- Menace Defined. ▶ Pen. Code, § 261(c) [in context of rape].
- Sexual Penetration Defined. ▶ Pen. Code, § 289(k); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Threatening to Retaliate Defined. ▶ Pen. Code, § 289(l).
- Unknown Object Defined. ▶ Pen. Code, § 289(k)(3).
- Fear Defined. ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Intent. ▶ *People v. Senior* (1992) 3 Cal.App.4th 765, 776 [5 Cal.Rptr.2d 14] [specific intent is “purpose of sexual arousal, gratification, or abuse”].
- Mistake of Fact Regarding Consent. ▶ See *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337] [in context of kidnapping and rape]; *People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, 339 [262 Cal.Rptr.3d 774] [noting minor over 14].
- Sexual Abuse Defined. ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

COMMENTARY

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

The instruction includes an optional definition of the sufficiency of “fear” because that term has meaning in the context of forcible sex offenses that is technical and may not be readily apparent to jurors. (See *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651] [fear in context of sodomy and oral copulation];

People v. Iniguez (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

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

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

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

(*Ibid.* at 1023–1024 [emphasis in original].)

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Consent Obtained by Fraudulent Representation

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

Consent Withdrawn

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

Minor Victim

When sexual penetration is committed against the will of a person who is incapable of consent, such as a baby, and is accomplished by physical force that results in physical

injury to the victim, the statutory requirements “against the will” and “use of force” are fully satisfied. (*People v. White* (1986) 179 Cal.App.3d 193, 202 [224 Cal.Rptr. 467].)

Multiple Penetrations

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

SECONDARY SOURCES

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

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

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:1~~86~~, 12:1~~97~~ (The Rutter Group).

1046. Sexual Penetration in Concert (Pen. Code, §§ 264.1, 289(a)(1))

The defendant[s] [_____ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count __] with committing sexual penetration by acting in concert [with _____ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code sections 264.1 and 289(a)(1)].

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

<Alternative A—defendant committed sexual penetration>

[1.] [The defendant personally committed sexual penetration and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<Alternative B—defendant aided and abetted>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sexual penetration.]

To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] committed sexual penetration, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted sexual penetration, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sexual penetration in concert.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SEXUAL PENETRATION AND AIDING AND ABETTING ARE GIVEN.>

[To prove the crime of sexual penetration in concert, the People do not have to prove a prearranged plan or scheme to commit sexual penetration.]

New January 2006; Revised October 2021, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sexual penetration. Give one or more of the following instructions defining sexual penetration: CALCRIM Nos. 1045 or 1047–1051.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

Related Instructions

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

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. ▶ Pen. Code, §§ 264.1, 289(a)(1); see *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [rape in concert requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Attempted Sexual Penetration. ▶ Pen. Code, §§ 664, 289(a)(1).
- Attempted Sexual Penetration in Concert. ▶ Pen. Code, §§ 663, 264.1, 289(a)(1).

- Battery. ▶ Pen. Code, § 242.
- Sexual Penetration. ▶ Pen. Code, § 289(a)(1).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape ~~or Spousal Rape~~ in Concert*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 21.

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

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:186, 12:197 (The Rutter Group).

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

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

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

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

[AND]

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

<Give element 4 when instructing on force or violence>

[AND]

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

A lewd or lascivious act is any touching of a person with the intent to sexually arouse the perpetrator or the other person. *A lewd or lascivious act* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]

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

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

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

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

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

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

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

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

New January 2006; Revised February 2013, September 2017, March 2022

BENCH NOTES

Instructional Duty

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

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM

No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra*, 51 Cal.3d at pp. 321–322.

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

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

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

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

Defenses—Instructional Duty

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

AUTHORITY

- Elements. ▶ Pen. Code, § 288(b)(2) & (c)(2).
- Caretaker Defined. ▶ Pen. Code, § 288(f)(1) & (g).
- Dependent Person Defined. ▶ Pen. Code, § 288(f)(3).
- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Elder Defined. ▶ See Pen. Code, § 368(g).
- Menace Defined. ▶ See Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. ▶ See *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching With Intent to Arouse. ▶ See *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Dependent Person Touching Own Body Parts at Defendant’s Instigation. ▶ See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] [“constructive” touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. ▶ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- Lewd Defined. ▶ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

COMMENTARY

The instruction includes definitions of “force” and “fear” because those terms have meanings in the context of the crime of lewd acts by force that are technical

and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The Court of Appeal has held that the definition of “force” as used in Penal Code section 288(b), subsection (1) (lewd acts by force with a minor) is different from the meaning of “force” as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, “force” does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, “force” means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of “force.” (*People v. Pitmon, supra*, 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra*, 33 Cal.4th at pp. 1026–1028.) It would seem that this definition of “force” would also apply to the crime of lewd acts with a dependant person, under Penal Code section 288(b), subsection (2).

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

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Dependent Person. ▶ Pen. Code, §§ 664, 288(c)(2).
- Attempted Lewd Act by Force With Dependent Person. ▶ Pen. Code, §§ 664, 288(b)(2).
- Simple Battery Not Lesser Included Offense of Lewd Act on Dependent Person Under the Statutory Elements Test. ▶ *People v. Chenelle* (2016) 4 Cal.App.5th 1255, 1263-1264 [209 Cal.Rptr.3d 371].

RELATED ISSUES

Developmental Disability

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 41, 47–55, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:186, 12:197 (The Rutter Group).

1123. Aggravated Sexual Assault of Child Under 14 Years (Pen. Code, § 269(a))

The defendant is charged [in Count __] with aggravated sexual assault of a child who was under the age of 14 years and at least seven years younger than the defendant [in violation of Penal Code section 269(a)].

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

1. The defendant committed _____ <insert sex offense specified in Pen. Code, § 269(a)(1)–(5)> on another person;

AND

2. When the defendant acted, the other person was under the age of 14 years and was at least seven years younger than the defendant.

To decide whether the defendant committed _____ <insert sex offense specified in Pen. Code, § 269(a)(1)–(5)>, please refer to the separate instructions that I (will give/have given) you on that crime.

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

New January 2006; Revised June 2007, March 2022

BENCH NOTES

Instructional Duty

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

In element 1 and in the sentence following element 2, insert the sex offense specified in Penal Code section 269(a)(1)–(5) that is charged. The sex offenses specified in section 269(a)(1)–(5) and their applicable instructions are:

1. Rape (Pen. Code, § 261(a)(2); see CALCRIM No. 1000, *Rape-~~or~~ Spousal Rape* by Force, Fear, or Threats).

2. Rape or sexual penetration in concert (Pen. Code, § 264.1; see CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, and CALCRIM No.1046, *Sexual Penetration in Concert*).
3. Sodomy (Pen. Code, § 286(c)(2); see CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*).
4. Oral copulation (Pen. Code, § 2878a(c)(2); see CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*).
5. Sexual penetration (Pen. Code, § 289(a); see CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*).

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

AUTHORITY

- Elements. ▶ Pen. Code, § 269(a).

LESSER INCLUDED OFFENSES

- Simple Assault. ▶ Pen. Code, § 240.
- Underlying Sex Offense. ▶ Pen. Code, §§ 261(a)(2) [rape], 264.1 [rape or sexual penetration in concert], 286(c)(2) [sodomy], 287(c)(2) [oral copulation], 289(a) [sexual penetration].

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 65, 178.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[2][a], [c], [7][c] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:186, 12:197 (The Rutter Group).

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

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

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

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

AND

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

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

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

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

New January 2006; Revised February 2012, February 2013, August 2013, April 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

Related Instructions

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

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

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

AUTHORITY

- Elements. ▶ Pen. Code, §§ 207(b), 288(a).
- Increased Prison Term If Victim Under 14 Years of Age. ▶ Pen. Code, § 208(b).
- Asportation Requirement. ▶ See *People v. Robertson* (2012) 208 Cal. App. 4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 & fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20

Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512]; *People v. Rayford* (1994) 9 Cal.4th 1, 11–14, 20 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225].

- Lewd or Lascivious Acts Defined. ▶ *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; *People v. Levesque* (1995) 35 Cal.App.4th 530, 538–542 [41 Cal.Rptr.2d 439]; *People v. Marquez* (1994) 28 Cal.App.4th 1315, 1321–1326 [33 Cal.Rptr.2d 821].
- Movement of Victim Need Not Substantially Increase Risk of Harm to Victim. ▶ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 & fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512].

LESSER INCLUDED OFFENSES

- Kidnapping. ▶ Pen. Code, § 207.

~~Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65–71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)~~

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

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 281–282, 291.

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

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

1201. Kidnapping: Child or Person Incapable of Consent (Pen. Code, § 207(a), (e))

The defendant is charged [in Count __] with kidnapping (a child/ [or] a person with a mental impairment who was not capable of giving legal consent to the movement) [in violation of Penal Code section 207].

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

1. The defendant used (physical force/~~deception~~fear) to take and carry away an unresisting (child/ [or] person with a mental impairment);
2. The defendant moved the (child/ [or] person with a mental impairment) a substantial distance(;/.)

[AND]

<Section 207(e)>

- [3. The defendant moved the child with an illegal intent or for an illegal purpose(;/.)]

[AND]

<Alternative 4A—alleged victim under 14 years.>

- [4. The child was under 14 years old at the time of the movement(;/.)]

<Alternative 4B—alleged victim has mental impairment.>

- [(3/4). _____ <Insert name of complaining witness> suffered from a mental impairment that made (him/her) incapable of giving legal consent to the movement.]

Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]

A person is incapable of giving legal consent if he or she is unable to understand the act, its nature, and possible consequences.

~~{Deception includes tricking the (child/mentally impaired person) into accompanying him or her a substantial distance for an illegal purpose.}~~

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

New January 2006; Revised April 2008, April 2020, September 2020, October 2021, March 2022

BENCH NOTES

Instructional Duty

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

Give alternative 4A if the defendant is charged with kidnapping a person under 14 years of age. (Pen. Code, § 208(b).) Do not use this bracketed language if a biological parent, a natural father, an adoptive parent, or someone with access to the child by a court order takes the child. (*Ibid.*) Give alternative 4B if the alleged victim has a mental impairment.

In the paragraph defining “substantial distance,” give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512].) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

Give this instruction when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement. (See, e.g., *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; see also 2003 Amendments to Pen. Code, § 207(e) [codifying holding of *In re Michele D.*].) Give CALCRIM No. 1200, *Kidnapping: For Child Molestation*, when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act.

Give 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].)

There is no sua sponte duty to define “illegal intent” or “illegal purpose.” (*People v. Singh* (2019) 42 Cal.App.5th 175, 181-183 [254 Cal.Rptr.3d 871].)

Related Instructions

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*.

AUTHORITY

- Elements. ▶ Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age. ▶ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim’s age not defense].
- Asportation Requirement. ▶ See *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child. ▶ *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; Pen. Code, § 207(e).
- Force Required to Kidnap Unconscious and Intoxicated Adult. ▶ *People v. Daniels* (2009) 176 Cal.App.4th 304, 333 [97 Cal.Rptr.3d 659].
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent. ▶ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593]; but see *People v. Hartland* (2020) 54 Cal.App.5th 71, 80 [268 Cal.Rptr.3d 1] [an illegal purpose or intent is not required for an intoxicated and resisting adult victim].

- Substantial Distance Requirement. ▶ *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].
- ~~Deceit Alone Does Not May Substitute for Force. ▶ *People v. Nieto* (2021) 62 Cal.App.5th 188, 195 [276 Cal.Rptr.3d 379] *People v. Dalerio* (2006) 144 Cal.App.4th 775, 783 [50 Cal.Rptr.3d 724] [taking requirement satisfied when defendant relies on deception to obtain child’s consent and through verbal directions and his constant physical presence takes the child substantial distance].~~
- ~~This Instruction Upheld. ▶ *People v. Singh* (2019) 42 Cal.App.5th 175, 181–183 [254 Cal.Rptr.3d 871] [no sua sponte duty to define “illegal intent” or “illegal purpose”].~~

COMMENTARY

Penal Code section 207(a) uses the term “steals” in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses “take and carry away” as the more inclusive terms, but the statutory terms “steal,” “hold,” “detain” and “arrest” may be used if any of these more closely matches the evidence.

LESSER INCLUDED OFFENSES

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 286-289.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person* § 142.14[1], [2][a] (Matthew Bender).

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

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

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

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

[AND]

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

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

[AND]

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

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

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

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

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

<Defense: Good Faith Belief in Consent>

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

<Defense: Consent Given>

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

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

New January 2006; Revised June 2007, April 2008, February 2013, August 2013, April 2020, March 2022

BENCH NOTES

Instructional Duty

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

In addition, the court has a **sua sponte** duty to instruct on the elements of the alleged underlying crime.

Give the bracketed definition of “consent” on request.

Defenses—Instructional Duty

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

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

Timing of Necessary Intent

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

Related Instructions

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

AUTHORITY

- Elements. ▶ Pen. Code, § 209(b)(1); *People v. Robertson* (2012) 208 Cal. App. 4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 869–870 & fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512]; *People v. Rayford* (1994) 9 Cal.4th 1 [36 Cal.Rptr.2d 317]; *People v. Daniels* (1969) 71 Cal.2d. 1119 [80 Cal.Rptr. 897, 459 P.2d 225].
- Robbery Defined. ▶ Pen. Code, § 211.
- Rape Defined. ▶ Pen. Code, § 261.
- Other Sex Offenses Defined. ▶ Pen. Code, §§ ~~262 [spousal rape]~~, 264.1 [acting in concert], 286 [sodomy], 287 [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking. ▶ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery. ▶ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim. ▶ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear. ▶ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].
- Movement of Victim Need Not Substantially Increase Risk of Harm to Victim. ▶ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512].

- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent. ▶ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].

LESSER INCLUDED OFFENSES

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

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

RELATED ISSUES

Psychological Harm

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 293–300, 310, 311–313.

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

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

1215. Kidnapping (Pen. Code, § 207(a))

The defendant is charged [in Count __] with kidnapping [in violation of Penal Code section 207(a)].

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

1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;
2. Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;

[AND]

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

<Give element 4 when instructing on reasonable belief in consent.>

[AND]

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

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

Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as [whether the distance the other person was moved was beyond that merely incidental to the commission of _____ <insert associated crime>], whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]

<Defense: Good Faith Belief in Consent>

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

reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>

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

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

New January 2006; Revised October 2010, April 2020, October 2021, March 2022

BENCH NOTES

Instructional Duty

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

In the paragraph defining “substantial distance,” give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512].) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez*, *suprasupra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

The court must give the bracketed language on movement incidental to an associated crime when it is supported by the evidence. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 237; *People v. Bell* (2009) 179 Cal.App.4th 428, 439 [102 Cal.Rptr.3d 300].)

Give the bracketed definition of “consent” on request.

Defenses—Instructional Duty

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

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

Related Instructions

If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*. An illegal purpose or intent is not required for an intoxicated and resisting adult victim. (*People v. Hartland* (2020) 54 Cal.App.5th 71, 80 [268 Cal.Rptr.3d 1].)

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to other defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*, and CALCRIM No. 1226, *Defense to Kidnapping: Citizen’s Arrest*.

AUTHORITY

- Elements. ▶ Pen. Code, § 207(a).

- Punishment If Victim Under 14 Years of Age. ▶ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim’s age not a defense].
- Asportation Requirement. ▶ *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement. ▶ See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119].
- Force or Fear Requirement. ▶ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820]; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent. ▶ Pen. Code, § 26(3) [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].
- Incidental Movement Test. ▶ *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Intent Requirement. ▶ *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Moya* (1992) 4 Cal.App.4th 912, 916 [6 Cal.Rptr.2d 323].
- Substantial Distance Requirement. ▶ *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

COMMENTARY

Penal Code section 207(a) uses the term “steals” in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses “take,” “hold,” or “detain” as the more inclusive terms, but includes in brackets the statutory terms “steal” and “arrest” if either one more closely matches the evidence.

LESSER INCLUDED OFFENSES

- False Imprisonment ▶ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

Threat of Arrest

“[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant’s conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim’s belief is objectively reasonable.” (*People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360].)

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 281–291, 316.

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

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

1216–1224. Reserved for Future Use

1350. Hate Crime: Misdemeanor Interference With Civil Rights by Force (Pen. Code, § 422.6(a))

The defendant is charged [in Count __] with interfering with another person's civil rights by the use of force [in violation of Penal Code section 422.6(a)].

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

1. The defendant used force to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____ <describe the right allegedly infringed, e.g., "be free from violence or bodily harm">, established by the law or Constitution of California or the United States;
2. The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

3. The defendant intended to interfere with the other person's legally protected right [or privilege].

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

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality, as used here, means ~~includes citizenship~~, country of origin, immigration status, including citizenship, and national origin.*]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

New January 2006; Revised March 2017, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. ~~This statute was substantially revised, effective January 1, 2005.~~

If the prosecution is based on the defendant’s speech alone, do not give this instruction. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].) Give CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

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

AUTHORITY

- Elements ▶ Pen. Code, § 422.6(a).
- Willfully Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).

- Specific Intent to Deprive Individual of Protected Right Required ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Not Limited to “Significant Constitutional Rights.” ▶ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▶ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

RELATED ISSUES

Defendant Need Not Know He or She Is Violating the Law

“ ‘[S]pecific intent’ under the statute does not require an actual awareness on the part of the defendant that he is violating another’s constitutional rights. It is enough that he engages in activity that interferes with rights clearly and specifically protected by the laws of the United States.” (*People v. Lashley* (1991) 1 Cal.App.4th 938, 948 [2 Cal.Rptr.2d 629].) “It is sufficient if the right is clearly defined and that the defendant intended to invade interests protected by constitutional or statutory authority.” (*Id.* at p. 949.)

Penal Code Section 654

In *In re M.S.* (1995) 10 Cal.4th 698, 727 [42 Cal.Rptr.2d 355, 896 P.2d 1365], the court rejected the argument that Penal Code section 654 does not apply to convictions under Penal Code section 422.6. In 2004, the Legislature amended the statute to add subdivision (d), which specifically states that Penal Code section 654 applies to convictions under Penal Code section 422.6.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

1351. Hate Crime: Misdemeanor Interference With Civil Rights by Threat (Pen. Code, § 422.6(a) & (c))

The defendant is charged [in Count __] with interfering with another person's civil rights by threatening violence [in violation of Penal Code section 422.6].

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

1. The defendant threatened physical violence against a specific person [or a specific group of people];
2. The threat would have caused a reasonable person to be afraid because the defendant appeared able to carry out the threat;
3. The defendant used the threat to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____ <describe the right allegedly infringed, e.g., "be free from violence or bodily harm">, established by the law or Constitution of California or the United States;
4. The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

5. The defendant intended to interfere with the other person's legally protected right [or privilege].

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

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or]

nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality, as used here, means ~~includes citizenship~~, country of origin, immigration status, including citizenship, and national origin.*]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

New January 2006; Revised March 2017, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. ~~This statute was substantially revised, effective January 1, 2005.~~

Give this instruction if the prosecution is based on the defendant's speech alone. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

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

AUTHORITY

- Elements ▶ Pen. Code, § 422.6(a) & (c).
- Willfully Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).

- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Requirements for Threat of Violence ▶ Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Not Limited to “Significant Constitutional Rights.” ▶ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▶ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

RELATED ISSUES

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

1352. Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property (Pen. Code, § 422.6(b))

The defendant is charged [in Count __] with interfering with another person's civil rights by damaging property [in violation of Penal Code section 422.6(b)].

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

1. The defendant (defaced[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by another person;
2. The defendant knew that (he/she) was (defacing[,]/ [or] damaging[,]/ [or] destroying) property that was (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by that person;
3. The defendant did so for the purpose of interfering with [or intimidating] that person's free exercise or enjoyment of the right [or privilege] to _____ <describe the right allegedly infringed, e.g., "be free from violence or bodily harm">, established by the law or Constitution of California or the United States;
4. The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

5. The defendant intended to interfere with the other person's legally protected right [or privilege].

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual

orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality, as used here, means ~~includes citizenship~~, country of origin, immigration status, including citizenship, and national origin.*]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

New January 2006; Revised March 2017, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. ~~This statute was substantially revised, effective January 1, 2005.~~

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

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

AUTHORITY

- Elements ▶ Pen. Code, § 422.6(b).
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].

- Not Limited to “Significant Constitutional Rights” ▶ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▶ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Victim Need Not Own Property ▶ *In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [104 Cal.Rptr.2d 10].

RELATED ISSUES

Target of Intimidation Need Not Own Property

“[T]he phrase ‘property of any other person’ in section 422.6, subdivision (b) does not require that the victim own the property. As long as the property is regularly and openly used, possessed, or occupied by the victim so that it is readily identifiable with him or her, it falls within the statutory scope.” (*In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [104 Cal.Rptr.2d 10] [classroom was the “property of” the students whose class met there].)

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

1354. Hate Crime Allegation: Felony (Pen. Code, § 422.75(a)–(c))

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

To prove this allegation [for each crime] the People must prove that the defendant committed that crime in whole or in part because of the alleged victim’s actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]).

As used here, *victim* includes, but is not limited to, a (person[,]/ [or] individual[,]/ [or] family[,]/ [or] group[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] entity[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other victim or intended victim of the crime).

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the victim if:

1. The defendant was biased against the victim based on the victim’s actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality*, as used here, means ~~includes citizenship~~, country of origin, immigration status, including citizenship, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

[If you conclude that the People have proved that the crime[s] committed by the defendant (was a/were) hate crime[s], you must also decide whether the defendant voluntarily acted together with another person by either personally committing the crime or by aiding and abetting another person in committing the crime.]

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

New January 2006; Revised March 2017, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490)

[120 S.Ct. 2348, 147 L.Ed.2d 435].) ~~This statute was substantially revised, effective January 1, 2005.~~

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined*.

If the prosecution alleges that the defendant acted in concert with another, pursuant to Penal Code section 422.75(b), give the bracketed sentence that begins with “If you conclude that the People have proved.” Give all relevant instructions on aiding and abetting. The jury must be provided with a verdict form on which it may indicate whether this factor has also been proved.

If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.75(d), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

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

Related Instructions

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damage to Property*.

CALCRIM No. 1355, *Hate Crime Allegation: Misdemeanor*.

AUTHORITY

- Enhancement ▶ Pen. Code, § 422.75(a)–(c).
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].

- Victim Defined ▶ Pen. Code, § 422.56(i).
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense ▶ See *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Aiding and Abetting ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Acting in Concert ▶ See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341 [122 Cal.Rptr. 658] [construing sodomy-in-concert statute]; *People v. Lopez* (1981) 116 Cal.App.3d 882, 886 [172 Cal.Rptr. 374] [construing rape-in-concert statute].
- No Specific Intent Required ▶ *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 740–741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].

SECONDARY SOURCES

3 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Punishment, § 373.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

1355. Hate Crime Allegation: Misdemeanor (Pen. Code, § 422.7)

If you find the defendant guilty of _____ *<insert offense[s]>* [as charged in Count[s] __], you must then decide whether the People have proved the additional allegation that the crime[s] committed by the defendant (was a/were) hate crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation [for each crime], the People must prove that:

1. When committing that crime, the defendant intended to interfere with [or intimidate] another person's free exercise or enjoyment of the right [or privilege] to _____ *<describe the right raised by the evidence>*, established by the law or Constitution of California or the United States;

[AND]

2. The defendant acted in whole or in part because of the other person's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s])(;/.)

[AND]

<Alternative 3A—caused physical injury>

- [3. When committing that crime, the defendant caused an actual physical injury or had the ability at that time to cause a violent injury.]

<Alternative 3B—caused property damage>

- [3. The defendant caused property damage in excess of \$950.]]

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality, as used here, means ~~includes citizenship~~, country of origin, immigration status, including citizenship, and national origin.*]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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

New January 2006; Revised February 2012, March 2017, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (*People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324] [statute defines enhancement, not separate offense].) This enhancement makes a crime “committed against the person or property of another” that would otherwise be a misdemeanor into a misdemeanor-felony “wobbler.” (Pen. Code, § 422.7.) ~~This statute was substantially revised, effective January 1, 2005.~~

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43 & 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give element 3A if the prosecution alleges that the crime was committed “against a person” and caused injury or included “the present ability to commit a violent injury.” (Pen. Code, § 422.7(a)). Give element 3B if the prosecution alleges property damage exceeding \$950. (Pen. Code, § 422.7(b).) If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.7(c), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined*.

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

Related Instructions

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property*.

CALCRIM No. 1354, *Hate Crime Allegation: Felony*.

AUTHORITY

- Enhancement ▶ Pen. Code, § 422.7.
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense ▶ *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Intent to Deprive Individual of Protected Rights ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1268 [40 Cal.Rptr.2d 793]; *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1742 [17 Cal.Rptr.2d 291].

LESSER INCLUDED OFFENSES

The underlying misdemeanor, and the attempt of the underlying misdemeanor (see Pen. Code, § 664), are lesser included offenses of a violation of Penal Code section 422.7.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

1356–1399. Reserved for Future Use

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

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

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

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

AND

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

OR

- b. aiding and abetting a felony offense.

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

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

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

<If criminal street gang has already been defined.>

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

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

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

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

AND

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

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

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

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

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

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

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

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

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

~~{OR}~~

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

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

~~AND~~

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

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

~~AND~~

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

AND

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

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

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

[To decide whether a member of the gang [or the defendant] committed
_____ <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>

please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

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

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

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

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

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

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

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

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

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

1. A member of the gang committed the crime;
2. The defendant knew that the gang member intended to commit the crime;

3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

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

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

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

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

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

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

AND

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

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

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

BENCH NOTES

Instructional Duty

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

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

~~In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)~~

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].)

Note that a defendant’s misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under section

12025(b)(3) or 12031(a)(2)(C).- *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

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

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

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

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

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

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

AUTHORITY

- Elements. ▶ Pen. Code, § 186.22(a); ~~*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307]~~.
- Active Participation Defined. ▶ ~~Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278]~~.
- Criminal Street Gang Defined. ▶ Pen. Code, § 186.22(f); ~~see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]~~.
- Pattern of Criminal Gang Activity Defined. ▶ Pen. Code, § 186.22(e), (g); ~~*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]~~.
- Examples of Common Benefit. ▶ Pen. Code, § 186.22(g).
- Willful Defined. ▶ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- ~~Separate Intent From Underlying Felony.~~ ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533,

290 P.3d 1143]; *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].

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

COMMENTARY

The jury may not consider ~~past offenses as well as the~~ circumstances of the charged crime to establish a pattern of criminal activity. (Pen. Code, § 186.22(e)(2).) (~~*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.)~~ A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. ~~The charged crime may serve as a predicate offense~~ (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), ~~as can a~~ another offense committed on the same occasion by a fellow gang member may serve as a predicate offense. (*People v. Loewn* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran*, (2002) *supra*, 97 Cal.App.4th 1448, at p. 1458 [119 Cal.Rptr.2d 272] [original italics].) The “felonious criminal conduct” need not be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062].)

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

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

RELATED ISSUES

Conspiracy

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

Labor Organizations or Mutual Aid Activities

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

Related Gang Crimes

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

Unanimity

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

SECONDARY SOURCES

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

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

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

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

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

To prove this allegation, the People must prove that:

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

AND

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

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

<If criminal street gang has already been defined.>

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

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

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

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

AND

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

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

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

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

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

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

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

~~1A-~~ (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1) ~~(25), (31) (33)~~>;

~~{OR}~~

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

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

AND

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

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;

4. _____

5.3. _____ AND

4. The crimes were committed on separate occasions or were personally committed by two or more memberspersons;

5. The crimes commonly benefitted a criminal street gang;

AND

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

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

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>*

please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

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

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

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

commission of that crime ~~and whether a pattern of criminal gang activity has been proved.~~]

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

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

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

~~[To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies from Pen. Code, § 186.22(e)(1) (25), (31–33)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]~~

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

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

BENCH NOTES

Instructional Duty

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

~~In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1) (25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 323–324.)~~

~~In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.*~~

~~(1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient] if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)~~

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

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

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

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

The court ~~must~~may bifurcate the trial on the gang enhancement, upon request of the defense, at its discretion. (Pen. Code, § 1109(a)~~*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.~~) If the trial is bifurcated, give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

Related Instructions

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

AUTHORITY

- Enhancement ▶ Pen. Code, § 186.22(b)(1).

- ~~“For the Benefit of, at the Direction of, or in Association With Any Criminal Street Gang” Defined.~~ ▶ ~~*People v. Albillar* (2010) 51 Cal.4th 47, 59–64 [119 Cal.Rptr.3d 415, 244 P.3d 1062].~~
- Specific Intent Defined.- ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); ~~see *People v. Duran, supra*, 97 Cal.App.4th at pp. 1464–1465.~~
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e), (g); ~~*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236];~~ see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- “To Benefit, Promote, Further, or Assist” Defined ▶ Pen. Code, § 186.22(g).
- Active or Current Participation in Gang Not Required ▶ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▶ *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138–1139 [150 Cal.Rptr.3d 533].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458~~1448, 1464–1465 [119 Cal.Rptr.2d 272].~~
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ ~~*People v. Prunty* (2015) 62 Cal.4th 59, 81–85 [192 Cal.Rptr.3d 309, 355 P.3d 480].~~

RELATED ISSUES

Commission On or Near School Grounds

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

Enhancements for Multiple Gang Crimes

Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple

criminal intents. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339–340 [65 Cal.Rptr.2d 338].)

Wobblers

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

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

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

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

SECONDARY SOURCES

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

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

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

1600. Robbery (Pen. Code, § 211)

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

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

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

AND

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

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

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

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

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

[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]

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

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

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

An act is accomplished by *fear* if the other person is actually afraid. The other person's actual fear may be inferred from the circumstances.

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

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

New January 2006; Revised August 2009, October 2010, April 2011, August 2013, August 2014, March 2017, September 2018, March 2022

BENCH NOTES

Instructional Duty

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

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

There is no sua sponte duty to define the terms “possession,” “fear,” and “immediate presence.” (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

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

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

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

AUTHORITY

- Elements. ▶ Pen. Code, § 211.
- Fear Defined. ▶ Pen. Code, § 212; see [*People v. Collins* \(2021\) 65 Cal.App.5th 333, 340–341 \[279 Cal.Rptr.3d 407\]](#); *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined. ▶ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. ▶ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. ▶ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined. ▶ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee. ▶ *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].
- Constructive Possession by Subcontractor/Janitor.- ▶ *People v. Gilbeaux*

(2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].

- Constructive Possession by Person With Special Relationship.- ▶ *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369-1370 [109 Cal.Rptr.3d 479].
- Felonious Taking Not Satisfied by Theft by False Pretense. ▶ *People v. Williams* (2013) 57 Cal.4th 776, 784-789 [161 Cal.Rptr.3d 81, 305 P.3d 1241].
- Constructive Possession and Immediate Presence of Funds in Account of Robbery Victims Using ATM. ▶ *People v. Mullins* (2018) 19 Cal.App.5th 594, 603 [228 Cal.Rptr.3d 198].

COMMENTARY

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

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

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

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

LESSER INCLUDED OFFENSES

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

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

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

RELATED ISSUES

Asportation—Felonious Taking

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

Claim of Right

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v.*

Romo (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

Fear

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413]; [*People v. Collins* \(2021\) 65 Cal.App.5th 333, 341 \[279 Cal.Rptr.3d 407\]](#).)

Force—Amount

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

Force—When Applied

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

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54

Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

Multiple Victims

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

Value

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

SECONDARY SOURCES

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

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

1830. Extortion by Threat or Force (Pen. Code, §§ 518, 519)

The defendant is charged [in Count __] with extortion by (threat/ [or] force) [in violation of Penal Code section 518].

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

<Alternative 1A—threatened to injure or used force>

1. The defendant (threatened to unlawfully injure/ [or] used force against) (another person or a third person/ [or] the property of another person or a third person);]

<Alternative 1B—threatened to accuse of crime>

1. The defendant threatened to accuse another person[, or that person's relative or family member,] of a crime;]

<Alternative 1C—threatened to expose secret>

1. The defendant threatened to expose a secret about another person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with a (disgrace[,]/ [or] crime[,]/ [or] deformity)];]
2. When (making the threat/ [or] using force), the defendant intended to use that (fear/ [or] force) to obtain the other person's consent (to give the defendant money [or] property)/ [or] to give the defendant anything of value [that involves (sexual conduct/ [or] an image of an intimate body part)]/ [or] to do an official act);
3. As a result of the (threat/ [or] use of force), the other person consented (to give the defendant money [or] property)/ [or] to give the defendant anything of value [that involves (sexual conduct/ [or] an image of an intimate body part)]/ [or] to do an official act);

AND

4. As a result of the (threat/ [or] use of force), the other person then (gave the defendant money [or] property)/ [or] gave the defendant anything of value [that involves (sexual conduct/ [or] an image of an intimate body part)]/ [or] did an official act).

The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.

The (threat/use of force) must be the controlling reason that the other person consented. If the person consented because of some other controlling reason, the defendant is not guilty of extortion.

[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The threat may involve harm to be inflicted by the defendant or by someone else.]

[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.]

[A *secret* is a fact that:

1. Is unknown to the general public or to someone who might be interested in knowing the fact;

AND

2. Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (give the defendant money [or property]/ [or] give the defendant anything of value [that involves (sexual conduct/ [or] an image of an intimate body part)]/ [or] do an official act) to prevent the fact from being revealed.]

[Sexual conduct means any of the following:

[• Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals(;/.)]

[• Penetration of the vagina or rectum by any object(;/.)]

[• Masturbation for the purpose of sexual stimulation of the viewer(;/.)]

[• Sadoomasochistic abuse for the purpose of sexual stimulation of the viewer(;/.)]

[• Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer(;/.)]

[• Defecation or urination for the purpose of sexual stimulation of the viewer(;/.)]

[An intimate body part means any portion of the genitals, the anus, and, in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or clearly visible through clothing.]

New January 2006; Revised March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. (See *People v. Hesslink* (1985) 167 Cal.App.3d 781, 788–790 [213 Cal.Rptr. 465].)

Depending on the evidence, in element 1, give the appropriate alternative A–C describing the threat. (Pen. Code, § 519.)

Related Instructions

For an instruction on the crime of kidnapping for ransom, reward, or extortion, see CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion*.

AUTHORITY

- Elements ▶ Pen. Code, §§ 518, 519; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789 [213 Cal.Rptr. 465].
- Specific Intent Required ▶ *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789–790 [213 Cal.Rptr. 465].
- Felony Punishment ▶ Pen. Code, § 520.
- Property Defined ▶ Pen. Code, § 7(10) and (12); see *People v. Baker* (1978) 88 Cal.App.3d 115, 119 [151 Cal.Rptr. 362] [includes right to file administrative protest]; *People v. Cadman* (1881) 57 Cal. 562, 564 [includes right to prosecute appeal]; *People v. Kozlowski* (2002) 96 Cal.App.4th 853, 869 [117 Cal.Rptr.2d 504] [includes PIN code].
- Coerced Consent ▶ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536]; *People v. Peck* (1919) 43 Cal.App. 638, 645 [185 P. 881].

- Force or Fear Must Be Controlling Cause ▶ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536].
- Official Act Defined ▶ See *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485] [kidnapping for extortion]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [same].
- Secret Defined ▶ *People v. Lavine* (1931) 115 Cal.App. 289, 295 [1 P.2d 496].
- Threat of Harm by Third Person ▶ *People v. Hopkins* (1951) 105 Cal.App.2d 708, 709–710 [233 P.2d 948].
- Unlawful Injury Defined ▶ *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370 [94 P. 407].
- Wrongful Defined ▶ *People v. Beggs* (1918) 178 Cal. 79, 83–84 [172 P. 152].
- Sexual Conduct Defined ▶ Pen. Code, § 311.3(b).
- Intimate Body Part Defined ▶ Pen. Code, § 647(j)(4)(C).

LESSER INCLUDED OFFENSES

- Attempted Extortion ▶ Pen. Code, § 524; see *People v. Sales* (2004) 116 Cal.App.4th 741, 748–749 [10 Cal.Rptr.3d 527]; *People v. Franquelin* (1952) 109 Cal.App.2d 777, 783–784 [241 P.2d 651]; *Isaac v. Superior Court* (1978) 79 Cal.App.3d 260, 263 [146 Cal.Rptr. 396]; *People v. Lavine* (1931) 115 Cal.App. 289, 297 [1 P.2d 496].

RELATED ISSUES

No Defense of Good Faith

A good faith belief in the right to property does not negate the specific intent required for extortion. A debt cannot be collected by extortion. (*People v. Beggs* (1918) 178 Cal. 79, 84 [172 P. 152]; see *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305] [kidnapping for ransom].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 119–124.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.02 (Matthew Bender).

2220. Driving With Suspended or Revoked Driving Privilege (Veh. Code, §§ 13106, 14601, 14601.1, 14601.2, 14601.5)

The defendant is charged [in Count __] with driving while (his/her) driving privilege was (suspended/ [or] revoked) [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant drove a motor vehicle while (his/her) driving privilege was (suspended/ [or] revoked) [for _____ <insert basis for suspension or revocation>];

AND

2. When the defendant drove, (he/she) knew that (his/her) driving privilege was (suspended/ [or] revoked).

[If the People prove that:

1. The California Department of Motor Vehicles mailed a notice to the defendant telling (him/her) that (his/her) driving privilege had been (suspended/ [or] revoked);
2. The notice was sent to the most recent address reported to the department [or any more recent address reported by the person, a court, or a law enforcement agency];

AND

3. The notice was not returned to the department as undeliverable or unclaimed;

then you may, but are not required to, conclude that the defendant knew that (his/her) driving privilege was (suspended/ [or] revoked).]

[If the People prove beyond a reasonable doubt that a court informed the defendant that (his/her) driving privilege had been (suspended/ [or] revoked), you may but are not required to conclude that the defendant knew that (his/her) driving privilege was (suspended/ [or] revoked).]

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

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

New January 2006; Revised April 2008, March 2022

BENCH NOTES

Instructional Duty

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

In element 1, the court may insert the reason for the suspension or revocation unless the court has accepted a stipulation regarding this issue.

The two bracketed paragraphs that begin with “If the People prove” each explain rebuttable presumptions created by statute. (See Veh. Code, §§ 14601(a), 14601.1(a), 14602(c), 14601.5(c); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [658 P.2d 1302].) In accordance with *Roder*, the bracketed paragraphs have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People prove that the California Department of Motor Vehicles mailed a notice” if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her driving privilege was revoked or suspended.

Similarly, the court **must not** give the bracketed paragraph that begins with “If the People prove beyond a reasonable doubt that a court informed the defendant” if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her driving privilege was revoked or suspended. In addition, this provision regarding notice by the court only applies if the defendant is charged with a violation of Vehicle Code section 14601.2. (See Veh. Code, § 14601.2(c).) Do not give this paragraph if the defendant is charged under any other Vehicle Code section.

Give the bracketed definition of motor vehicle unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements. ▶ Veh. Code, §§ 13106, 14601, 14601.1, 14601.2, 14601.5.
- Motor Vehicle Defined. ▶ Veh. Code, § 415.
- Actual Knowledge of Suspension or Revocation Required. ▶ *In re Murdock* (1968) 68 Cal.2d 313, 315–316 [66 Cal.Rptr. 380, 437 P.2d 764].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. ▶ *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

RELATED ISSUES

Suspension or Revocation Continues Until License Restored

In *People v. Gutierrez* (1998) 65 Cal.App.4th Supp. 1 [76 Cal.Rptr.2d 166], the defendant's license had been suspended for a period of one year for driving under the influence. The defendant was arrested for driving after that one-year period had expired. The court held that the defendant's license remained suspended even though the stated time period had passed because the defendant had not taken the steps necessary to restore his driving privilege. (*Id.* at pp. 8–9.)

Privilege to Drive May Be Suspended or Revoked Even If No License Issued

A person's privilege to drive may be suspended or revoked even though that person has never been issued a valid driver's license. (*People v. Matas* (1988) 200 Cal.App.3d Supp. 7, 9 [246 Cal.Rptr. 627].)

~~*May Be Punished for This Offense and Driving Under the Influence*~~

~~In *In re Hayes* (1969) 70 Cal.2d 604, 611 [75 Cal.Rptr. 790, 451 P.2d 430], the court held that Penal Code section 654 did not preclude punishing the defendant for both driving under the influence and driving with a suspended license.~~

SECONDARY SOURCES

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

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 93, *Disabilities Flowing From Conviction*, § 93.08[6] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

2306. Possession of Controlled Substance with Intent to Commit Sexual Assault (Health & Saf. Code, §§ 11350.5, 11377.5)

The defendant is charged [in Count ___] with possession of _____ <insert type of controlled substance from sections 11056(c)(11), (g), 11054(e)(3); or 11057(d)(13) of the Health and Safety Code>, a controlled substance, with intent to commit _____ <insert description of alleged target crime or crimes from sections 243.4, 261, ~~262~~, 286, 287, or 289 of the Penal Code>, [in violation of Health and Safety Code section[s] (11350.5[,]/ [and/or] 11377.5)].

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

1. The defendant possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. When the defendant possessed the controlled substance, (he/she) intended to use it to commit _____ <insert description of alleged target crime or crimes from sections 243.4, 261, ~~262~~, 286, 287, or 289 of the Penal Code>;
5. The controlled substance was _____ <insert type of controlled substance>;
6. The controlled substance was in a usable amount.

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

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

[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.]

New September 2017; Revised March 2022

BENCH NOTES

Instructional Duty

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

The court must also give the appropriate instructions on the target sexual offense or offenses in element 4.

AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11350.5, 11377.5.
- Prohibited Controlled Substances ▶ Health & Saf. Code, §§ 11054(e)(3), 11056(c)(11) or (g); 11057(d)(13).
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 105, 106.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1-69.

2307–2314. Reserved for Future Use

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

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

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

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

AND

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

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

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

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

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

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

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

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

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

New January 2006; Revised February 2012, February 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

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

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions. **Defenses—Instructional Duty** Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements ▶ Pen. Code, § 17500.
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Objects With Innocent Uses ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Knowledge Required ▶ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Assault ▶ Pen. Code, § 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, § 189.

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

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

2514. Possession of Firearm by Person Prohibited by Statute: Self-~~—~~ Defense

The defendant is not guilty of unlawful possession of a firearm[, as charged in Count __,] if (he/she) temporarily possessed the firearm in (self-defense/ [or] defense of another). The defendant possessed the firearm in lawful (self-defense/ [or] defense of another) if:

1. The defendant reasonably believed that (he/she/someone else/ _____ <insert name of third party>) was in imminent danger of suffering great bodily injury;
2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;
3. A firearm became available to the defendant without planning or preparation on (his/her) part;
4. The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or reasonably appeared to have been necessary] for self-defense;
5. No other means of avoiding the danger of injury was available;

AND

6. The defendant's use of the firearm was reasonable under the circumstances.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar

knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

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

[The defendant's belief that (he/she/someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ *<insert name of person who allegedly threatened defendant>* threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ *<insert name of person who allegedly threatened defendant>* had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ *<insert name of person who was the alleged source of the threat>*, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.

New January 2006; Revised December 2008, February 2012, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense 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, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000] [self-defense applies to charge under now repealed Pen. Code, § 12021].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats or assaults against the defendant on the reasonableness of defendant’s conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.) If these instructions have already been given in CALCRIM No. 3470 or CALCRIM No. 505, the court may delete them here.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived*.

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

AUTHORITY

- Temporary Possession of Firearm by Felon in Self-Defense ▶ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ▶ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Possession Must Be Brief and Not Planned ▶ *People v. McClindon* (1980) 114 Cal.App.3d 336, 340 [170 Cal.Rptr. 492].
- Instructional Requirements ▶ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▶ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.
- Burden of Proof ▶ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ▶ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], disapproved on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Reasonable Belief ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

RELATED ISSUES

Reasonable Person Standard Not Modified by Evidence of Mental Impairment
In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. “The common law does not take account of a person’s mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds ‘the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.’ (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)” (*Ibid.*; see also Rest.2d Torts, § 283B.)

Reasonable Person Standard and Physical Limitations

A defendant’s physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686

[277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 86, 87, 68, 71, 72, 73.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 233-237.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.11[1][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.06 (Matthew Bender).

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

2515–2519. Reserved for Future Use

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

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

To prove this allegation, the People must prove that:

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

AND

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

OR

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

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

~~[OR]~~

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

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

~~AND~~

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

2. At least one of those crimes was committed after September 26, 1988;
3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the currently charged offense;

~~AND~~

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

~~AND~~

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

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

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

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

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

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

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

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

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

To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

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

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

AND

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

Someone *aids and abets* a crime if he or she knows of the perpetrator’s unlawful purpose and he or she specifically intends to, and does in fact, aid,

facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.

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

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

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

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

AND

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra*, 67 Cal.App.4th at p. 135.) ~~In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 316, 323–324.)~~

~~In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”]). In the definition of “felonious criminal conduct,” insert~~

~~the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)~~

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

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

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

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

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

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

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

AUTHORITY

- Factors ▶ Pen. Code, §§ 25400(c)(3), 25850(c)(3)
- Sentencing Factors, Not Elements ▶ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Elements of Gang Factor ▶ Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].
- Active Participation Defined ▶ ~~Pen. Code, § 186.22(i);~~ *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- ~~Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran, supra*, 97 Cal.App.4th at pp. 1464–1465.~~
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (g); ~~*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].~~
- Examples of Common Benefit ▶ Pen. Code, § 186.22(g).
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent

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

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

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

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

SECONDARY SOURCES

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

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

2670. Lawful Performance: Peace Officer

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

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

<A. Unlawful Detention>

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

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

AND

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

Any other detention is unlawful.

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

<B. Unlawful Arrest>

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

Any other arrest is unlawful.

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

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

<Arrest without warrant for most misdemeanors or infractions>

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

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

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

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

<Entering home without warrant>

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

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

AND

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

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

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest. [The officer does not have to tell the arrested person these things if the officer has

probable cause to believe that the person is committing or attempting to commit a crime, is fleeing immediately after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which he or she is being arrested if he or she asks for that information.]]]

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

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

<C. Use of Force by a Peace Officer>

[Special rules control the use of force.]

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

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

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

OR

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

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

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

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

AND

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

[Deadly force is force that creates a substantial risk of causing death or serious bodily injury. It includes, but is not limited to, the discharge of a firearm. It does not require that the encounter result in the death of the person against whom the force was used.]

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

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

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

[In considering the totality of the circumstances, you may consider whether:

- [● Prior to the use of force, the officer (identified/ [or] attempted to identify) himself or herself as a peace officer and (warned/ [or] attempted to warn) that deadly force may be used(;/.)]
- [● Prior to the use of force, the officer had objectively reasonable grounds to believe the defendant was aware that the officer was a peace officer and that deadly force may be used(;/.)]
- [● The officer was able, under the circumstances, [[to [identify] [or] [attempt to identify]] himself or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].]

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

<D. Use of Force by a Person Being Arrested or Detained>

[If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any

weapon to resist an officer's use of reasonable force. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him or her.]

If a peace officer uses unreasonable or excessive force while (arresting or attempting to arrest/ [or] detaining or attempting to detain) a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested or detained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

New January 2006; Revised August 2016, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] [“disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element”]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

Give section A if there is an issue as to whether the officer had a legal basis to detain someone. Give section B if there is an issue as to whether the officer had a legal basis to arrest someone. Give section C if there is an issue as to whether the officer used excessive force in arresting or detaining someone. If the issue is whether the officer used excessive force in some other duty, give section C with any necessary modifications.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the bracketed sentence in section C that begins with “If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her.” (*People v. White, supra*, 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that

bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with “However, you may not find the defendant guilty of resisting arrest.”

When giving the bracketed section under the heading “A. Unlawful Detention,” if there is a factual issue about whether the person was in fact “detained,” the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

In the section headed “B. Unlawful Arrest,” two options are provided for arrests without a warrant. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the officer made the arrest for an infraction or a misdemeanor falling under the general rule, give the bracketed paragraph under the heading “Arrest without warrant for most misdemeanors or infraction.” If the officer made the arrest for a felony or misdemeanor not requiring commission in the officer’s presence give the bracketed paragraph under the heading “Arrest without warrant for felony or misdemeanor not requiring commission in officer’s presence.” The court may also give both bracketed paragraphs, if appropriate.

Give the bracketed section about entering a home without a warrant if the arrest took place in a home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].) If there is a factual issue about whether the officer had consent to enter the home, the court must also instruct on the legal requirements for consent. (*Ibid.*)

AUTHORITY

- Instructional Duty ▶ *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Lawful Detention ▶ *People v. Celis* (2004) 33 Cal.4th 667, 674–675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].

- Lawful Arrest ▶ Pen. Code, §§ 834–836, 841.
- Probable Cause Defined ▶ *People v. Celis* (2004) 33 Cal.4th 667, 673 [16 Cal.Rptr.3d 85, 93 P.3d 1027]; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer’s Training and Experience Relevant ▶ *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention ▶ Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home ▶ *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743]; *People v. Ramey* (1976) 16 Cal.3d 263, 276 [127 Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].
- Reasonable Force ▶ Pen. Code, §§ 692, 693.
- Excessive Use of Deadly Force ▶ Pen. Code, § 835a.
- Excessive Force Makes Arrest Unlawful ▶ *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Excessive Force Triggers Right to Self-Defense With Reasonable Force ▶ *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].
- Merely Photographing or Recording Officers Not a Crime ▶ Pen. Code, § 148(g).

RELATED ISSUES

Service of Warrant

An officer is lawfully engaged in his or her duties if he or she is correctly serving “a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].) On the other hand, “the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement.” (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. (*Ibid.*)

Lawfulness of Officer’s Conduct Based on Objective Standard

The rule “requires that the officer’s lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant’s mens rea.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) The defendant’s belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. The intended scope of this new legislation is unclear. Until the legislature or courts of review provide further guidance, the court will have to determine whether section 148(g) should apply in an individual case.

SECONDARY SOURCES

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.01-11.06 (Matthew Bender).

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

2672. Lawful Performance: Resisting Unlawful Arrest With Force

The defendant is not guilty of the crime of (battery against a peace officer[,]/ [or] assault against a peace officer[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon) against a peace officer[,]/ [or] _____ <insert other crime charged, e.g., resisting arrest>) if the officer was not lawfully performing (his/her) duties because (he/she) was unlawfully arresting someone.

However, even if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crime of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

On the other hand, if the officer used unreasonable or excessive force, and the defendant used only reasonable force in (self-defense/ [or] defense of another), then the defendant is not guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

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

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

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

OR

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

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

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

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

AND

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

[Deadly force is force that creates a substantial risk of causing death or serious bodily injury. It includes, but is not limited to, the discharge of a firearm. It does not require that the encounter result in the death of the person against whom the force was used.]

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

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

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

[In considering the totality of the circumstances, you may consider whether:

- [• Prior to the use of force, the officer (identified/ [or] attempted to identify) himself or herself as a peace officer and (warned/ [or] attempted to warn) that deadly force may be used(;/.)]
- [• Prior to the use of force, the officer had objectively reasonable grounds to believe the defendant was aware that the officer was a peace officer and that deadly force may be used(;/.)]

[• The officer was able, under the circumstances, [[to [identify] [or] [attempt to identify]] himself or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].]

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

The People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing (his/her) duties. If the People have not met this burden, you must find the defendant not guilty [of _____ <insert crimes>].

New January 2006; Revised March 2022

BENCH NOTES

Instructional Duty

The court may give this instruction on request.

AUTHORITY

- No Right to Forcibly Resist Arrest ▶ Pen. Code, § 834a.
- Applies to Arrest, Not Detention ▶ *People v. Coffey* (1967) 67 Cal.2d 204, 221 [60 Cal.Rptr. 457, 430 P.2d 15]; *People v. Jones* (1970) 8 Cal.App.3d 710, 717 [87 Cal.Rptr. 625].
- Forcible Resistance to Unlawful Arrest Is Battery or Assault on Nonofficer ▶ *People v. Curtis* (1969) 70 Cal.2d 347, 355–356 [74 Cal.Rptr. 713, 450 P.2d 33]; *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].
- Use of Reasonable Force in Response to Excessive Force Is Complete Defense ▶ *People v. White* (1980) 101 Cal.App.3d 161, 168 [161 Cal.Rptr. 541].
- May Not Be Convicted of Resisting Unlawful Arrest ▶ *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541]; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 10 [108 Cal.Rptr. 338].

SECONDARY SOURCES

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11[2][b], 73.15[2] (Matthew Bender).

2720. Assault by Prisoner Serving Life Sentence (Pen. Code, § 4500)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence [in violation of Penal Code section 4500].

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

2. The defendant did that act willfully;

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

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

5. The defendant acted with malice aforethought;

[AND]

<Alternative 6A—defendant sentenced to life term>

[6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]

<Alternative 6B—defendant sentenced to life and to determinate term>

[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

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

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

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

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

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

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

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

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

The defendant acted with *implied malice* if:

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

AND

4. (He/She) deliberately acted with conscious disregard for human life.

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

[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]

BENCH NOTES

Instructional Duty

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

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

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

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

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

On request, give the bracketed definition of “sentenced to a term in state prison.” Within that definition, give the bracketed portion that begins with “regardless of

the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

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

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless “the person subjected to such assault does not die within a year and a day after” the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

AUTHORITY

- Elements of Assault by Life Prisoner ▶ Pen. Code, § 4500.

- Elements of Assault With Deadly Weapon or Force Likely ▶ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Malice Equivalent to Malice in Murder ▶ *People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].
- Malice Defined ▶ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969].
- Ill Will Not Required for Malice ▶ *People v. Seden* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].
- Undergoing Sentence of Life ▶ *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▶ Pen. Code, § 245; see *People v. St. Martin* (1970) 1 Cal.3d 524, 536 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault ▶ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

Note: In *People v. Noah* (1971) 5 Cal.3d 469, 476–477 [96 Cal.Rptr. 441, 487 P.2d 1009], the court held that assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner serving a life sentence, Penal Code section 4500. The court based its conclusion on the fact that Penal Code section 4501 includes as an element of the offense that the prisoner was not serving a life sentence. However, Penal Code section 4501 was amended, effective January 1, 2005, to remove this element. The trial court should, therefore, consider whether Penal Code section 4501 is now a lesser included offense to Penal Code section 4500.

RELATED ISSUES

Status as Life Prisoner Determined on Day of Alleged Assault

Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836]; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell)*, *supra*, 99 Cal.App.4th at p. 1341; *Graham v. Superior Court*, *supra*, 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life

This statute applies to “[e]very person undergoing a life sentence” (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836], the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating “a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had ‘nothing left to lose’ by committing the assault.” (*Ibid.*)

Error to Instruct on General Definition of Malice and General Intent

“Malice,” as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. (*Ibid.*)

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 58–60.

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

2721. Assault by Prisoner (Pen. Code, § 4501)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence [in violation of Penal Code section 4501].

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

2. The defendant did that act willfully;

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

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

[AND]

5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND]

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

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

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

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or dangerous or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

A person is *confined in a state prison* if he or she is (confined in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the

(confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *confined in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *confined in a state prison*.]

New January 2006; Revised August 2016, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

Give the bracketed definition of “application of force and apply force” on request.

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of “serving a sentence in a state prison,” give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements of Assault by Prisoner ▶ Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury ▶ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined ▶ Pen. Code, § 7 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Confined in State Prison Defined ▶ Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid ▶ *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▶ Pen. Code, § 245; see *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault ▶ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

RELATED ISSUES

Not Serving a Life Sentence

Previously, this statute did not apply to an inmate “undergoing a life sentence.” (See *People v. Noah* (1971) 5 Cal.3d 469, 477 [96 Cal.Rptr. 441, 487 P.2d 1009].) The statute has been amended to remove this restriction, effective January 1, 2005. If the case predates this amendment, the court must add to the end of element 5, “for a term other than life.”

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 61, 63.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

2749. Bringing or Sending Controlled Substance or Paraphernalia Into Penal Institution (Pen. Code, § 4573(a))

The defendant is charged [in Count __] with (bringing/sending/ [or] assisting in (bringing/sending)) (_____ <insert type of controlled substance>, a controlled substance/an object intended for use to inject or consume controlled substances), into a penal institution [in violation of Penal Code section 4573].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] (brought/sent/ [or] assisted in (bringing/sending)) (a controlled substance~~s~~/ [or] an object intended for use to inject or consume controlled substances) into a penal institution [or onto the grounds of a penal institution];
2. The defendant knew that (he/she) was (bringing/sending/ [or] assisting in (bringing/sending)) (a controlled substance/an object intended for use to inject or consume a controlled substance) into a penal institution [or onto the grounds of a penal institution];

[AND]

3. The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming a controlled substance)(;/.)

<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>

4. The controlled substance was [an analog of] _____ <insert type of controlled substance>;

AND

5. The controlled substance was a usable amount.]

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <insert name of analog drug> is an analog of

_____ <insert type of controlled substance>. **An analog of a controlled substance:**

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

A penal institution is a (state prison[,]/ [or] prison camp or farm[,]/ [or] jail[,]/ [or] county road camp[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees).

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[An object is *intended to be used* for injecting or consuming a controlled substance if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]

[The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)) the following items: _____ <insert description of each controlled substance or all paraphernalia when multiple items alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (brought/sent/ [or] assisted in (bringing/sending)) at least one of these items and you all agree on which item (he/she) (brought/sent/ [or] assisted in (bringing/sending)).]

<Defense: *Conduct Authorized*>

[The defendant is not guilty of this offense if (he/she) was authorized to (bring/send) the (substance/item) into the penal institution by (law[,]/ [or] a person in charge of the penal institution[,]/ [or] an officer of the penal institution empowered by the person in charge of the institution to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (bring/send) the

(substance/item) into the institution. If the People have not met this burden, you must find the defendant not guilty of this offense.]

New March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with bringing or sending a controlled substance, give elements 1 through 5. If the defendant is charged with bringing or sending paraphernalia, give elements 1 through 3 only.

If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give the bracketed phrase “an analog of” in element 4.

If the prosecution alleges under a single count that the defendant brought or sent multiple items into the institution, 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 (brought/sent/ [or] assisted in (bringing/sending)),” inserting the items alleged.

If there is sufficient evidence that the defendant was authorized to bring or send the controlled substance or item, give the bracketed word “unlawfully” in element 1. Give also the bracketed paragraph **under the heading** “Defense: Conduct Authorized.”

AUTHORITY

- Elements ▶ Pen. Code, § 4573; *People v. Low* (2010) 49 Cal.4th 372, 381–387 [110 Cal.Rptr.3d 640, 232 P.3d 635].
- Knowingly Brings or Sends ▶ *People v. Low* (2010) 49 Cal.4th 372, 386 [110 Cal.Rptr.3d 640, 232 P.3d 635]; *People v. Gastello* (2010) 49 Cal.4th 395, 402–403 [110 Cal.Rptr.3d 658, 232 P.3d 650].
- Usable Amount ▶ *People v. Blanco* (2021) 61 Cal.App.5th 278, 286 [275 Cal.Rptr.3d 558].

- Jail Defined ▶ *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution ▶ *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- Unanimity ▶ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Definition of Analog Controlled Substance ▶ Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis, supra*, 57 Cal.4th at p. 362, fn. 5.

RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment pursuant to Penal Code section 2684 is not “under the custody of prison officials.” (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].)

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Governmental Authority, § 105.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

3010. Eavesdropping or Recording Confidential Communication (Pen. Code, § 632(a))

The defendant is charged [in Count __] with using an electronic device to eavesdrop on or to record a confidential communication [in violation of Penal Code section 632(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

- 1. The defendant intentionally listened to or recorded a (conversation/communication);**
- 2. When the defendant listened to or recorded the (conversation/communication), (he/she) used (an/a) (electronic amplifying/recording) device;**
- 3. When the defendant listened to or recorded the (conversation/communication), (he/she) did not have the consent of all the individuals who were party to the (conversation/communication);**
- 4. At least one of the [other] individuals who were party to the (conversation/communication) intended that the (conversation/communication) be confidential(;/.)**

[AND]

- 5. The individual[s] who intended that the (conversation/communication) be confidential had objectively reasonable grounds to believe that the (conversation/communication) would be confidential(;/.)**

[AND]

<Give element 6 if evidence shows defendant may have been an officer, agent, or employee of a public communications utility.>

[6. The defendant was not an officer, agent, or employee of a public communications utility company acting in the lawful performance of (his/her) duties.]

[A *confidential communication* does not include a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.]

New March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements ▶ Pen. Code, § 632(a).
- Confidential Communication ▶ Pen. Code, § 632(c); *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774–776 [117 Cal.Rptr.2d 574, 41 P.3d 575].
- Exceptions ▶ Pen. Code, § 632(e) & (f).

RELATED ISSUES

Intent to Record Confidential Communication

In *People v. Superior Court of Los Angeles County* (1969) 70 Cal.2d 123, 133 [74 Cal.Rptr. 294, 449 P.2d 230], the California Supreme Court interpreted a prior but similar version of Penal Code section 632 and held that the recording of a confidential communication must be intentional.

Prostitution and Reasonable Expectation of Privacy

“A person’s participation in sexual activities at a private residence in exchange for money, without more, does not necessarily cause them to expect that their words and actions will be recorded without their consent.” (*People v. Lyon* (2021) 61 Cal.App.5th 237, 247 [275 Cal.Rptr.3d 581].)

Wiretapping

Wiretapping is the interception of communications by an unauthorized connection to the transmission line. (See Pen. Code, § 631.) Penal Code section 632 does not prohibit wiretapping but instead prohibits the interception of communications with equipment that is not connected to a transmission line. (See *People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1168 [26 Cal.Rptr. 143].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.20 (Matthew Bender).

3100. Prior Conviction: Nonbifurcated Trial (Pen. Code, §§ 1025, 1158)

If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____ <insert number[s] or description[s] of exhibit[s]>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <insert code section alleged>, **for which judgment was entered** on _____ <insert date of conviction/judgment>, in the _____ <insert name of court>, in Case Number _____ <insert docket or case number>(:/.)

[AND <Repeat for each prior conviction alleged>.]

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ <insert other permitted purpose, e.g., assessing credibility of the defendant>]. Do not consider this evidence as proof that the defendant committed any of the crimes with which he is currently charged or for any other purpose.]

[You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved.

New January 2006; Revised March 2018, September 2020, March 2022

BENCH NOTES

Instructional Duty

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation.

If identity is an issue, the court must make the factual determination that the defendant is the person who has suffered the convictions in question before giving this instruction.

Do **not** give this instruction if the court has bifurcated the trial. Instead, give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the “washout” period. (Pen. Code, § 667.5(a) & (b).) The Commentary below discusses these issues further. If the court chooses to submit these issues to the jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103, *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary below discusses this issue further.

Give the bracketed phrase “for which judgment was entered” if there is more than one prior conviction charged.

On request, the court should give the limiting instruction that begins with “Consider the evidence presented on this allegation only when deciding.—.” (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may request that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

The court must provide the jury with a verdict form on which the jury will indicate whether the prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Statutory Authority ▶ Pen. Code, §§ 1025, 1158.
- Bifurcation ▶ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].
- Judge Determines Whether Defendant Is Person Named in Documents ▶ Pen. Code, § 1025(c); *People v. Epps* (2001) 25 Cal.4th 19, 25 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].

- Limiting Instruction on Prior Conviction ▶ See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Disputed Factual Issues ▶ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].
- Three-Strikes Statutes ▶ Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony ▶ Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony ▶ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▶ Pen. Code, § 667.5(b).
- Serious Felony Defined ▶ Pen. Code, § 1192(c).
- Violent Felony Defined ▶ Pen. Code, § 667.5(c).

COMMENTARY

Factual Issues—Decided by Jury or Court?

Penal Code sections 1025 and 1158 state that when an accusation charges a defendant with having suffered a prior conviction, the jury must decide whether the defendant “suffered the prior conviction” (unless the right to a jury trial is waived). Under Penal Code section 1025, the court, not the jury, must determine whether the defendant is the person named in the documents submitted to prove the prior conviction. (Pen. Code, § 1025(c); see also *People v. Epps* (2001) 25 Cal.4th 19, 24-25 [104 Cal.Rptr.2d 572, 18 P.3d 2].)

In some cases, however, a prior conviction may present an ancillary factual issue that must be decided before the conviction may be used under a particular enhancement or sentencing statute. For example, if the prosecution seeks sentencing under the “three strikes” law and alleges that the defendant was previously convicted of two burglaries, these prior convictions would qualify as “strikes” only if the burglaries were residential. (See *People v. Kelii* (1999) 21 Cal.4th 452, 455 [87 Cal.Rptr.2d 674, 981 P.2d 518].) If the defendant had been specifically convicted of first degree burglary of an inhabited dwelling, then there would be no issue over whether the prior convictions qualified. If, on the other hand, the defendant had been convicted simply of “burglary,” then whether the offenses were residential would be a factual issue. (*Ibid.*)

The court’s role is “limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.” (See *People v. Gallardo* (2017) 4 Cal.5th 120, 136-137 [226 Cal.Rptr.3d 379, 407 P.3d 55].) A court considering whether to impose an increased sentence based on a prior conviction may not make its own findings about what facts or conduct “realistically” supported the conviction. (*Ibid.*) To allow otherwise would constitute impermissible judicial factfinding violative of the Sixth Amendment right to a jury trial. (*Ibid.*; see also *Descamps v. United States* (2013) 570 U.S. 254, 268-70 [133 S.Ct. 2276, 186 L.Ed.2d 438] [under federal Constitution’s Sixth Amendment right to jury trial, the only facts related to a prior conviction that a sentencing court can rely on in imposing recidivist punishment are the facts necessarily implied by the elements of the relevant prior offense].)

Prior Prison Term and “Washout” Period

A similar issue arises over whether the jury or the court must decide if the defendant served a prison term as a result of a particular conviction and if the defendant has been free of custody for sufficient time to satisfy the “washout” period. (See Pen. Code, § 667.5(a) & (b).) In *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901], the Court of Appeal held that the jury must determine whether the defendant served a prior prison term for a felony conviction. The other holdings in *Winslow* were rejected by the California Supreme Court. (*People v. Kelii, supra*, 21 Cal.4th at pp. 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541].) However, the *Winslow* holding that the jury must determine if the defendant served a prison term for a felony conviction remains controlling authority.

But, in *People v. Epps, supra*, 25 Cal.4th at pp. 25–26, the Court expressed doubt, in dicta, about whether the fact of having served a prison term is properly submitted to the jury. Discussing the 1997 amendment to Penal Code section 1025, the Court noted that

[t]he analysis lists the following questions that the jury would still decide if Senate Bill 1146 became law: . . . ‘Was the defendant sentenced to prison based on that conviction? How long has the defendant been out of custody since he or she suffered the prior conviction?’ . . .

[T]hough we do not have a case before us raising the issue, it appears that many of the listed questions are the sort of legal

questions that are for the court under [*Wiley*]. For example, determining . . . whether the defendant was sentenced to prison is “largely legal” (*Kelii, supra*, 21 Cal. 4th at p. 455, quoting *Wiley, supra*, 9 Cal. 4th at p. 590), and though these questions require resolution of some facts, “a factual inquiry, limited to examining court documents, is . . . ‘the type of inquiry traditionally performed by judges as part of the sentencing function.’” (*Kelii*, at p. 457, quoting *Wiley*, at p. 590.) . . . Therefore, the list of questions in the committee analysis should not be read as creating new jury trial rights that did not exist under *Wiley*.

(*Ibid.*)

On the other hand, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] could be interpreted as requiring the jury to make these factual findings. (But see *People v. Thomas* (2001) 91 Cal.App.4th 212, 223 [110 Cal.Rptr.2d 571] [even under *Apprendi*, no federal due process right to have jury determine whether defendant served a prior prison term].)

Until the California Supreme Court resolves this question, the court should consider submitting to the jury the issues of whether the defendant served a prison term and whether the defendant has remained free of custody for sufficient time to satisfy the “washout” period. The court may use CALCRIM No. 3102, *Prior Conviction: Prison Prior*.

RELATED ISSUES

Constitutionality of Prior

The prosecution is not required to prove the constitutional validity of a prior conviction as an “element” of the enhancement. (*People v. Walker* (2001) 89 Cal.App.4th 380, 386 [107 Cal.Rptr.2d 264].) Rather, following the procedures established in *People v. Sumstine* (1984) 36 Cal.3d 909, 922–924 [206 Cal.Rptr. 707, 687 P.2d 904], and *People v. Allen* (1999) 21 Cal.4th 424, 435–436 [87 Cal.Rptr.2d 682, 981 P.2d 525], the defense may bring a motion challenging the constitutional validity of the prior. These questions are matters of law to be determined by the trial court.

Defense Stipulation to Prior Convictions

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

Motion for Bifurcated Trial

Either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.)

SECONDARY SOURCES

4 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 618.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining*, § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

3101. Prior Conviction: Bifurcated Trial (Pen. Code, §§ 1025, 1158)

The People have alleged that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____ <insert number[s] or description[s] of exhibit[s]>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <insert code section[s] alleged>, **I for which judgment was entered** on _____ <insert date of conviction/judgment>, in the _____ <insert name of court>, Case Number _____ <insert docket or case number>(;/.)

[AND <Repeat for each prior conviction alleged.>]

[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.

New January 2006; Revised September 2020, March 2022

BENCH NOTES

Instructional Duty

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation. Give this instruction if the court has granted a bifurcated trial. The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the “washout” period. (Pen. Code, § 667.5(a) & (b).) The Commentary to CALCRIM No. 3100 discusses this issue. If the court chooses to submit these issues to the

jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103: *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary to CALCRIM No. 3100 discusses this issue.

Give the bracketed phrase “for which judgment was entered” if there is more than one prior conviction alleged.

Give the bracketed paragraph that begins with “In deciding whether the People have proved” on request.

The court must provide the jury with a verdict form on which the jury will indicate whether each prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Statutory Authority ▶ Pen. Code, §§ 1025, 1158.
- Bifurcation ▶ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].
- Judge Determines Whether Defendant Is Person Named in Documents ▶ Pen. Code, § 1025(b); *People v. Epps* (2001) 25 Cal.4th 19, 25 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].
- Disputed Factual Issues ▶ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].
- Three-Strikes Statutes ▶ Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony ▶ Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony ▶ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▶ Pen. Code, § 667.5(b).
- Serious Felony Defined ▶ Pen. Code, § 1192(c).
- Violent Felony Defined ▶ Pen. Code, § 667.5(c).

RELATED ISSUES

See *Motion for Bifurcated Trial* in the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

SECONDARY SOURCES

5 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Criminal Trial, § 618.

2 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 42, *Arraignment, Pleas, and Plea Bargaining*, § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

3130. Personally Armed With Deadly Weapon (Pen. Code, § 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a deadly weapon in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

A person is *armed* with a deadly weapon when that person:

- 1. Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense in connection with the crime[s] charged;**

AND

- 2. Knows that he or she is carrying the deadly weapon [or has it available].**

<If there is an issue in the case over whether the defendant was armed with the weapon “in the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised December 2008, February 2013, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the definition of “armed,” the court may give the bracketed phrase “or has a deadly weapon available” on request if the evidence shows that the weapon was at the scene of the alleged crime and “available to the defendant to use in furtherance of the underlying felony.” (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed “in the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996)

13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Enhancement ▶ Pen. Code, § 12022.3.
- Deadly Weapon Defined ▶ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Armed ▶ *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338]; *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Must Be Personally Armed ▶ *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].\
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

Penal Code Section 220

A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense. (*People v. Rich* (2003) 109 Cal.App.4th 255, 261 [134 Cal.Rptr.2d 553].) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, “translates into an attempt to commit” a sexual offense. (*People v. Rich, supra*, 109 Cal.App.4th at p. 261.)

Multiple Weapons

There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [215 Cal.Rptr. 124] [defendant may only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [182 Cal.Rptr. 790] [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.

Pepper Spray

In *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678], the court upheld the jury’s determination that pepper spray was a deadly weapon.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 349, 364, 388.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.31 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[7][c], 142.21[1][d][iii] (Matthew Bender).

3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly [or dangerous] weapon* is any object, instrument, or weapon that is [inherently deadly] [or] [dangerous] [or] **one that is** used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Someone *personally uses* a deadly [or dangerous] weapon if he or she intentionally [does any of the following]:

[1. Displays the weapon in a menacing manner(./;)]

[OR]

[(2/1). Hits someone with the weapon(./;)]

[OR]

[(3/2). Fires the weapon(./;)]

[OR

(4/3). _____ <insert description of use>.]

<If there is an issue in the case over whether the defendant used the weapon “in the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, February 2013, September 2017, September 2019, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give all of the bracketed “or dangerous” phrases if the enhancement charged uses both the words “deadly” and “dangerous” to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word “deadly.” (Pen. Code, § 12022.3.)

Give the bracketed phrase “inherently deadly” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the definition of “personally uses,” the court may give the bracketed item 3 if the case involves an object that may be “fired.”

If the case involves an issue of whether the defendant used the weapon “in the commission of” the offense, the court may give CALCRIM No. 3261, *While*

Committing a Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Enhancements ▶ Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.
- Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Personally Uses ▶ *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(2).
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▶ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].
- Inherently Deadly Defined ▶ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▶ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*

(2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle];
People v. McCoy (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

No Duty to Instruct on “Lesser Included Enhancements”

“[A] trial court’s sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on ‘lesser included enhancements.’ ” (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

Weapon Displayed Before Felony Committed

Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was “at least ... an aid in completing an essential element of the subsequent crimes. . . .” (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705].)

Weapon Used Did Not Cause Death

In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. (*Ibid.*) The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be “a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime.” (*Ibid.*) [ellipsis and brackets omitted] Here, the court found that “[t]he knife was instrumental to the consummation of the murder and was used to advantage.” (*Ibid.*)

“One Strike” Law and Use Enhancement

Where the defendant’s use of a weapon has been used as a basis for applying the “one strike” law for sex offenses, the defendant may not also receive a separate enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

Assault and Use of Deadly Weapon Enhancement

“A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1)

cannot be enhanced pursuant to section 12022, subdivision (b).” (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

Robbery and Use of Deadly Weapon Enhancement

A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 40.

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 356-357, 361–369.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.30, 91.81[1][d] (Matthew Bender).

**3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(d)(6),
1192.7(c)(8), 12022.7, 12022.8)**

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ <insert name of injured person> during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <insert name of injured person> was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

[Committing the crime of _____ <insert sexual offense charged> is not by itself the infliction of great bodily injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ <insert name of injured person> and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____ <insert name of injured person> if the People have proved that:

1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;

AND

[3A. The amount or type of physical force the defendant used on _____ <insert name of injured person> was enough that it alone

could have caused _____ <insert name of injured person> to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ <insert name of injured person> was sufficient in combination with the force used by the others to cause _____ <insert name of injured person> to suffer great bodily injury.]

The defendant must have applied substantial force to _____ <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, February 2015, September 2020, March 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Enhancements ▶ Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 12022.7, 12022.8.

- Great Bodily Injury Enhancements Do Not Apply to Conviction for Murder or Manslaughter. ▶ *People v. Cook* (2015) 60 Cal.4th 922, 924 [183 Cal.Rptr.3d 502].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Great Bodily Injury May Be Established by Pregnancy or Abortion ▶ *People v. Cross* (2008) 45 Cal.4th 58, 68 [82 Cal.Rptr.3d 373, 190 P.3d 706].
- Must Personally Inflict Injury ▶ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▶ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▶ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762, 139 P.3d 136].
- This Instruction Is Correct In Defining Group Beating ▶ *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “During Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- This Instruction Correctly Omits Requirement Of Intent to Inflict GBI ▶ *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 [117 Cal.Rptr.3d 884].

RELATED ISSUES

Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with “the intent to inflict such injury.” (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

Instructions on Aiding and Abetting

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant’s gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. (*Ibid.*) The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

Enhancement May be Applied Once Per Victim

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

Furnishing Drugs

In *People v. Ollo* (2021) 11 Cal.5th 682 [279 Cal.Rptr.3d 668, 487 P.3d 981], the defendant was charged with personally inflicting great bodily injury on a victim who had voluntarily ingested the drugs furnished by the defendant. The court held: “[T]he act of furnishing is not by itself sufficient to establish personal infliction. Whether a defendant who furnishes drugs personally inflicts such injury depends on the facts of the particular case. To determine whether a defendant personally inflicts such injury, fact finders and courts must examine the circumstances of the underlying offense and the defendant’s role in causing the injury that followed.” (11 Cal.5th at p. 685.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350-351.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

3404. Accident (Pen. Code, § 195)

<Give this paragraph when instructing on general or specific intent crimes>

[The defendant is not guilty of _____ *<insert crime[s]>* if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ *<insert crime[s]>* unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]

<Give this paragraph when instructing on criminal or ordinary negligence crimes>

[The defendant is not guilty of _____ *<insert crime[s]>* if (he/she) acted [or failed to act] accidentally without (criminal/ordinary) negligence. You may not find the defendant guilty of _____ *<insert crime[s]>* unless you are convinced beyond a reasonable doubt that (he/she) acted with (criminal/ordinary) negligence.]

[(Criminal/Ordinary) negligence is defined in another instruction.]

[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.]

[Ordinary negligence 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).]

New January 2006; Revised April 2008, August 2012, September 2017, March 2022

BENCH NOTES

Instructional Duty

The court has no **sua sponte** duty to instruct on accident. (*People v. Anderson* (2011) 51 Cal.4th 989, 997-998 [125 Cal.Rptr.3d 408].)

The court should select either “criminal” or “ordinary” based on the words used in the instruction on the elements of the underlying offense. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1175–1176 [214 Cal.Rptr.3d 467].)

Give the bracketed definition of criminal or ordinary negligence unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Related Instructions

If murder is charged, see CALCRIM No. 510, *Excusable Homicide: Accidental*.

AUTHORITY

- Instructional Requirements ▶ Pen. Code, §§ 26(5), 195.
- Burden of Proof ▶ *People v. Black* (1951) 103 Cal.App.2d 69, 79 [229 P.2d 61]; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Misfortune as Accident ▶ *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].
- Criminal or Gross Negligence Defined. ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Ordinary Negligence Defined. ▶ Pen. Code, § 7, subd. 2; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1174–1175 [214 Cal.Rptr.3d 467].

RELATED ISSUES

Misfortune Defined

~~“‘Misfortune’ when applied to a criminal act is analogous [to] the word ‘misadventure’ and bears the connotation of accident while doing a lawful act.” (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].)~~

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, § 273.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.01[5] (Matthew Bender).

3414. Coercion (Pen. Code, §§ 236.23, 236.24)

The defendant is not guilty of _____ *<insert crime[s]>* if (he/she) acted because of coercion.

In order to establish this defense, the defendant must prove that:

1. (He/She) acted because of coercion;
2. The coercion was a direct result of being a victim of (human trafficking/intimate partner violence/sexual violence) at the time the defendant acted;

AND

3. When the defendant acted, (he/she) had a reasonable fear of harm.

<Give for defense under Pen. Code, § 236.23.>

[To prove that the defendant was the victim of human trafficking, the defendant must prove that:

1. Another person either deprived the defendant of personal liberty or violated the defendant's personal liberty;

[AND]

<Give Alternative 2A if the defendant claims he or she was the victim of human trafficking under Pen. Code, § 236.1subsection (a).>

[2A. When the other person acted, (he/she) intended to obtain forced labor or services(./;)]

[OR]

<Give Alternative 2B if the defendant claims/alleges he or she was the victim of human trafficking under Pen. Code, § 236.1subsection (b).>

[2B. When the other person acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of _____ *<insert appropriate code section[s]>*).]

[Depriving or violating a person's -personal liberty, as used here, includes substantial and sustained restriction of a -person's liberty accomplished through _____ <insert terms that apply from statutory definition, i.e.: force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury> to the person under circumstances in which the person receiving or perceiving the threat reasonably believes that it is likely that the person making the threat would carry it out.]

[Forced labor or services, as used here, means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, duress, or coercion, or equivalent conduct that would reasonably overbear the will of the person.]

[Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to].]

-[Duress includes (a direct or implied threat to destroy, conceal, remove, confiscate, or possess any actual or purported passport or immigration document of the other person/ [or] knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the other person).]

[Violence means using physical force that is greater than the force reasonably necessary to restrain someone.]

[Menace means a verbal or physical threat of harm[, including use of a deadly weapon]. The threat of harm may be express or implied.]

[Coercion includes any scheme, plan, or pattern intended to cause a person to believe that failing to perform an act would result in (serious harm to or physical restraint against someone else/ [or] the abuse or threatened abuse of the legal process/ [or] debt bondage/ [or] providing or facilitating the possession of any controlled substance to impair the other person's judgment).]

[When you decide whether the other person (used duress/ [or] used coercion/ [or] deprived the defendant of personal liberty or violated the defendant's personal liberty), consider all of the circumstances, including the age of the

defendant, (his/her) relationship to the other person [or the other person's agent[s]], and the defendant's handicap or disability, if any.]

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.

New September 2017; Revised March 2022

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. -The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence, which, if believed, would be sufficient for a reasonable jury to find that the defendant has shown the defense to be more likely than not true.

This defense does not apply to ~~a serious felony, as defined in subdivision (e) of Penal Code section 1192.7, or a violent felony, as defined in subdivision (c) of Penal Code section 667.5, or a violation of Penal Code section 236.1.~~

AUTHORITY

- Instructional Requirements ▶ Pen. Code, §§ 236.23, 236.24.
- Definition of Coercion ▶ Pen. Code, § 236.1(h)(1); *In re D.C. (2021) 60 Cal.App.5th 915, 920 [275 Cal.Rptr.3d 191] [in context of human trafficking]*.

- Burden of Proof ▶ *People v. Waters* (1985) 163 Cal.App.3d 935, 938 [209 Cal.Rptr. 661]; *People v. Condley* (1977) 69 Cal.App.3d 999, 1008 [138 Cal.Rptr. 515].
- Human Trafficking Elements and Definitions ▶ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment] ▶ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Violence Defined [in context of false imprisonment] ▶ *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].

Related Instruction

See CALCRIM No. 1243, *Human Trafficking*.

SECONDARY SOURCES

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Human Trafficking*, § 142.14A (Matthew Bender).

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

Self-defense is a defense to _____ *<insert list of pertinent crimes charged>*. The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ *<insert name of third party>*) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];
2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was (imminent danger of bodily injury to (himself/herself/ [or] someone else)/ [or] an imminent danger that (he/she/ [or] someone else) would be touched unlawfully). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The slightest touching can be unlawful if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <insert name of victim> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <insert name of victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <insert name of victim>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/ _____ <insert crime>) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ <insert crime(s) charged>.

New January 2006; Revised June 2007, April 2008, August 2009, February 2012, August 2012, March 2022

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the

defendant is relying on it or it is not inconsistent with the defendant's theory of the case. When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another.*)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another.*
CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.
CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense.*
CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self-Defense.*

AUTHORITY

- Instructional Requirements ▶ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▶ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518].
- Burden of Proof ▶ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].

- Elements ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ▶ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]).
- No Duty to Retreat ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Temporary Possession of Firearm by Felon in Self-Defense ▶ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ▶ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Inmate Self-Defense ▶ *People v. Saavedra* (2007) 156 Cal.App.4th 561 [67 Cal.Rptr.3d 403].
- Reasonable Belief ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. “The common law does not take account of a person’s mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds ‘the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.’ (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)” (*Ibid.*; see also Rest.2d Torts, § 283B.)

Reasonable Person Standard and Physical Limitations

A defendant’s physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

See also the Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, §§ 68, 71-73, 86-87.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, §§ 73.11, 73.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 124, *Jurisdiction and Disposition Hearings*, § 124.04 (Matthew Bender).

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]:
Circulate for comment (out of cycle)

Rules Committee Meeting Date: 2/3/2022

Title of proposal: Criminal Law: Felony Sentencing

Proposed rules, forms, or standards (include amend/revise/adopt/approve):

Amend rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453

Committee or other entity submitting the proposal:

Criminal Law Advisory Committee

Staff contact (name, phone and e-mail): Sarah Fleischer-Ihn, 5-7702, sarah.fleischer-ihn@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by Rules Committee date: 11/2/2021

Project description from annual agenda: Amend felony sentencing rules: Effective January 1, 2022, Assembly Bill 124 and Senate Bill 567 amend Penal Code section 1170, and Senate Bill 81 amends Penal Code section 1385 on felony sentencing. These changes require amendments to rules of court on felony sentencing, including rules 4.405 (definitions), 4.406 (statement of reasons), 4.408 (listing of factors not exclusive; sequence not significant), 4.420 (selection of term of imprisonment), 4.421 (circumstances in aggravation), 4.422 (circumstances in mitigation), 4.428 (factors affecting imposition of enhancements), 4.433 (matters to be considered at sentencing), and 4.437 (statements in aggravation or mitigation).

If requesting July 1 or out of cycle, explain:

This proposal implements statutory changes to sentencing rules effective 1/1/22. The proposal is to circulate for a short period of time (10 days) to allow public comment and then take final recommendations to the March Judicial Council meeting so that the rules can be amended to comply with law as soon as possible.

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- List any amended forms in this proposal that have already been translated:
- List any new forms that require translation by statute or that you will request to be translated:

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SP22-__

<p>Title Criminal Law: Felony Sentencing</p> <p>Proposed Rules, Forms, Standards, or Statutes Amend rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453</p> <p>Proposed by Criminal Law Advisory Committee Hon. Brian. M. Hoffstadt, Chair</p>	<p>Action Requested Review and submit comments by February 14, 2022</p> <p>Proposed Effective Date March 14, 2022</p> <p>Contact Sarah Fleischer-Ihn, 415-865-7702Staff sarah.fleischer-ihn@jud.ca.gov</p>
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Executive Summary and Origin

The Criminal Law Advisory Committee proposes amendments to specified felony sentencing rules of the California Rules of Court to reflect several major legislative changes were made to sentencing of felony offenses and enhancements, which went into effect January 1, 2022. The recommended amendments will reflect statutory changes (1) requiring aggravated factors to be stipulated to by the defendant or found true beyond a reasonable doubt when imposing the upper term of a felony offense or enhancement; (2) allowing courts to consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records, but that this exception may not be used to select the upper term of an enhancement; (3) discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice; (4) regarding mitigating circumstances requiring imposition of the lower term; (5) identifying specified mitigating circumstances for consideration in sentencing; (6) allowing an act or omission that is punishable in different ways by different laws to be punished under either of those provisions; and (7) amending dismissal of enhancements due to specified mitigating circumstances. The proposal would also clarify that courts may consider aggravating factors in exercising discretion in imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to Penal Code Section 1385(c) and make nonsubstantive technical amendments.

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

Background

Effective January 1, 2022, several major legislative changes were made to sentencing of felony offenses and enhancements.

Penal Code section 1170(b)(1)-(3) and 1170.1(d) were added to state that a court may impose an upper term of custody if aggravating factors were found true beyond a reasonable doubt or stipulated to by the defendant, except when a prior conviction is used as an aggravating factor to impose the upper base term, but not for the upper term of an enhancement. (Senate Bill 567 (Stats. 2021, ch. 731).)

Penal Code section 1170(b)(6) was added to require the imposition of the low term of custody in specified circumstances, except if imposition of the low term would not be in the interests of justice if aggravating factors outweigh mitigating factors. The specified circumstances are (1) if the person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence; (2) the person was a youth (defined as any person under 26 years of age) at the time of the commission of the offense; or (3) prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking. (Assembly Bill 124 (Stats. 2021, ch. 695).)

Penal Code section 1385 was amended to direct the exercise of judicial discretion in striking enhancements in specified circumstances, unless the court finds that dismissal would endanger public safety. (Senate Bill 81 (Stats. 2021, ch 721).) The specified circumstances are as follows:

- Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745.
- Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.
- The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.
- The current offense is connected to mental illness.
- The current offense is connected to prior victimization or childhood trauma.
- The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.
- The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.
- The enhancement is based on a prior conviction that is over five years old.
- Though a firearm was used in the current offense, it was inoperable or unloaded.

Along with amendments to reflect changes to Penal Code sections 1170, 1170.01, and 1385, the proposed amendments reflect the committee's conclusion that the new statutory requirements for imposition of an upper term of an offense or enhancement do not apply when the court is imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c). (See *People v. Black* (2007) 41 Cal.4th 799, 815-816 (*Black II*) [aggravating circumstances serve two

analytically distinct functions in California’s current determinate sentencing scheme; one function is to raise the maximum permissible sentence from the middle term to the upper term, and the other function is to serve as a consideration in the trial court’s exercise of its discretion in selecting the appropriate term from among those authorized for the defendant’s offense].)

Finally, Penal Code section 654 was amended to allow an act or omission that is punishable in different ways by different laws to be punished under either of those provisions. (Assembly Bill 518 (Stats. 2021, ch. 441).)

The committee also recommends amendments reflecting statutory changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice. (Senate Bill 92 (Stats. 2021, ch. 18).)

Proposal

This proposal would amend several sentencing rules to reflect the statutory changes described above and provide additional clarification and guidance on felony sentencing:

1. Repeal rule 4.300 to reflect changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice;
2. Amend rule 4.405 to clarify the definition of “base term,” and add definitions of “principal term,” “subordinate term,” and “offense;”
3. Amend renumbered rule 4.405(7) to modify the definition of “aggravation” to apply to factors that justify the imposition of the upper prison term or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c);
4. Update rule 4.405’s advisory committee comment to reflect changes regarding sentencing triads;
5. Delete rule 4.406(b)(3), which required the court to state reasons for declining to commit an eligible juvenile found amenable to treatment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice, to reflect the repeal of Welfare and Institutions Code section 707.2;
6. Amend renumbered rule 4.406(b)(3) to require a court to state reasons for selecting a term for either an offense or an enhancement;
7. Update rule 4.406’s advisory committee comment to reflect changes regarding sentencing triads;
8. Update rule 4.408’s advisory committee comment to reflect changes regarding sentencing triads;
9. Amend rule 4.411.5(a) to require the contents of a probation officer’s presentence investigation report to include: whether factors in aggravation were proven beyond a reasonable doubt or stipulated; specific factors in mitigation that may require imposition of low term; and discussion of both aggravating and mitigating factors related to

- disposition;
10. Amend rule 4.411.5(a) to require the contents of a probation officer's presentence investigation report to include any mitigating factors pursuant to Penal Code section 1385(c);
 11. Amend rule 4.411.5(a) to delete references to chargeable probation services and attorney fees under Penal Code section 987.8, to reflect the repeal of these fees by Assembly Bill 1869 (Stats. 2020, ch. 92));
 12. Amend rule 4.414 to state that a court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when determining a defendant's suitability for probation;
 13. Update the title of rule 4.420 to clarify that it addresses offenses, and not enhancements;
 14. Amend rule 4.420 to reflect changes regarding sentencing triads, including under what circumstances the court may impose the upper term;
 15. Amend rule 4.420 to reflect changes regarding mandatory imposition of the low term under specified circumstances;
 16. Update rule 4.420's advisory committee comment to reflect changes regarding sentencing triads and to include a definition of "interests of justice;"
 17. Update rule 4.421's advisory committee comment to reflect changes regarding sentencing triads and nonsubstantive technical amendments;
 18. Amend rule 4.423 to add mitigating factors specified in Penal Code section 1385(c);
 19. Amend rule 4.424 to reflect changes allowing the court to use its discretion regarding which act or omission to punish under Penal Code section 654;
 20. Amend rule 4.425 to clarify that a court may consider any circumstances in aggravation or mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when considering whether to impose consecutive or concurrent sentences, with specified exceptions;
 21. Amend rule 4.427 to reflect changes to Penal Code section 1385(c) regarding dismissal of enhancements;
 22. Update rule 4.427's advisory committee comment to reflect changes to Penal Code sections 1170.1, regarding requirements to impose the upper term of an enhancement, and 1385(c), regarding dismissal of enhancements;
 23. Amend rule 4.428 to reflect changes regarding enhancements with triads and include a new section on dismissal of enhancements under Penal Code section 1385(c);
 24. Amend rule 4.428's advisory committee comment to include definitions of "furtherance of justice" and "great weight;"
 25. Amend rule 4.428's advisory committee comment to state that the legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes;
 26. Update rule 4.437's advisory committee comment to state that the requirement that a statement in aggravation or mitigation include notice of intention to rely on new evidence may include either party's intention to provide evidence to prove or contest the existence of a factor in mitigation that would require imposition of the low term for the underlying offense or dismissal of an enhancement;

27. Amend rule 4.447 and the advisory committee comment to refer to Penal Code section 1385(c); and
28. Repeal rule 4.453 to reflect changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice.

Alternatives Considered

The committee did not consider alternatives, determining that the rule amendments were needed to reflect the legislative changes.

Fiscal and Operational Impacts

No implementation or operational impacts are likely.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed amendments to Cal. Rules of Court, rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.433, at pages 6–24

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 **Rule 4.300. Commitments to nonpenal institutions**

2
3 ~~When a defendant is convicted of a crime for which sentence could be imposed under~~
4 ~~Penal Code section 1170 and the court orders that he or she be committed to the~~
5 ~~California Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
6 ~~under Welfare and Institutions Code section 1731.5, the order of commitment must~~
7 ~~specify the term of imprisonment to which the defendant would have been sentenced. The~~
8 ~~term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules,~~
9 ~~as though a sentence of imprisonment were to be imposed.~~

10
11
12 **Advisory Committee Comment**

13
14 ~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
15 ~~(formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult~~
16 ~~institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

17
18 ~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from~~
19 ~~the record of the conviction, the maximum potential period of imprisonment for the crime of~~
20 ~~which the defendant was convicted.~~

21
22 ~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves~~
23 ~~doubt as to the maximum term when only the record of convictions is present.~~

24
25 **Rule 4.405. Definitions**

26
27 As used in this division, unless the context otherwise requires:

28
29 (1) * * *

30
31 (2) “Base term” is the determinate or indeterminate sentence imposed for the
32 commission of a crime, not including any enhancements that carry an additional
33 term of imprisonment. determinate term in prison or county jail under section
34 1170(h) selected from among the three possible terms prescribed by statute; the
35 determinate term in prison or county jail under section 1170(h) prescribed by
36 statute if a range of three possible terms is not prescribed; or the indeterminate term
37 in prison prescribed by statute.

38
39 (3) When a person is convicted of two or more felonies, the “principal term” is the
40 greatest determinate term of imprisonment imposed by the court for any of the
41 crimes, including any term imposed for applicable count-specific enhancements.

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

- 1 (4) When a person is convicted of two or more felonies, the “subordinate term” is the
2 determinate term imposed for an offense, plus any count-specific enhancements
3 applicable to the offense ordered to run consecutively to the principal term.
4
- 5 (35) “Enhancement” means an additional term of imprisonment added to the base term.
6
- 7 (6) “Offense” means the offense of conviction unless a different meaning is specified
8 or is otherwise clear from the context. The term “instant” or “current” is used in
9 connection with “offense” or “offense of conviction” to distinguish the violation for
10 which the defendant is being sentenced from an enhancement, prior or subsequent
11 offense, or from an offense before another court.
12
- 13 (47) “Aggravation,” or “circumstances in aggravation,” “mitigation,” or “circumstances
14 in mitigation” means factors that justify the imposition of the upper prison term
15 referred to in Penal Code section 1170(b) and 1170.1, or factors that the court may
16 consider in exercising discretion authorized by statute and under these rules
17 including imposing the middle term instead of a low term, denying probation,
18 ordering consecutive sentences, or determining whether to exercise discretion
19 pursuant to Penal Code section 1385(c). ~~that the court may consider in its broad~~
20 sentencing discretion authorized by statute and under these rules.
21
- 22 (8) “Mitigation” or “circumstances in mitigation” means factors that the court may
23 consider in its broad sentencing discretion authorized by statute and under these
24 rules.
25
- 26 (59) “Sentence choice” means the selection of any disposition of the case that does not
27 amount to a dismissal, acquittal, or grant of a new trial.
28
- 29 (610) “Section” means a section of the Penal Code.
30
- 31 (711) “Imprisonment” means confinement in a state prison or county jail under section
32 1170(h).
33
- 34 (812) “Charged” means charged in the indictment or information.
35
- 36 (913) “Found” means admitted by the defendant or found to be true by the trier of fact
37 upon trial.
38
- 39 (4014) “Mandatory supervision” means the period of supervision defined in section
40 1170(h)(5)(A), (B).
41

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 (~~4115~~) “Postrelease community supervision” means the period of supervision governed
2 by section 3451 et seq.

3
4 (~~4216~~) “Risk/needs assessment” means a standardized, validated evaluation tool designed
5 to measure an offender’s actuarial risk factors and specific needs that, if
6 successfully addressed, may reduce the likelihood of future criminal activity.

7
8 (~~4317~~) “Evidence-based practices” means supervision policies, procedures, programs,
9 and practices demonstrated by scientific research to reduce recidivism among
10 individuals under probation, parole, or postrelease supervision

11
12 (~~4418~~) “Community-based corrections program” means a program consisting of a system
13 of services for felony offenders under local supervision dedicated to the goals
14 stated in section 1229(c)(1)–(5).

15
16 (~~4519~~) “Local supervision” means the supervision of an adult felony offender on
17 probation, mandatory supervision, or postrelease community supervision.

18
19 (~~4620~~) “County jail” means local county correctional facility.
20

21 **Advisory Committee Comment**

22
23 ~~Following the United States Supreme Court decision in *Cunningham v. California* (2007) 549~~
24 ~~U.S. 270, the Legislature amended the determinate sentencing law to remove the presumption that~~
25 ~~the court is to impose the middle term on a sentencing triad, absent aggravating or mitigating~~
26 ~~circumstances. (See Sen. Bill 40; Stats. 2007, ch. 3.) It subsequently amended sections 186.22,~~
27 ~~186.33, 1170.1, 12021.5, 12022.2, and 12022.4 to eliminate the presumptive middle term for an~~
28 ~~enhancement. (See Sen. Bill 150; Stats. 2009, ch. 171.) Instead of finding facts in support of a~~
29 ~~sentencing choice, courts are now required to state reasons for the exercise of judicial discretion~~
30 ~~in sentencing.~~

31
32 The Legislature amended the determinate sentencing law to require courts to order imposition of
33 a sentence or enhancement not to exceed the middle term unless factors in aggravation justify
34 imposition of the upper term and are stipulated to by the defendant or found true beyond a
35 reasonable doubt at trial by the jury or by the judge in a court trial. (See Sen. Bill 567; Stats.
36 2021, ch. 731.) However, in determining whether to impose the upper term for a criminal offense,
37 the court may consider as an aggravating factor that a defendant has suffered one or more prior
38 convictions, based on certified official records. This exception may not be used to select the
39 upper term of an enhancement.

40
41 The court may exercise its judicial discretion in imposing the middle term or low term and must
42 state the facts and reasons on the record for choosing the sentence imposed. In exercising this

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 discretion between the middle term and the low term, the court may rely on aggravating factors
2 that have not been stipulated to by the defendant or proven beyond a reasonable doubt. (*People v.*
3 *Black* (2007) 41 Cal.4th 799.)

4
5 The Legislature also amended the determinate sentencing law to require courts to order
6 imposition of the low term when the court finds that certain factors contributed to the commission
7 of the crime unless the court finds that it would not be in the interests of justice to do so because
8 the aggravating factors outweigh the mitigating factors. (See Sen. Bill 567; Stats. 2021, ch. 731.)
9

10 **Rule 4.406. Reasons**

11
12 (a) * * *

13
14 (b) **When reasons required**

15
16 Sentence choices that generally require a statement of a reason include, but are not
17 limited to:

- 18
19 (1) Granting probation when the defendant is presumptively ineligible for
20 probation;
21
22 (2) Denying probation when the defendant is presumptively eligible for
23 probation;
24
25 (3) ~~Declining to commit an eligible juvenile found amenable to treatment to the~~
26 ~~Department of Corrections and Rehabilitation, Division of Juvenile Justice;~~
27
28 (4)(3) ~~Selecting a term for either an offense or an enhancement one of the three~~
29 ~~authorized terms in prison or county jail under section 1170(h) referred to in~~
30 ~~section 1170(b) for either a base term or an enhancement;~~
31
32 (5)(4) ~~Imposing consecutive sentences;~~
33
34 (6)(5) ~~Imposing full consecutive sentences under section 667.6(c) rather than~~
35 ~~consecutive terms under section 1170.1(a), when the court has that choice;~~
36
37 (7)(6) ~~Waiving a restitution fine;~~
38
39 (8)(7) ~~Granting relief under section 1385; and~~
40
41 (9)(8) ~~Denying mandatory supervision in the interests of justice under section~~
42 ~~1170(h)(5)(A).~~

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

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Advisory Committee Comment

* * *

Rule 4.408. Listing of factors not exclusive; sequence not significant

(a)–(b) * * *

Advisory Committee Comment

The variety of circumstances presented in felony cases is so great that no listing of criteria could claim to be all-inclusive. (Cf., Evid. Code, § 351.)

The court may impose a sentence or enhancement exceeding the middle term only if the facts underlying the aggravating factor were stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (Pen. Code, § 1170(b)(2).)

However, in determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records This exception may not be used to select the upper term of an enhancement. (Pen. Code, § 1170(b)(3).)

Rule 4.411.5. Probation officer’s presentence investigation report

(a) Contents

A probation officer’s presentence investigation report in a felony case must include at least the following:

- (1) A face sheet showing at least:
 - (A) The defendant’s name and other identifying data;
 - (B) The case number;
 - (C) The crime of which the defendant was convicted, and any enhancements which were found true;
 - (D) Any factors in aggravation, including whether the factors were stipulated to by the defendant, found true beyond a reasonable doubt at trial by a jury, or found true beyond a reasonable doubt by a judge in a court trial;

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

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~~(D)~~(E) The date of commission of the crime, the date of conviction, and any other dates relevant to sentencing;

~~(E)~~(F) The defendant’s custody status; and

~~(F)~~(G) The terms of any agreement on which a plea of guilty was based.

~~(2)–(5)~~ * * *

(6) Any relevant facts concerning the defendant’s social history, including those categories enumerated in section 1203.10, organized under appropriate subheadings, including, whenever applicable, “Family,” “Education,” “Employment and income,” “Military,” “Medical/psychological,” “Record of substance abuse or lack thereof,” and any other relevant subheadings. This includes:

(A) Facts relevant to whether the defendant may be suffering from sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems as a result of his or her U.S. military service; and

(B) Factors listed in Penal Code section 1170(b)(6) and whether the current offense is connected to those factors.

~~(7)–(9)~~ * * *

(10) Any mitigating factors pursuant to Penal Code section 1385(c).

~~(11)~~(11) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report must include recommendations concerning the length of any prison or county jail term under section 1170(h) that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, ~~and~~ the imposition or striking of the additional terms for enhancements charged and found

~~(12)~~(12) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period or periods of custody; the existence of any other sentences imposed on the defendant during the period of custody; the amount of good behavior, work, or participation credit to which the defendant is entitled; and whether the sheriff or other officer

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 holding custody, the prosecution, or the defense wishes that a hearing be held
2 for the purposes of denying good behavior, work, or participation credit.

3
4 ~~(1213)~~A statement of mandatory and recommended restitution, restitution fines,
5 other fines, and costs to be assessed against the defendant; ~~including~~
6 ~~chargeable probation services and attorney fees under section 987.8 when~~
7 ~~appropriate, findings concerning the defendant's ability to pay, and a~~
8 recommendation whether any restitution order should become a judgment
9 under section 1203(j) if unpaid; and, when appropriate, any finding
10 concerning the defendant's ability to pay.

11
12 ~~(1314)~~ Information pursuant to Penal Code section 29810(c):

13
14 (A)–(B) * * *

15
16 (b)–(c) * * *

17
18 **Rule 4.414. Criteria affecting probation**

19
20 Criteria affecting the decision to grant or deny probation include facts relating to the
21 crime and facts relating to the defendant.

22
23 (a)–(b) * * *

24
25 **(c) Suitability for probation**

26
27 In determining the suitability of the defendant for probation, the court may consider
28 factors in aggravation and mitigation, whether or not the factors have been
29 stipulated to by the defendant or found true beyond a reasonable doubt at trial by a
30 jury or the judge in a court trial.

31
32 **Advisory Committee Comment**

33
34 * * *

35
36
37 **Rule 4.420. Selection of term of imprisonment for offense**

38
39 (a) When a ~~sentence judgment~~ of imprisonment is imposed, or the execution of a
40 ~~sentence judgment~~ of imprisonment is ordered suspended, the sentencing judge
41 must, in their sound discretion, order imposition of a sentence not to exceed the
42 middle term, except as otherwise provided in paragraph (b). ~~select the upper,~~

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 ~~middle, or lower term on each count for which the defendant has been convicted, as~~
2 ~~provided in section 1170(b) and these rules.~~

3
4 **(b)** The court may only choose an upper term when (1) there are circumstances in
5 aggravation of the crime that justify the imposition of an upper term, and (2) the
6 facts underlying those circumstances have been (i) stipulated to by the defendant,
7 (ii) found true beyond a reasonable doubt at trial by a jury, or (iii) found true
8 beyond a reasonable doubt by the judge in a court trial.

9
10 **(c)** Notwithstanding paragraphs (a) and (b), the court may consider the fact of
11 defendant’s prior convictions based on a certified record of conviction without it
12 having been stipulated to by the defendant or found true beyond a reasonable doubt
13 at trial by a jury, or by a judge in a court trial. This exception does not apply to the
14 use of the record of a prior conviction in selecting the upper term of an
15 enhancement.

16
17 ~~**(b)(d)**~~ In selecting between the middle and lower terms of imprisonment, exercising his or
18 her discretion in selecting one of the three authorized terms of imprisonment
19 referred to in section 1170(b), the sentencing judge may consider circumstances in
20 aggravation or mitigation, and any other factor reasonably related to the sentencing
21 decision. The court may consider factors in aggravation and mitigation whether or
22 not the factors have been stipulated to by the defendant or found true beyond a
23 reasonable doubt at trial by a jury or the judge in a court trial. The relevant
24 circumstances may be obtained from the case record, the probation officer’s report,
25 other reports and statements properly received, statements in aggravation or
26 mitigation, and any evidence introduced at the sentencing hearing.

27
28 **(e)** Notwithstanding section 1170(b)(1), and unless the court finds that the aggravating
29 circumstances outweigh the mitigating circumstances such that imposition of the
30 lower term would be contrary to the interests of justice, the court must order
31 imposition of the lower term if any of the following was a contributing factor in the
32 commission of the offense:

33
34 **(A)** the defendant has experienced psychological, physical, or childhood
35 trauma, including, but not limited to, abuse, neglect, exploitation, or
36 sexual violence;

37
38 **(B)** the defendant is a youth, or was a youth as defined under subdivision
39 (b) of Section 1016.7 at the time of the commission of the offense; or
40

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 *People v. Riolo* (1983) 33 Cal.3d 223, 227 (and note 5 on 227) held that section 1170.1(a) does
2 not require the judgment to state the base term (upper, middle, or lower) and enhancements,
3 computed independently, on counts that are subject to automatic reduction under the one-third
4 formula of section 1170.1(a).

5
6 Even when sentencing is under section 1170.1, however, it is essential to determine the base term
7 and specific enhancements for each count independently, in order to know which is the principal
8 term count. The principal term count must be determined before any calculation is made using the
9 one-third formula for subordinate terms.

10
11 In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at
12 an informed decision whether to make terms consecutive or concurrent; and the base term for
13 each count must be stated in the judgment when sentences are concurrent or are fully consecutive
14 (i.e., not subject to the one-third rule of section 1170.1(a)).

15
16 Case law suggests that in determining the “interests of justice” the court should consider the
17 constitutional rights of the defendant and the interests of society represented by the people; the
18 defendant’s background and prospects, including the presence or absence of a record; the nature
19 and circumstances of the crime and the defendant’s level of involvement; the factors in
20 aggravation and mitigation including the specific factors in mitigation of Penal Code section
21 1170(b)(6); and the factors that would motivate a “reasonable judge” in the exercise of their
22 discretion. The court should not consider whether the defendant has simply pled guilty, factors
23 related to controlling the court’s calendar, or antipathy toward the statutory scheme. (See *People*
24 *v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v.*
25 *Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)

26
27 **Rule 4.421. Circumstances in aggravation**

28
29 Circumstances in aggravation include factors relating to the crime and factors relating to
30 the defendant.

31
32 **(a)–(c)** * * *

33
34 **Advisory Committee Comment**

35
36 ~~Circumstances in aggravation may justify imposition of the middle or upper of three possible~~
37 ~~terms of imprisonment. (Section 1170(b).)~~

38
39 ~~The list of circumstances in aggravation includes some facts that, if charged and found, may be~~
40 ~~used to enhance the sentence.~~

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 Courts may not impose a sentence greater than the middle term except when aggravating factors
2 justifying the imposition of the upper term have been stipulated to by the defendant or found true
3 beyond a reasonable doubt at trial by the jury or the judge in a court trial. These requirements do
4 not apply to consideration of aggravating factors for the lower or middle term. If the court finds
5 that any of the factors listed in Section 1170(b)(6)(A–C) were a contributing factor to the
6 commission of the offense, the court must impose the lower term (see Rule 4.420(e)) unless the
7 court finds that the aggravating factors outweigh the mitigating factors to such a degree that
8 imposing the lower term would be contrary to the interests of justice. In this instance, since the
9 court is not addressing the imposition of the upper term, the court may consider factors in
10 aggravation that have not been stipulated to by the defendant or found true beyond a reasonable
11 doubt at trial by the jury or the judge in a court trial.

12
13 In determining whether to impose the upper term for a criminal offense, the court may consider as
14 an aggravating factor that a defendant has suffered one or more prior convictions, based on
15 certified official records. This exception may not be used to select the upper term of an
16 enhancement.

17
18 This rule does not deal with the dual use of the facts; the statutory prohibition against dual use is
19 included, in part, in the comment to rule 4.420.

20
21 ~~Conversely, such facts as infliction of bodily harm, being armed with or using a weapon, and a~~
22 ~~taking or loss of great value may be circumstances in aggravation even if not meeting the~~
23 ~~statutory definitions for enhancements or charged as an enhancement.~~

24
25 ~~Facts concerning the defendant’s prior record and personal history may be considered. By~~
26 ~~providing that the defendant’s prior record and simultaneous convictions of other offenses may~~
27 ~~not be used both for enhancement and in aggravation, section 1170(b) indicates that these and~~
28 ~~other facts extrinsic to the commission of the crime may be considered in aggravation in~~
29 ~~appropriate cases.~~

30
31 Refusal to consider the personal characteristics of the defendant in imposing sentence may raise
32 serious constitutional questions. The California Supreme Court has held that sentencing decisions
33 must take into account “the nature of the offense and/or the offender, with particular regard to the
34 degree of danger both present to society.” (In re Rodriguez (1975) 14 Cal.3d 639, 654, quoting In
35 re Lynch (1972) 8 Cal.3d 410, 425.) In *Rodriguez* the court released petitioner from further
36 incarceration because “it appears that neither the circumstances of his offense *nor his personal*
37 *characteristics* establish a danger to society sufficient to justify such a prolonged period of
38 imprisonment.” (*Id.* at p. 655, fn. omitted, italics added.) “For the determination of sentences,
39 justice generally requires . . . that there be taken into account the circumstances of the offense
40 together with the character and propensities of the offender.” (*Pennsylvania ex rel. Sullivan v.*
41 *Ashe* (1937) 302 U.S. 51, 55, quoted with approval in *Gregg v. Georgia* (1976) 428 U.S. 153,
42 189.)

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

~~Former subdivision (a)(4), concerning multiple victims, was deleted to avoid confusion. Some of the cases that had relied on that circumstance in aggravation were reversed on appeal because there was only a single victim in a particular count.~~

~~Old age or youth of the victim may be circumstance in aggravation; see section 1170.85(b). Other statutory circumstances factors in aggravation are listed, for example, in sections 422.76, 1170.7, 1170.71, 1170.8, and 1170.85, and may be considered to impose the upper term if stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial.~~

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime

Factors relating to the crime include that:

(1)–(9) * * *

(10) If a firearm was used in the commission of the offense, it was unloaded or inoperable.

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1)–(2) * * *

(3) The defendant experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence and it was a factor in the commission of the crime;

(4) The commission of the current offense is connected to the defendant’s prior victimization or childhood trauma, or mental illness as defined by 1385(c);

(5) The defendant is or was a victim of intimate partner violence or human trafficking at the time of the commission of the offense and it was a factor in the commission of the offense;

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 **Rule 4.425. Factors affecting concurrent or consecutive sentences**

2
3 Factors affecting the decision to impose consecutive rather than concurrent
4 sentences include:

5
6 **(a) * * ***

7
8 **(b) Other facts and limitations**

9
10 Any circumstances in aggravation or mitigation, whether or not the factors have
11 been stipulated to by the defendant or found true beyond a reasonable doubt at trial
12 by a jury or the judge in a court trial, may be considered in deciding whether to
13 impose consecutive rather than concurrent sentences, except:

- 14
15 (1) A fact used to impose the upper term;
16
17 (2) A fact used to otherwise enhance the defendant’s sentence in prison or county
18 jail under section 1170(h); and
19
20 (3) A fact that is an element of the crime may not be used to impose consecutive
21 sentences.
22

23 **Advisory Committee Comment**

24
25 * * *

26
27
28 **Rule 4.427. Hate crimes**

29
30 **(a)–(b) * * ***

31
32 **(c) Hate crime enhancement**

33
34 If a hate crime enhancement is pled and proved, the punishment for a felony
35 conviction must be enhanced under section 422.75 unless the conviction is
36 sentenced as a felony under section 422.7.

- 37
38 (1) The following enhancements apply:
39
40 (A) An enhancement of a term in state prison as provided in section
41 422.75(a). Personal use of a firearm in the commission of the offense

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 is an aggravating factor that must be considered in determining the
2 enhancement term.

3
4 (B) An additional enhancement of one year in state prison for each prior
5 felony conviction that constitutes a hate crime as defined in section
6 422.55.

7
8 (2) The court may strike enhancements under (c) if it finds mitigating
9 circumstances under rule 4.423, or pursuant to Penal Code section 1385(c)
10 and states those mitigating circumstances on the record.

11
12 (3) The punishment for any enhancement under (c) is in addition to any other
13 punishment provided by law.

14
15 (d)–(e) * * *

16 **Advisory Committee Comment**

17
18 Multiple enhancements for prior convictions under subdivision (c)(1)(B) may be imposed if the
19 prior convictions have been brought and tried separately. (Pen. Code, § 422.75(d).

20
21 In order to impose the upper term based on Penal Code section 422.75, the fact of the
22 enhancement pursuant to Penal Code section 422.55 or 422.6 must be stipulated to by the
23 defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.

24
25 Any enhancement alleged pursuant to this section may be dismissed pursuant to Penal Code
26 section 1385(c).

27
28 **Rule 4.428. Factors affecting imposition of enhancements**

29
30 (a) **Enhancements punishable by one of three terms**

31
32 If an enhancement is punishable by one of three terms, the court must, in its sound
33 discretion, order imposition of a sentence not to exceed the middle term, unless
34 there are circumstances in aggravation that justify the imposition of a term of
35 imprisonment exceeding the middle term, and the facts underlying those
36 circumstances have been stipulated to by the defendant, or have been found true
37 beyond a reasonable doubt at trial by the jury or by the judge in a court trial.

38 ~~; in its discretion, impose the term that best serves the interest of justice and state~~
39 ~~the reasons for its sentence choice on the record at the time of sentencing. In~~
40 ~~exercising its discretion in selecting the appropriate term, the court may consider~~
41 ~~factors in mitigation and aggravation as described in these rules or any other factor~~
42 ~~authorized by rule 4.408.~~

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1
2 **(b) Striking enhancements under section 1385**

3
4 If the court has discretion under section 1385(a) to strike an enhancement in the
5 interests of justice, the court also has the authority to strike the punishment for the
6 enhancement under section 1385(b). In determining whether to strike the entire
7 enhancement or only the punishment for the enhancement, the court may consider
8 the effect that striking the enhancement would have on the status of the crime as a
9 strike, the accurate reflection of the defendant’s criminal conduct on his or her
10 record, the effect it may have on the award of custody credits, and any other
11 relevant consideration.

12
13 **(c) Dismissing enhancements under section 1385(c)**

- 14
15 (1) The court shall exercise the discretion to dismiss an enhancement if it is in
16 the furtherance of justice to do so, unless the dismissal is prohibited by
17 initiative statute.
18
19 (2) In exercising its discretion under section 1385(c), the court must consider and
20 afford great weight to evidence offered by the defendant to prove that any of
21 the mitigating circumstances in section 1385(c) are present.
22
23 (A) Proof of the presence of one or more of these circumstances weighs
24 greatly in favor of dismissing the enhancement, unless the court finds
25 that dismissal of the enhancement would endanger public safety.
26
27 (B) The circumstances listed in 1385(c) are not exclusive.
28
29 (C) “Endanger public safety” means there is a likelihood that the dismissal
30 of the enhancement would result in physical injury or other serious
31 danger to others.
32
33 (3) If the court dismisses the enhancement pursuant to 1385(c), then both the
34 enhancement and its punishment must be dismissed.
35

36 **Advisory Committee Comment**

37
38 Case law suggests that in determining the “furtherance of justice” the court should consider the
39 constitutional rights of the defendant and the interests of society represented by the people; the
40 defendant’s background and prospects, including the presence or absence of a record; the nature
41 and circumstances of the crime and the defendant’s level of involvement; the factors in
42 aggravation and mitigation including the specific factors in mitigation of Penal Code section

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 1170(b)(6); and the factors that would motivate a “reasonable judge” in the exercise of their
2 discretion. The court should not consider whether the defendant has simply pled guilty, factors
3 related to controlling the court’s calendar, or antipathy toward the statutory scheme. (See *People*
4 *v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v.*
5 *Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)
6

7 How to afford great weight to a mitigating circumstance is not further explained in section 1385.
8 The court is not directed to give conclusive weight to the mitigating factors, and must still engage
9 in a weighing of both mitigating and aggravating factors. A review of case law suggests that the
10 court can find great weight when there is an absence of “substantial evidence of countervailing
11 considerations of sufficient weight to overcome” the presumption of dismissal when the
12 mitigating factors are present. *People v. Martin* (1996) 42 Cal.3d 437. In exercising this
13 discretion, the court may rely on aggravating factors that have not been stipulated to by the
14 defendant or proven beyond a reasonable doubt at trial by a jury or a judge in a court trial.
15 (*People v. Black* (2007) 41 Cal.4th 799.)
16

17 The legislative history on Senate Bill 81 states that the presumption created by Penal Code
18 section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes,
19 or Three Strikes. (See Assem. Comm. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg.
20 Sess.) June 29, 2021, p. 5–6.) Unlike an offense specific enhancement, an alternative sentencing
21 scheme does not add an additional term of imprisonment to the base term; instead, it provides for
22 an alternate sentence for the underlying felony itself when it is proven that certain conditions
23 specified in the statute are true. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v.*
24 *Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.)
25

26 **Rule 4.437. Statements in aggravation and mitigation**

27
28 **(a)–(e) * * ***
29

30 **Advisory Committee Comment**

31
32 Section 1170(b)(4) states in part:

33
34 “At least four days prior to the time set for imposition of judgment, either party or the victim, or
35 the family of the victim if the victim is deceased, may submit a statement in aggravation or
36 mitigation to dispute facts in the record or the probation officer’s report, or to present additional
37 facts.”
38

39 This provision means that the statement is a document giving notice of intention to dispute
40 evidence in the record or the probation officer’s report, or to present additional facts.
41

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 The statement itself cannot be the medium for presenting new evidence, or for rebutting
2 competent evidence already presented, because the statement is a unilateral presentation by one
3 party or counsel that will not necessarily have any indicia of reliability. To allow its factual
4 assertions to be considered in the absence of corroborating evidence would, therefore, constitute a
5 denial of due process of law in violation of the United States (14th Amend.) and California (art. I,
6 § 7) Constitutions.

7
8 The requirement that the statement include notice of intention to rely on new evidence will
9 enhance fairness to both sides by avoiding surprise and helping to ensure that the time limit on
10 pronouncing sentence is met. This notice may include either party's intention to provide
11 evidence to prove or contest the existence of a factor in mitigation that would require imposition
12 of the low term for the underlying offense or dismissal of an enhancement.

13 14 **Rule 4.447. Sentencing of enhancements**

15 16 **(a) Enhancements resulting in unlawful sentences**

17
18 Except pursuant to section 1385(c), Aa court may not strike or dismiss an
19 enhancement solely because imposition of the term is prohibited by law or exceeds
20 limitations on the imposition of multiple enhancements. Instead, the court must:

- 21
22 (1) Impose a sentence for the aggregate term of imprisonment computed without
23 reference to those prohibitions or limitations; and
24
25 (2) Stay execution of the part of the term that is prohibited or exceeds the
26 applicable limitation. The stay will become permanent once the defendant
27 finishes serving the part of the sentence that has not been stayed.

28 29 **(b) Multiple enhancements**

30
31 Notwithstanding section 1385(c), If a defendant is convicted of multiple
32 enhancements of the same type, the court must either sentence each enhancement
33 or, if authorized, strike the enhancement or its punishment. While the court may
34 strike an enhancement, the court may not stay an enhancement except as provided
35 in (a) or as authorized by section 654.

36 37 **Advisory Committee Comment**

38
39 **Subdivision (a).** Statutory restrictions may prohibit or limit the imposition of an enhancement in
40 certain situations. (See, for example, sections 186.22(b)(1), 667(a)(2), 667.61(f), 1170.1(f) and
41 (g),-12022.53(e)(2) and (f), and Vehicle Code section 23558.)
42

Rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, are amended, effective March 14, 2022, to read:

1 Penal Code section 1385(c) requires that in the furtherance of justice certain enhancements be
2 dismissed unless dismissal is prohibited by any initiative statute.

3
4 Present practice of staying execution is followed to avoid violating a statutory prohibition or
5 exceeding a statutory limitation, while preserving the possibility of imposition of the stayed
6 portion should a reversal on appeal reduce the unstayed portion of the sentence. (See *People v.*
7 *Gonzalez* (2008) 43 Cal.4th 1118, 1129–1130; *People v. Niles* (1964) 227 Cal.App.2d 749, 756.)

8
9 Only the portion of a sentence or component thereof that exceeds a limitation is prohibited, and
10 this rule provides a procedure for that situation. This rule applies to both determinate and
11 indeterminate terms.

12
13 **Subdivision (b).** A court may stay an enhancement if section 654 applies. (See *People v. Bradley*
14 (1998) 64 Cal.App.4th 386; *People v. Haykel* (2002) 96 Cal.App.4th 146, 152.)

15
16
17 **Rule 4.453. Commitments to nonpenal institutions**

18
19 ~~When a defendant is convicted of a crime for which sentence could be imposed under~~
20 ~~Penal Code section 1170 and the court orders that he or she be committed to the~~
21 ~~California Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
22 ~~under Welfare and Institutions Code section 1731.5, the order of commitment must~~
23 ~~specify the term of imprisonment to which the defendant would have been sentenced. The~~
24 ~~term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules,~~
25 ~~as though a sentence of imprisonment were to be imposed.~~

26
27 **Advisory Committee Comment**

28
29 ~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
30 ~~(formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult~~
31 ~~institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

32
33 ~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from~~
34 ~~the record of the conviction, the maximum potential period of imprisonment for the crime of~~
35 ~~which the defendant was convicted.~~

36
37 ~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves~~
38 ~~doubt as to the maximum term when only the record of convictions is present.~~

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]:
Circulate for comment (out of cycle)

Rules Committee Meeting Date: 2/3/2022

Title of proposal: Criminal Procedure: Mental Competency Proceedings

Proposed rules, forms, or standards (include amend/revise/adopt/approve):
Amend rule 4.130

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

Staff contact (name, phone and e-mail): Sarah Fleischer-Ihn, 5-7702, sarah.fleischer-ihn@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by Rules Committee date: 11/2/2021

Project description from annual agenda: Review recently enacted legislation that may have an impact on criminal court administration - Amending rule 4.130 (mental competency proceedings) to reflect changes to misdemeanor incompetent to stand trial cases under SB 317

If requesting July 1 or out of cycle, explain:

Requesting expedited circulation for comments so proposal can go to May council meeting. This proposal implements a statutory change that became effective 1/1/22, and the rule does not comply with the change. Proposal is for amended rule to be effective immediately after the May council meeting.

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- List any amended forms in this proposal that have already been translated:
- List any new forms that require translation by statute or that you will request to be translated:

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SP22-__

Title	Action Requested
Criminal Procedure: Mental Competency Proceedings	Review and submit comments by March 18, 2022
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 4.130	May 16, 2022
Proposed by	Contact
Criminal Law Advisory Committee Hon. Brian. M. Hoffstadt, Chair	Sarah Fleischer-Ihn, 415-865-7702 sarah.fleischer-ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends amendments to California Rules of Court, rule 4.130, to reflect statutory changes to Penal Code section 1370 authorizing the Department of State Hospitals to conduct a reevaluation of a defendant found to be incompetent to stand trial in specified circumstances, and statutory changes to Penal Code section 1370.01 regarding defendants found incompetent to stand trial in a misdemeanor criminal proceeding.

Background

Penal Code section 1370, which applies to felony cases in which a defendant is found to be mentally incompetent, was amended, in relevant part, to authorize the Department of State Hospitals to conduct a reevaluation of a defendant in county custody if the defendant has been committed to and awaiting admission to the department for 60 days or more (Assembly Bill 133 (Stats. 2021, ch. 143)).

Penal Code section 1370.01, which applies to findings misdemeanor cases in which a defendant is found to be incompetent was amended, in relevant part, to repeal provisions regarding the restoration of competency for a person charged with a misdemeanor, or a violation of probation for a misdemeanor, and, upon finding the defendant incompetent to stand trial, requiring a court to suspend the proceedings and take certain actions, including granting diversion not to exceed one year or dismissing the charges (Senate Bill 317 (Stats. 2021, ch. 599)).

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

The Proposal

This proposal would amend California Rules of Court, rule 4.130, to reflect recent statutory changes:

- Amend subdivision (d)(2)(G) to clarify that a placement recommendation from the court-appointed expert only applies to felonies;
- Add new subdivision (d)(2)(H) to require the expert competency report to contain an opinion as to whether a misdemeanor defendant is “gravely disabled,” to incorporate statutory changes allowing a court to refer misdemeanor defendants ineligible for diversion to the county conservatorship investigator for possible conservatorship proceedings;
- Amend subdivision (f)(2) to clarify that restoration only applies to felonies and those found incompetent to stand trial due to developmental disorders;¹
- Add new subdivision (f)(3) to state posttrial options when a defendant is found incompetent to stand trial in a misdemeanor criminal proceeding;
- Amend subdivision (g) to delete provisions that mirror statutes on mental health diversion, and shift the focus to the procedure for reinstatement of felony proceedings when the circumstances in Penal Code section 1001.36(d) exist;
- Amend the title to subdivision (h) to clarify that the contents apply to posttrial hearings on competence under Penal Code section 1370; and
- Amend subdivision (h)(2) to add references to reevaluations done by Department of State Hospitals.

Alternatives Considered

The committee considered adding a new subdivision on mental health diversion for a defendant found incompetent to stand trial in a misdemeanor criminal proceeding under Penal Code section 1370.01. However, since the new subdivision in the rule would largely mirror the statutory requirements already stated in Penal Code section 1370.01, the committee decided not to propose a new subdivision. Instead, the committee added posttrial options for when a defendant is found incompetent to stand trial in a misdemeanor criminal proceeding to the existing subdivision on posttrial procedures.

Fiscal and Operational Impacts

The statutory changes to Penal Code section 1370.01 include an evaluation by a qualified mental health expert on whether specified defendants are gravely disabled as defined by Welfare and Institutions Code section 5008(h)(1)(A). The proposed rule suggests this evaluation be conducted as part of the initial competency examination to increase efficiencies and streamline procedures, when appropriate, by having one court-appointed expert provide all the relevant mental health

¹ Note that Penal Code section 1370.1, which applies to a finding of mental incompetency based on or accompanied by a developmental disability, was not amended, and still applies to both felonies and misdemeanors.

information regarding the defendant, rather than requiring the appointment of a separate expert at a later time.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- In subdivision (f)(2), would the following phrasing be clearer and more accurate than the proposed version?

If the defendant in a felony case is found to be mentally incompetent under Penal Code section 1370 or the defendant in any criminal action is found to be mentally incompetent under section 1370.1 due to a developmental disability, the criminal proceedings remain suspended and the court either:

(A) must issue an order committing the person for restoration treatment under the provisions of the governing statute, or,

(B) in the case of a person eligible for commitment under Penal Code sections 1370 or 1370.01, if the person is found incompetent due to a mental disorder, may consider placing the committed person on a program of diversion under Penal Code section 1001.36, in lieu of commitment.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed amendments to Cal. Rules of Court, rule 4.130, at pages 4–9

Rule 4.130 of the California Rules of Court would be amended, effective May 16, 2022, to read:

1 **Rule 4.130. Mental competency proceedings**

2
3 (a) – (c) * * *

4
5 (d) **Examination of defendant after initiation of mental competency proceedings**

6
7 (1) On initiation of mental competency proceedings, the court must inquire
8 whether the defendant, or defendant’s counsel, seeks a finding of mental
9 incompetence.
10

15
16 (A) A brief statement of the examiner’s training and previous experience as
17 it relates to examining the competence of a criminal defendant to stand
18 trial and preparing a resulting report;

19
20 (B) A summary of the examination conducted by the examiner on the
21 defendant, including a summary of the defendant’s mental status, a
22 diagnosis under the most recent version of the *Diagnostic and*
23 *Statistical Manual of Mental Disorders*, if possible, of the defendant’s
24 current mental health disorder or disorders, and a statement as to
25 whether symptoms of the mental health disorder or disorders which
26 motivated the defendant’s behavior would respond to mental health
27 treatment;

28
29 (C) A detailed analysis of the competence of the defendant to stand trial
30 using California’s current legal standard, including the defendant’s
31 ability or inability to understand the nature of the criminal proceedings
32 or assist counsel in the conduct of a defense in a rational manner as a
33 result of a mental health disorder;

34
35 (D) A summary of an assessment—conducted for malingering or feigning
36 symptoms, if clinically indicated—which may include, but need not be
37 limited to, psychological testing;

38
39 (E) Under Penal Code section 1369, a statement on whether treatment with
40 antipsychotic or other medication is medically appropriate for the
41 defendant, whether the treatment is likely to restore the defendant to
42 mental competence, a list of likely or potential side effects of the

Rule 4.130 of the California Rules of Court would be amended, effective May 16, 2022, to read:

1 medication, the expected efficacy of the medication, possible
2 alternative treatments, whether it is medically appropriate to administer
3 antipsychotic or other medication in the county jail, and whether the
4 defendant has capacity to make decisions regarding antipsychotic or
5 other medication. If an examining psychologist is of the opinion that a
6 referral to a psychiatrist is necessary to address these issues, the
7 psychologist must inform the court of this opinion and his or her
8 recommendation that a psychiatrist should examine the defendant;
9

10 (F) A list of all sources of information considered by the examiner,
11 including legal, medical, school, military, regional center, employment,
12 hospital, and psychiatric records; the evaluations of other experts; the
13 results of psychological testing; police reports; criminal history;
14 statement of the defendant; statements of any witnesses to the alleged
15 crime; booking information, mental health screenings, and mental
16 health records following the alleged crime; consultation with the
17 prosecutor and defendant’s attorney; and any other collateral sources
18 considered in reaching his or her conclusion; and
19

20 (G) If the defendant is charged with a felony offense, a A-recommendation,
21 if possible, for a placement or type of placement or treatment program
22 that is most appropriate for restoring the defendant to competency.
23

24 (H) If the defendant is charged only with a misdemeanor offense,
25 an opinion based on present clinical impressions and available
26 historical data, as to whether the defendant, regardless of custody
27 status, appears to be gravely disabled, as defined in Welfare and
28 Institutions Code section 5008(h)(1)(A).
29

34
35 (e) **Trial on mental competency**

36 * * *

37
38
39 (f) **Posttrial procedure**
40

Rule 4.130 of the California Rules of Court would be amended, effective May 16, 2022, to read:

1

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(3) If the defendant is found to be mentally incompetent in a misdemeanor case under Penal Code section 1370.01, the criminal proceedings remain suspended, and the court may dismiss the case under section 1385 or conduct a hearing to consider placing the person on a program of diversion under Penal Code section 1001.36.

(g) **Reinstatement of felony proceedings under Penal Code section 1001.36(d) Diversion of a person eligible for commitment under section 1370 or 1370.01**

(1) ~~After the court finds that the defendant is mentally incompetent and before the defendant is transported to a facility for restoration under section 1370(a)(1)(B)(i), the court may consider whether the defendant may benefit from diversion under Penal Code section 1001.36. The court may set a hearing to determine whether the defendant is an appropriate candidate for diversion. When determining whether to exercise its discretion to grant diversion under this section, the court may consider previous records of participation in diversion under section 1001.36.~~

(2) ~~The maximum period of diversion after a finding that the defendant is incompetent to stand trial is the lesser of two years or the maximum time for restoration under Penal Code section 1370(c)(1) (for felony offenses) or 1370.01(c)(1) (for misdemeanor offenses).~~

(3) ~~The court may not condition a grant of diversion for defendant found to be incompetent on either:~~

(A) ~~The defendant's consent to diversion, either personally, or through counsel; or~~

Rule 4.130 of the California Rules of Court would be amended, effective May 16, 2022, to read:

- 1 (B) ~~A knowing and intelligent waiver of the defendant’s statutory right to a~~
2 ~~speedy trial, either personally, or through counsel.~~
3
- 4 (4) ~~A finding that the defendant suffers from a mental health disorder or~~
5 ~~disorders rendering the defendant eligible for diversion, any progress reports~~
6 ~~concerning the defendant’s treatment in diversion, or any other records~~
7 ~~related to a mental health disorder or disorders that were created as a result of~~
8 ~~participation in, or completion of, diversion or for use at a hearing on the~~
9 ~~defendant’s eligibility for diversion under this section, may not be used in~~
10 ~~any other proceeding without the defendant’s consent, unless that information~~
11 ~~is relevant evidence that is admissible under the standards described in article~~
12 ~~I, section 28(f)(2) of the California Constitution.~~
13
- 14 (5) If a defendant eligible for commitment under Penal Code section 1370 is
15 granted diversion under Penal Code section 1001.36, and during the period of
16 diversion, the court determines that criminal proceedings should be reinstated
17 under Penal Code section 1001.36(d), the court must, under Penal Code
18 section 1369, appoint a psychiatrist, licensed psychologist, or any other
19 expert the court may deem appropriate, to examine the defendant and return a
20 report, opining on the defendant’s competence to stand trial. The expert’s
21 report must be provided to counsel for the People and to the defendant’s
22 counsel.
23
- 24 (A) On receipt of the evaluation report, the court must conduct an inquiry
25 into the defendant’s current competency, under the procedures set forth
26 in (h)(2) of this rule.
27
- 28 (B) If the court finds by a preponderance of the evidence that the defendant
29 is mentally competent, the court must hold a hearing as set forth in
30 Penal Code section 1001.36(d).
31
- 32 (C) If the court finds by a preponderance of the evidence that the defendant
33 is mentally incompetent, criminal proceedings must remain suspended,
34 and the court must order that the defendant be committed, ~~under Penal~~
35 ~~Code section 1370 (for felonies) or 1370.01 (for misdemeanors), and~~
36 placed for restoration treatment.
37
- 38 (D) If the court concludes, based on substantial evidence, that the defendant
39 is mentally incompetent and is not likely to attain competency within
40 the time remaining before the defendant’s maximum date for returning
41 to court, and has reason to believe the defendant may be gravely
42 disabled, within the meaning of Welfare and Institutions Code section

Rule 4.130 of the California Rules of Court would be amended, effective May 16, 2022, to read:

1 5008(h)(1), the court may, instead of issuing a commitment order under
2 Penal Code sections 1370 ~~or 1370.01~~, refer the matter to the
3 conservatorship investigator of the county of commitment to initiate
4 conservatorship proceedings for the defendant under Welfare and
5 Institutions Code section 5350 et seq.
6

7 (6) ~~If the defendant performs satisfactorily and completes diversion, the case~~
8 ~~must be dismissed under the procedures stated in Penal Code section~~
9 ~~1001.36, and the defendant must no longer be deemed incompetent to stand~~
10 ~~trial.~~

11
12 **(h) Posttrial hearings on competence under Penal Code section 1370**

13
14 (1) If, at any time after the court has declared a defendant incompetent to stand
15 trial, and counsel for the defendant, or a jail medical or mental health staff
16 provider, provides the court with substantial evidence that the defendant’s
17 psychiatric symptoms have changed to such a degree as to create a doubt in
18 the mind of the judge as to the defendant’s current mental incompetence, the
19 court may appoint a psychiatrist or a licensed psychologist to examine the
20 defendant and, in an examination with the court, opine as to whether the
21 defendant has regained competence.
22

23 (2) On receipt of ~~the~~ an evaluation report under (h)(1) or an evaluation by the
24 State Department of State Hospitals, pursuant to Welfare and Institutions
25 Code section 4335.2, the court must direct the clerk to serve a copy on
26 counsel for the People and counsel for the defendant. If, in the opinion of the
27 appointed expert ~~or the department’s expert~~, the defendant has regained
28 competence, the court must conduct a hearing, as if a certificate of restoration
29 of competence had been filed under Penal Code section 1372(a)(1), except
30 that a presumption of competency does not apply. At the hearing, the court
31 may consider any evidence, presented by any party, which is relevant to the
32 question of the defendant’s current mental competency.
33

34 (A) At the conclusion of the hearing, if the court finds that it has been
35 established by a preponderance of the evidence that the defendant is
36 mentally competent, the court must reinstate criminal proceedings.
37

41

Rule 4.130 of the California Rules of Court would be amended, effective May 16, 2022, to read:

- 1 (C) The court’s findings on the defendant’s mental competency must be
- 2 stated on the record and recorded in the minutes.
- 3
- 4

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]:
Circulate for comment (out of cycle)

Rules Committee Meeting Date: 2/3/2022

Title of proposal: Criminal Procedure: Motion and Order to Vacate Conviction or Sentence

Proposed rules, forms, or standards (include amend/revise/adopt/approve):
Revise forms CR-187 and CR-188

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

Staff contact (name, phone and e-mail): Sarah Fleischer-Ihn, 5-7702, sarah.fleischer-ihn@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by Rules Committee date: 11/2/2021

Project description from annual agenda: Review recently enacted legislation that may have an impact on criminal court administration - revise form CR-187 (motion to vacate conviction or sentence) to reflect that relief is available to convictions and sentences under AB 1259

If requesting July 1 or out of cycle, explain:

Implements statutory changes effective 1/1/22

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- List any amended forms in this proposal that have already been translated:
- List any new forms that require translation by statute or that you will request to be translated:

JUDICIAL COUNCIL OF CALIFORNIA

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

W__

Title	Action Requested
Criminal Procedure: Motion and Order to Vacate Conviction or Sentence	Review and submit comments by March 18, 2022
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Revise forms CR-187 and CR-188	July 1, 2022
Proposed by	Contact
Criminal Law Advisory Committee Hon. Brian. M. Hoffstadt, Chair	Sarah Fleischer-Ihn, 415-865-7702 sarah.fleischer-ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends revisions to two optional Judicial Council forms in response to recent amendments to Penal Code section 1473.7(a)(1). These revisions would (1) allow a moving party to seek relief based on a prejudicial error that interfered with the party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence; (2) clarify the out-of-custody requirement (see *People v. Rodriguez* (2021) 68 Cal.App.5th 301); (3) include a request for appointment of counsel (see *People v. Fryhaat* (2019) 35 Cal.App.5th 969); (4) add provisions around timeliness of the motion; and (5) simplify the language in the motion to aid self-represented petitioners.

Background

Optional forms *Motion to Vacate Conviction or Sentence* (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188) were adopted by the Judicial Council, effective January 1, 2018, to implement the provisions of Assembly Bill 813 (Stats. 2016, ch. 739) and help individuals and the courts adhere to the procedural requirements of Penal Code sections 1016.5 and 1473.7. The forms were last amended effective January 1, 2020, in response to Assembly Bill 2867 (Stats. 2018, ch. 825), which clarified the timing and procedural requirements of Penal Code section 1473.7.

Assembly Bill 1259 (Stats. 2021, ch. 420) amended section 1473.7(a)(1) to allow a moving party to seek relief based on a prejudicial error damaging the party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

consequences of a conviction or sentence. The amendment broadens relief to convictions that occurred at trial; previously, relief was limited to convictions resulting from a guilty or no contest plea.

Section 1473.7(a) states that “[a] person who is no longer in criminal custody may file a motion to vacate a conviction or sentence” under subdivisions (a)(1) and (a)(2). In *People v. Rodriguez, supra*, 68 Cal.App.5th at p. 315, the court held that a person is not barred from moving to vacate a conviction under section 1473.7(a)(1) if that person is in custody for another, unrelated conviction.

In *People v. Fryhaat, supra*, 35 Cal.App.5th at p. 981, the court construed section 1473.7 to “provide the right to appointed counsel where an indigent moving party has set forth factual allegations stating a prima facie case for entitlement to relief under the statute” and added that “to interpret the statute otherwise would be to raise serious and doubtful questions as to its constitutionality.” The opinion also notes that the same requirements exist for a court to appoint counsel in a petition for writ of *coram nobis*, and that “[w]e are not aware of any reason the rules for writs of *coram nobis* applicable to a section 1016.5 motion would not include the constitutionally grounded rules for appointing counsel for an indigent moving party.” (Id. at p. 982.)

Motions brought under section 1473.7(a)(1) “shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody” (Pen. Code, § 1473.7(b)(1)), unless the motion was not filed with reasonable diligence after the later of the following:

(A) The moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(B) Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate. (Pen. Code, § 1473.7(b)(2)(A)(B).)

In *People v. Perez* (2021) 67 Cal.App.5th 1008, the court held that even if a judge finds that a petitioner did not act with reasonable diligence in filing a motion to vacate under section 1473.7(a)(1), the court must exercise its discretionary authority and decide whether to deem the motion untimely.

Additionally, motions brought under section 1473.7(a)(2), newly discovered evidence of innocence, “shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief.” (Pen. Code, § 1473.7(c)).

The current version of *Order on Motion to Vacate Conviction or Sentence* (form CR-188) allows a court to deny a motion under section 1473.7(a)(1) because it was not filed with reasonable

diligence, or to deny a motion under section 1473.7(a)(2) because the moving party failed to exercise due diligence in discovering the relevant evidence or failed to file without undue delay from the date the party discovered or could have discovered the evidence. However, the motion form (form CR-187) does not include corresponding questions about the timing for filing. The committee recommends adding items to the motion form to allow the moving party to indicate whether the party received notice from immigration authorities and to explain why the party did not or could not bring the motion earlier. The committee also recommends revising the order to clearly delineate the court's options regarding the motion's timeliness.

The Proposal

The proposal would revise *Motion to Vacate Conviction or Sentence* (form CR-187) to incorporate the following:

- On item 1, delete “the above,” before “case number.”
- On item 3, for motions under section 1473.7(a)(1):
 - Change the section heading to “Legal Invalidity With Immigration Consequences”;
 - Clarify that the out-of-custody requirement applies to the case at hand (“The Moving Party is not currently in criminal custody in the case referred to in item #1”), in light of *People v. Rodriguez, supra*, 68 Cal.App.5th 301;
 - Replace references to the “actual or potential adverse immigration consequences of a plea of guilty or nolo contendere (no contest)” with the “actual or potential adverse immigration consequences of a conviction or sentence,” to reflect statutory changes made by AB 1259;
 - Simplify language; and
 - Add a new “reasonable diligence” provision for the moving party to indicate whether the party received notice from immigration authorities and to explain why the party did not or could not bring the motion earlier.
- On item 4, for motions under section 1473.7(a)(2):
 - Clarify that the out-of-custody requirement applies to the case at hand (“The Moving Party is not currently in criminal custody in the case referred to in item 1”), in light of *People v. Rodriguez, supra*, 68 Cal.App.5th 301; and
 - Simplify language.
- Add new item 5, to request appointment of counsel on a finding by the court that there is a prima facie case for relief, and direct the moving party to file a financial statement to show indigency, in light of *People v. Fryhaat, supra*, 35 Cal.App.5th at p. 981.
- On renumbered item 6, revise the request to excuse the moving party's personal presence by including check boxes indicating the party's custody status.

- On renumbered item 8, revise the request for withdrawal of a plea to apply if the moving party entered a plea.

The proposal would revise *Order on Motion to Vacate Conviction or Sentence* (form CR-188) to incorporate the following:

- On new item 1, add a provision for the court to grant or deny a request for appointment of counsel.
- On new item 2, consolidate and move two provisions allowing the court to grant or deny a request to have a hearing without the personal presence of the moving party.
- On renumbered item 4, for orders related to section 1473.7(a)(1):
 - Revise the item on reasonable diligence to allow the court to find the motion timely, exercise its discretion to find the motion timely, or find the motion untimely;
 - Replace references to the “actual or potential adverse immigration consequences of a plea of guilty or nolo contendere (no contest)” with the “actual or potential adverse immigration consequences of a conviction or sentence,” to reflect statutory changes made by AB 1259; and
 - Separate the provision for the court to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of guilty from the general grant or denial of relief.
- On renumbered item 5, for orders related to section 1473.7(a)(2):
 - Revise the item on timeliness to allow the court to find that the moving party filed or failed to file the motion without undue delay from the date the moving party discovered, or could have discovered through the exercise of due diligence, the evidence of actual innocence; and
 - Separate the provision for the court to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of guilty from the general grant or denial of relief.

Alternatives Considered

The committee did not consider alternatives, determining that it was important to be responsive to the legislative change and case law.

Fiscal and Operational Impacts

Expected costs are limited to training, possible case management system updates, and the production of revised forms. No other implementation requirements or operational impacts are expected.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms CR-187 and CR-188, at pages 6–10
2. Link A: Pen. Code, § 1473.7,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.7&lawCode=PEN
3. Link B: Assem. Bill 1259 (Stats. 2021, ch. 420),
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=20210220AB1259

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY DRAFT Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	FOR COURT USE ONLY DATE: TIME: DEPARTMENT:

MOTION TO VACATE CONVICTION OR SENTENCE

Pen. Code, § 1016.5
 Pen. Code, § 1473.7(a)(1)
 Pen. Code, § 1473.7(a)(2)

Instructions—Read carefully if you are filing this motion for yourself

- The term "Moving Party" as used in this form refers to you.
- This motion must be clearly handwritten in ink or typed. Make sure all answers are true and correct. If you make a statement that you know is false, you could be convicted of perjury (lying under oath).
- You must file a separate motion for each separate case number.
- Fill in the requested information. If you need more space, add an extra page and note that your answer is "continued on added page," or use *Attachment to Judicial Council Form* (form MC-025) as your additional page.
- Serve the motion on the prosecuting agency.
- **File the motion in the superior court in the county where the conviction or sentence was imposed.** Only the original motion needs to be filed unless local rules require additional copies.
- Notify the clerk of the court in writing if you change your address after filing your motion.

1. This motion concerns a conviction or sentence in case number _____ . On (date): _____ , the Moving Party was convicted of a violation of the following offenses (list all offenses included in the conviction):

CODE	SECTION	TYPE OF OFFENSE (felony, misdemeanor, or infraction)

If you need more space to list offenses, use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:

CASE NUMBER:

2. **MOTION UNDER PENAL CODE SECTION 1016.5**a. **GROUND FOR RELIEF: The Moving Party requests relief based on the following:**

- (1) Before acceptance of a plea of guilty or nolo contendere to the offense, the court failed to advise the Moving Party that the conviction might have immigration consequences, as required under Penal Code section 1016.5(a).
- (2) The conviction that was based on the plea of guilty or nolo contendere may result in immigration consequences for the Moving Party, including possible deportation, exclusion from admission to the United States, or denial of naturalization.
- (3) The Moving Party likely would not have pleaded guilty or nolo contendere if the court had advised the Moving Party of the immigration consequences of the plea. (*People v. Arriaga* (2014) 58 Cal.4th 950.)

b. **Supporting Facts**

Tell your story briefly. Describe the facts you allege regarding (1) the court's failure to advise you of the immigration consequences, (2) the possible immigration consequences, and (3) the likelihood that you would not have pleaded guilty or nolo contendere if you had been advised of the immigration consequences by the court. (*If necessary, attach additional pages. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.*)

3. **MOTION UNDER PENAL CODE SECTION 1473.7(a)(1), Legal Invalidity With Immigration Consequences**

The Moving Party is not currently in criminal custody **in the case referred to in item #1** (criminal custody includes in jail or prison; on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUND FOR RELIEF: Moving Party requests relief based on the following:**

The conviction or sentence is legally invalid due to a prejudicial error (a mistake that causes harm) that damaged the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a **conviction or sentence**. (Note: A determination of legal invalidity may, *but is not required to*, include a finding of ineffective assistance of counsel.) If you are claiming that your conviction or sentence is invalid due to ineffective assistance of counsel, before the hearing is held on this motion you (or the prosecutor) must give timely notice to the attorney who you are claiming was ineffective in representing you.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:

CASE NUMBER:

3. b. **Supporting Facts**

Tell your story briefly. **What facts show** prejudicial error? Include information that shows that the conviction **or sentence** you are challenging is currently causing or has the possibility of causing your removal from the United States, or the denial of your application for an immigration benefit, lawful status, or naturalization.

CAUTION: You must *state facts, not conclusions*. For example, if claiming ineffective assistance of counsel, you must state facts detailing what the attorney did or failed to do and how that affected your **conviction or sentence**.

Note: **The court presumes** your conviction or sentence is not legally **valid** if

- (1) you pleaded guilty or nolo contendere based on a law that provided that the arrest and conviction would be deemed never to have occurred if specific requirements were completed;
- (2) you completed those specific requirements; and
- (3) despite completing those requirements, your guilty or nolo contendere plea has been, or possibly could be, used as a basis for adverse immigration consequences.

(If necessary, attach additional pages. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)

c. **Reasonable diligence (check all that apply):**

- (1) On (date): _____, the Moving Party received a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.
- (2) On (date): _____, the Moving Party received notice that a final removal order was issued against the Moving Party, based on the conviction or sentence that the Moving Party seeks to vacate.
- (3) The Moving Party has not received notice from immigration authorities as described above.
- (4) If the Moving Party has received notice from immigration authorities as described above, the law requires that this motion be brought without delay. If you received notice, explain why you did not bring and could not bring this motion earlier:

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
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4. **MOTION UNDER PENAL CODE SECTION 1473.7(a)(2), Newly Discovered Evidence of Actual Innocence**

The Moving Party is not currently in criminal custody in the case referred to in item #1 (criminal custody includes in jail or prison; or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUND FOR RELIEF: Moving Party requests relief based on the following:**

- (1) Newly discovered evidence of actual innocence exists that requires vacating the conviction or sentence as a matter of law or in the interests of justice.
- (2) The Moving Party discovered the new evidence of actual innocence on (date):

b. **Supporting Facts**

Tell your story briefly. Describe the newly discovered evidence and how it proves your actual innocence. Explain why you could not discover this evidence at the time of your trial. Explain why you did not bring and could not bring this motion earlier. (If necessary, attach additional pages. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)

5. **REQUEST FOR COUNSEL (People v. Fryhaat (2019) 35 Cal.App.5th 969, 981.)**

- a. The Moving Party requests appointment of counsel upon a finding by the court that there is a prima facie case for relief.
- b. The Moving Party is indigent and has completed and attached Defendant's Financial Statement and Notice to Defendant (form CR-105) showing that the Moving Party cannot afford to hire a lawyer. Form CR-105 is available online at www.courts.ca.gov/forms.

6. The Moving Party requests that the court hold the hearing on this motion without the Moving Party's personal presence because the Moving Party is (check one)

- a. in federal custody awaiting deportation.
- b. otherwise in custody at (facility):
- c. other (specify):

7. The Moving Party requests that the court vacate the conviction or sentence in the above-captioned matter.

8. If the Moving Party entered a plea of guilty or nolo contendere, the Moving Party requests that the court allow the withdrawal of the plea of guilty or nolo contendere in the above-captioned matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

(TYPE OR PRINT NAME)

 _____
(SIGNATURE OF MOVING PARTY OR ATTORNEY)

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]:
Submit to JC (without circulating for comment)

Rules Committee Meeting Date: 2/3/2022

Title of proposal: Rules and Forms: Miscellaneous Technical Changes

Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):
Amend Cal. Rules of Court, rules 4.200 and 4.530; revise forms CR-251 and CR-402

Committee or other entity submitting the proposal:
Judicial Council staff

Staff contact (name, phone and e-mail): Sarah Fleischer-Ihn, 415-865-7702, sarah.fleischer-ihn@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by Rules Committee date:
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:

The proposal recommends minor changes to forms and rules to reflect legislative changes effective January 1, 2022 or earlier. They are minor noncontroversial changes (simply to reflect new statutes) and do not require circulation for comment.

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:*
- *List any new forms that require translation by statute or that you will request to be translated:*



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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-028

For business meeting on: March 11, 2022

Title

Rules and Forms: Miscellaneous Technical Changes

Agenda Item Type

Action Required

Effective Date

March 16, 2022

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 4.200 and 4.530; revise forms CR-251 and CR-402

Date of Report

January 28, 2022

Recommended by

Judicial Council staff
Sarah Fleischer-Ihn, Attorney
Criminal Justice Services

Contact

Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary

Judicial Council staff have identified items in the California Rules of Court and Judicial Council forms that must be amended and revised to reflect changes in the law resulting from recent legislation and correct inadvertent errors. Judicial Council staff recommend making the necessary corrections as soon as possible to ensure the rules and forms comply with the law and to avoid causing confusion for court users, clerks, and judicial officers.

Recommendation

Judicial Council staff recommend that the council, effective March 16, 2022:

1. Amend California Rules of Court, rule 4.200, to replace the reference to “*Wheeler/Batson* objections” with a reference to objections under Code of Civil Procedure, section 231.7(b);
2. Amend California Rules of Court, rule 4.530, to delete references to repealed Penal Code section 1203.1b and to reflect amendments to Penal Code section 1203.9;

3. Revise *Order for Transfer* (form CR-251) to delete references to repealed Penal Code section 1203.1b; and
4. Revise *Prosecuting Agency Response to Petition/Application* (form CR-402) to replace an incorrect reference in item 2 of the proof of service.

The text of the proposed amended rules and revised forms is attached at pages 4–8.

Relevant Previous Council Action

Although the Judicial Council has previously acted on the rules and forms, this proposal recommends only minor corrections unrelated to any prior action.

Analysis/Rationale

The changes to these forms are noncontroversial and necessary to conform to statutory changes or correct inadvertent errors.

The amendment to California Rules of Court, rule 4.200 will replace the reference in subdivision (a)(8) to “*Wheeler/Batson* objections” with a reference to objections under Code of Civil Procedure, section 231.7(b). This change is needed to incorporate the new Code of Civil Procedure section that addresses bias in peremptory challenges in jury selection (Assem. Bill 3070; Stats. 2020, ch. 318).

The amendment to California Rules of Court, rule 4.530, Intercounty transfer of probation and mandatory supervision cases, is needed to reflect statutory changes repealing or canceling specified criminal fines and fees (Assem. Bill 1869; Stats. 2020, ch. 92 and Assem. Bill 177; Stats. 2021, ch. 257). The change will delete references to repealed Penal Code section 1203.1b in subdivision (g)(4), and to update subdivision (h)(1)(B) to reflect amendments to Penal Code section 1203.9(d)(2).

The revision to *Order for Transfer* (form CR-251) deletes references to the specified fines and fees that are no longer authorized as a result of the repeal of Penal Code section 1203.1b by Assembly Bill 1869.

The revision to *Prosecuting Agency Response to Petition/Application* (form CR-402) will replace an incorrect reference in item 2 of the proof of service, replacing the reference to the “Petition/Application for Resentencing or Reduction” with the “Prosecuting Agency Response to Petition/Application.”

Policy implications

There are no policy implications to this proposal.

Comments

This proposal was not circulated for public comment because the recommended changes are corrections and minor modifications that are unlikely to create controversy because they are to implement new statutes, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

No alternatives were considered.

Fiscal and Operational Impacts

Operational impacts are expected to be minor. The proposed revisions may result in reproduction costs if courts provide hard copies of any of the forms recommended for revision. Because the proposed changes are minor or technical corrections, case management systems are unlikely to need updating to implement them.

Attachments and Links

1. Cal. Rules of Court, rules 4.200 and 4.530, at pages 4–5
2. Forms CR-251 and CR-402, at pages 6–8
3. Link A: Code of Civil Procedure, § 231.7,
<https://leginfo.legislature.ca.gov/faces/selectFromMultiples.xhtml?lawCode=CCP§ionNum=231.7>
4. Link B: Assembly Bill 3070 (Stats. 2020, ch. 318),
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3070
5. Link C: Assembly Bill 1869 (Stats. 2020, ch. 92),
http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB1850
6. Link D: Assembly Bill 177 (Stats. 2021, ch. 257),
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB177

Rules 4.200 and 4.530 of the California Rules of Court are amended, effective March 14, 2022, to read:

1 **Rule 4.200. Pre–voir dire conference in criminal cases**

2
3 **(a) The conference**

4
5 Before jury selection begins in criminal cases, the court must conduct a conference
6 with counsel to determine:

7
8 (1)–(7) * * *

9
10 (8) The procedure for making ~~Wheeler/Batson~~ objections pursuant to Code of
11 Civil Procedure 231.7(b).

12
13 The judge must, if requested, excuse the defendant from then disclosing any
14 defense theory.

15
16 **(b) * * ***

17
18 **Advisory Committee Comment**

19
20 * * *

21
22 **Rule 4.530. Intercounty transfer of probation and mandatory supervision cases**

23
24 **(a)–(f) * * ***

25
26 **(g) Transfer**

27
28 (1)–(3) * * *

29
30 (4) The orders for transfer must include an order committing the supervised
31 person to the care and custody of the probation officer of the receiving county
32 ~~and an order for reimbursement of reasonable costs for processing the~~
33 ~~transfer to be paid to the county of the transferring court in accordance with~~
34 ~~Penal Code section 1203.1b.~~

35
36 (5)–(9) * * *

37
38 **(h) Court-ordered debt**

39
40 (1) In accordance with Penal Code section 1203.9(d) and (e):

41
42 (A) * * *

1
2
3
4
5
6
7
8
9
10
11

(B) The receiving court and receiving county probation department may not impose additional local fees and costs ~~as authorized~~.

(C) * * *

(2) * * *

Advisory Committee Comment

* * *

<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</p> <p>CITY AND ZIP CODE: STREET ADDRESS: DEPT.: BRANCH NAME:</p>	<p><i>FOR COURT USE ONLY</i></p> <p>DRAFT</p> <p>Not approved by the Judicial Council</p>
<p>PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: _____ DATE OF BIRTH: _____</p>	
<p>ORDER FOR TRANSFER (Pen. Code, § 1203.9 and Cal. Rules of Court, rule 4.530)</p>	<p>CASE NUMBER: _____</p>

1. A motion for intercounty transfer of (*select one*): probation mandatory supervision in the above-entitled case was heard by this court on (*date*):
2. Notice of the motion was provided as required by California Rules of Court, rule 4.530(d).
3. Before deciding the motion, the court considered
 - a. any comments provided by the receiving court; and
 - b. at least the following factors: (1) the permanency of the supervised person's residence, (2) the availability of appropriate programs for the supervised person, (3) restitution orders, and (4) victim issues.
4. The motion for transfer is (*select one*):
 - Denied** for the reasons stated on the record.
 - Granted**. The court has determined the supervised person's county of residence and the case is hereby ordered transferred to the Superior Court of the County of:
 - a. The court of the receiving county must accept entire jurisdiction over the case.
The balance of time remaining on supervision is (*specify*):
 - b. The supervised person is committed to the care and custody of the probation officer of the receiving county.
 - c. The entire original court file, excluding exhibits or any records of payments, must be transmitted to the receiving court. If transfer is ordered in a case involving more than one defendant, the court must transmit certified copies of the entire original court file, excluding exhibits and any records of payment.
 - d. The probation officer of the transferring county must transmit, at a minimum, any court orders, probation or mandatory supervision reports, and case plans to the probation officer of the receiving county.
 - e. The probation officer of the transferring county must notify the supervised person of this transfer order.
 - f. The supervised person must report to the probation officer of the receiving county (*select one*):
 - within 30 days of this order.
 - within (*specify*): _____ days of this order.
 - within 30 days of release from custody.
 - within (*specify*): _____ days of release from custody.
 - g. Any jail sentence imposed as a condition of probation or mandatory supervision prior to transfer must be served in the transferring county unless otherwise authorized by law.
 - h. If the transferring court has ordered the supervised person to pay fines, fees, forfeitures, penalties, assessments, or restitution, and those and any other amounts ordered by the court are still unpaid at the time of transfer, the supervised person is ordered to pay to the collection program for the transferring court for proper distribution and accounting once collected.

Date: _____

By: _____
(JUDICIAL OFFICER)

FOR COURT USE ONLY

PEOPLE OF THE STATE OF CALIFORNIA v DEFENDANT:	CASE NUMBER:
--	--------------

**PROOF OF SERVICE
FOR PROSECUTING AGENCY RESPONSE
Method of Service (only one):**

Personal Service

Mail

1. Person serving: I am over the age of 18 and not a party to this action.
 - a. Name:
 - b. Residence or Business Address:
 - c. Telephone:

2. I served a copy of the **Prosecuting Agency Response to Petition/Application** on the person or persons listed below as follows:
 - a. Name of person served:
 - b. Address where served:
 - c. Date Served:
 - c. Time Served: AM PM

3. The documents were served by the following means (*specify*):
 - a. **by personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.

 - b. **by United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and (*specify one*):
 - (1) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (2) placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (*city and state*):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date:

 _____
 SIGNATURE OF DECLARANT

 (PRINTED NAME OF DECLARANT)

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]:
Submit to JC (without circulating for comment)

Rules Committee Meeting Date: Feb 3, 2022

Title of proposal: Rules and Forms: Technical Form Changes to Reflect Federal Poverty Guidelines

Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):
Revise forms FW-001, FW-001-GC, APP 015/FW-015-INFO, and JV-132

Committee or other entity submitting the proposal:
Judicial Council staff
Anne M. Ronan, Supervising Attorney

Staff contact (name, phone and e-mail): Anne Ronan, 415-865-8933 anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by Rules Committee date: N/A
Project description from annual agenda: N/A

If requesting July 1 or out of cycle, explain:

The proposal involves minor and noncontroversial changes to forms to conform them to current law, so does not need to circulate for comment.

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:* FW-001
- *List any new forms that require translation by statute or that you will request to be translated:*



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-074

For business meeting on March 11, 2022

Title

Rules and Forms: Technical Form Changes
to Reflect Federal Poverty Guidelines

Rules, Forms, Standards, or Statutes Affected

Revise forms FW-001, FW-001-GC,
APP-015/FW-015-INFO, and JV-132

Recommended by

Judicial Council staff
Anne M. Ronan, Supervising Attorney
Legal Services

Agenda Item Type

Action Required

Effective Date

March 14, 2022

Date of Report

January 28, 2022

Contact

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Executive Summary

Judicial Council staff recommend the revision of four Judicial Council forms containing figures based on the federal poverty guidelines to reflect the changes in those guidelines recently published by the federal government.

Recommendation

Judicial Council staff recommend that the Judicial Council, effective March 14, 2022, revise the following documents to reflect 2021 increases in the federal poverty guidelines:

- *Request to Waive Court Fees* (form FW-001)
- *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC)
- *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO); and

- *Financial Declaration—Juvenile Dependency* (form JV-132).

The revised forms are attached at pages 4–12.

Relevant Previous Council Action

The council last revised these forms on March 15, 2021, to reflect the last change in the federal poverty guidelines.

Analysis/Rationale

Judicial Council forms containing figures based on the federal poverty guidelines need to be revised to reflect the changes in those guidelines recently published by the federal government.

Fee waiver forms

The eligibility of indigent litigants to proceed without paying filing fees or other court costs is determined by California Government Code section 68632. Among other things, section 68632(b) provides that a fee waiver will be granted to litigants whose household monthly income is 125 percent or less of the current poverty guidelines established by the U.S. Department of Health and Human Services (HHS).

The Judicial Council has adopted rules of court and forms for litigants to obtain fee waivers. Three of the forms—*Request to Waive Court Fees* (form FW-001), *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC), and *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO)—contain figures based on the monthly poverty guidelines. The tables in item 5b on the general fee waiver application form, in item 8(b) on the probate fee waiver form, and on page 1 of the appellate court information sheet provide monthly income figures on which a court may base a decision to grant a fee waiver in accordance with Government Code section 68632.

Juvenile form

The Judicial Council administers a program under Welfare and Institutions Code section 903.47 to collect reimbursement of the cost of court-appointed counsel in dependency proceedings from liable persons found able to pay. Under the statewide standard adopted by the council, an otherwise liable person is presumed to be unable to pay reimbursement if that person's monthly household income is 125 percent or less of the current federal poverty guidelines established by the HHS.

Financial Declaration—Juvenile Dependency (form JV-132) contains figures based on the poverty guidelines. The table in item 3 provides monthly income levels below which an individual is presumed to be unable to pay reimbursement for the cost of court-appointed counsel.

Revisions required

The monthly income figures currently on the four forms reflect 125 percent of the 2021 poverty guidelines established by the HHS. The HHS released revised federal poverty guidelines on

January 21, 2022.¹ As a result, these items on the Judicial Council forms must be revised to reflect the 2022 federal poverty guideline revisions.

To determine the new monthly income figures for the forms, the federal poverty guidelines must be multiplied by 125 percent and divided by 12.² The new figures are reflected in the revised tables on the attached forms.

Policy implications

Staff monitors revisions to the poverty guidelines and ensures that the forms are revised as necessary and submitted to the council. Revised forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132 should take effect as soon as possible to ensure that litigants and courts are provided with accurate monthly income guidelines on which a court may base a decision regarding fee waivers or financial liability. This change is necessary because the revised poverty guidelines take effect immediately on release. Once adopted, the revised forms will be distributed to the courts and forms publishers and posted to the California Courts website.

Comments

These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

The alternative to updating the income tables using the 2022 federal poverty guidelines would be *not* to update them. Staff did not consider this option because of the provisions in Government Code section 68632 and in the Judicial Council standard on financial liability.

Fiscal and Operational Impacts

If a court provides free copies of these forms to parties, it will incur costs to print or duplicate the forms. However, the revisions are required to make the forms consistent with current law.

Attachments and Links

1. Forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132, at pages 4–14.
2. Attachment A: Computation Sheet
3. Link A: Annual Update of the HHS Poverty Guidelines,
<https://www.federalregister.gov/documents/2022/01/21/2022-01166/annual-update-of-the-hhs-poverty-guidelines>

¹ The 2022 figures have been published in the Federal Register. See U.S. Department of Health and Human Services, Annual Update of the HHS Poverty Guidelines, 87 FR 3315. (See Link A.)

² See Attachment A for the Computation Sheet. The monthly income figures in the tables on the forms slightly exceed 125 percent of the poverty guidelines because they are rounded up to the nearest cent. The language on the forms reflects this slight excess in stating that the item should be checked if the household income is “less than” the amount in the chart.

If you are getting public benefits, are a low-income person, or do not have enough income to pay for your household's basic needs and your court fees, you may use this form to ask the court to waive your court fees. The court may order you to answer questions about your finances. If the court waives the fees, you may still have to pay later if:

- You cannot give the court proof of your eligibility,
- Your financial situation improves during this case, or
- You settle your civil case for **\$10,000** or more. The trial court that waives your fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge you any collection costs.

Clerk stamps date here when form is filed.

DRAFT 01/29/22

NOT APPROVED BY
JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

1 Your Information (person asking the court to waive the fees):

Name: _____
 Street or mailing address: _____
 City: _____ State: ____ Zip: _____
 Phone: _____

2 Your Job, if you have one (job title): _____

Name of employer: _____
 Employer's address: _____

3 Your Lawyer, if you have one (name, firm or affiliation, address, phone number, and State Bar number):

a. The lawyer has agreed to advance all or a portion of your fees or costs (check one): Yes No

b. (If yes, your lawyer must sign here) Lawyer's signature: _____
 If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

4 What court's fees or costs are you asking to be waived?

- Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)
- Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO).)

5 Why are you asking the court to waive your court fees?

- a. I receive (check all that apply; see form FW-001-INFO for definitions): Food Stamps Supp. Sec. Inc. SSP Medi-Cal County Relief/Gen. Assist. IHSS CalWORKS or Tribal TANF CAPI
- b. My gross monthly household income (before deductions for taxes) is less than the amount listed below. (If you check 5b, you must fill out 7, 8, and 9 on page 2 of this form.)

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$491.67 for each extra person.
1	\$1,415.63	3	\$2,398.96	5	\$3,382.30	
2	\$1,907.30	4	\$2,890.63	6	\$3,873.96	

- c. I do not have enough income to pay for my household's basic needs and the court fees. I ask the court to: (check one and you **must** fill out page 2):
- waive all court fees and costs
 - waive some of the court fees
 - let me make payments over time

6 Check here if you asked the court to waive your court fees for this case in the last six months. (If your previous request is reasonably available, please attach it to this form and check here):

I declare under penalty of perjury under the laws of the State of California that the information I have provided on this form and all attachments is true and correct.

Date: _____

Print your name here

Sign here

Your name: _____

If you checked 5a on page 1, do not fill out below. If you checked 5b, fill out questions 7, 8, and 9 only. If you checked 5c, you **must** fill out this entire page. If you need more space, attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

7 Check here if your income changes a lot from month to month. If it does, complete the form based on your average income for the past 12 months.

8 Your Gross Monthly Income

a. List the source and amount of **any** income you get each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

- (1) _____ \$ _____
- (2) _____ \$ _____
- (3) _____ \$ _____
- (4) _____ \$ _____

b. Your total monthly income: \$ _____

9 Household Income

a. List the income of all other persons living in your home who depend in whole or in part on you for support, or on whom you depend in whole or in part for support.

Name	Age	Relationship	Gross Monthly Income
(1) _____	_____	_____	\$ _____
(2) _____	_____	_____	\$ _____
(3) _____	_____	_____	\$ _____
(4) _____	_____	_____	\$ _____

b. Total monthly income of persons above: \$ _____

Total monthly income and household income (8b plus 9b): \$ _____

10 Your Money and Property

- a. Cash \$ _____
- b. All financial accounts (List bank name and amount):
 - (1) _____ \$ _____
 - (2) _____ \$ _____
 - (3) _____ \$ _____

c. Cars, boats, and other vehicles

Make / Year	Fair Market Value	How Much You Still Owe
(1) _____	\$ _____	\$ _____
(2) _____	\$ _____	\$ _____
(3) _____	\$ _____	\$ _____

d. Real estate

Address	Fair Market Value	How Much You Still Owe
(1) _____	\$ _____	\$ _____
(2) _____	\$ _____	\$ _____

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

Describe	Fair Market Value	How Much You Still Owe
(1) _____	\$ _____	\$ _____
(2) _____	\$ _____	\$ _____

11 Your Monthly Deductions and Expenses

- a. List any payroll deductions and the monthly amount below:
 - (1) _____ \$ _____
 - (2) _____ \$ _____
 - (3) _____ \$ _____
 - (4) _____ \$ _____
- b. Rent or house payment & maintenance \$ _____
- c. Food and household supplies \$ _____
- d. Utilities and telephone \$ _____
- e. Clothing \$ _____
- f. Laundry and cleaning \$ _____
- g. Medical and dental expenses \$ _____
- h. Insurance (life, health, accident, etc.) \$ _____
- i. School, child care \$ _____
- j. Child, spousal support (another marriage) \$ _____
- k. Transportation, gas, auto repair and insurance \$ _____
- l. Installment payments (list each below):
 - Paid to:
 - (1) _____ \$ _____
 - (2) _____ \$ _____
 - (3) _____ \$ _____
- m. Wages/earnings withheld by court order \$ _____
- n. Any other monthly expenses (list each below).

Paid to:	How Much?
(1) _____	\$ _____
(2) _____	\$ _____
(3) _____	\$ _____

Total monthly expenses (add 11a – 11n above): \$ _____

To list any other facts you want the court to know, such as unusual medical expenses, etc., attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

Check here if you attach another page.

Important! If your financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010.

This form must be used by a guardian or conservator, or by a petitioner for the appointment of a guardian or conservator, to request a waiver of court fees in the guardianship or conservatorship court proceeding or in any other civil action in which the guardian or conservator represents the interests of the ward or conservatee as a plaintiff or defendant.

If the ward or conservatee (including a proposed ward or conservatee if a petition for appointment of a guardian or conservator has been filed but has not yet been decided by the court) directly receives public benefits or is supported by public benefits received by another for his or her support, is a low-income person, or does not have enough income to pay for his or her household's basic needs and the court fees, you may use this form to ask the court to waive the court fees. The court may order you to answer questions about the finances of the ward or conservatee. If the court waives the fees, the ward or conservatee, his or her estate, or someone with a duty to support the ward or conservatee, may still have to pay later if:

- You cannot give the court proof of the ward's or conservatee's eligibility,
- The ward's or conservatee's financial situation improves during this case, or
- You settle the civil case on behalf of the ward or conservatee for **\$10,000** or more. The trial court that waives fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge the ward or conservatee, or his or her estate, any collection costs.

Clerk stamps date here when form is filed.

DRAFT 01/29/22
NOT APPROVED BY
JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

1 Your Information (*guardian or conservator, or person asking the court to appoint a guardian or conservator*):

Name: _____ Phone: _____
Street or mailing address: _____
City: _____ State: _____ Zip: _____

2 Your Lawyer (*if you have one*): Name: _____

Firm or Affiliation: _____ State Bar No.: _____
Address: _____ Phone: _____
City: _____ State: _____ Zip: _____ E-mail: _____

a. The lawyer has agreed to advance all or a portion of court fees or costs (*check one*): Yes No

b. (*If yes, your lawyer must sign here.*) Lawyer's signature: _____
If your lawyer is not providing legal-aid type services based on your or the ward's or conservatee's low income,

3 Ward's or Conservatee's Information (*file a separate Request for each ward in a multiward case*):

Name: _____ Age and date of birth (*ward only*): _____
Street or mailing address: _____
City: _____ State: _____ Zip: _____
Phone: _____

4 Ward's or Conservatee's Lawyer, if any: Name: _____

Firm or Affiliation: _____ State Bar No.: _____
Address: _____ Phone: _____
City: _____ State: _____ Zip: _____ E-mail: _____

5 Ward or Conservatee's Job (*job title; if not employed, so state*): _____

Name of employer: _____
Employer's address: _____ State: _____ Zip: _____



Name of (Proposed) Ward or Conservatee: _____

Case Number: _____

6 What court's fees or costs are you asking to be waived?

- Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)
- Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO).)

7 Check here if you asked the court to waive court fees for this case in the last six months.
(If your previous request is reasonably available, please attach it to this form and check here):

8 Why are you asking the court to waive the ward's or conservatee's court fees?

- a. The ward or one or both of the ward's parents, or the conservatee or the conservatee's spouse or registered domestic partner, receive (check all that apply):
- Supplemental Security Income (SSI) State Supplemental Payment (SSP) SNAP (Food Stamps)
 - IHSS (In-Home Supportive Services) CalWORKS or Tribal TANF Medi-Cal
 - County Relief/General Assistance CAPI (Cash Assistance Program for Aged, Blind, and Disabled)
- (Names and relationships to ward or conservatee of persons who receive the public benefits listed above):

b. The gross monthly income of the ward's or conservatee's household (before deductions for taxes) is less than

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$491.67 for each extra person.
1	\$1,415.63	3	\$2,398.96	5	\$3,382.30	
2	\$1,907.30	4	\$2,890.63	6	\$3,873.96	

- c. The ward's or conservatee's household does not have enough income to pay for its basic needs and the court fees. I ask the court to (check one, and you **must** fill out items 14, 15, 16, 17, and 18 on page 4):*
- (1) Waive all court fees and costs.
 - (2) Waive some court fees and costs.
 - (3) Let the (proposed) guardian or conservator, on behalf of the (proposed) ward or conservatee, make payments over time.

* (Do not include income of guardian or conservator living in the household in 8b or 8c or count him or her in family size in 8b. unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.)

Guardians or petitioners for their appointment must complete items 9 and 10.

9 Ward's Estate: Person only, no estate. Inventory or petition estimated value:

Source (e.g., gift, inheritance, settlement, judgment, insurance): _____ Est. collection date: _____

10 Ward's Parents' Information:

- a. Name of ward's father: _____ Deceased (date of death): _____
Street or mailing address: _____
City: _____ State: _____ Zip: _____
Phone: _____
- b. Name of ward's mother: _____ Deceased (date of death): _____
Street or mailing address: _____
City: _____ State: _____ Zip: _____
Phone: _____
- c. Ward's parents are (check all that apply): married living together separated divorced
Support order for ward? No Yes Payable to (name): _____
Payor (name): _____
Court: _____ Case Number: _____
Date of order (if multiple, date of latest): _____ Monthly amount: _____



Name of (Proposed) Ward or Conservatee: _____

Case Number: _____

Conservators or petitioners for their appointment must complete items 11–13.

11 Conservatee's Estate: Person only, no estate.

Inventory or petition estimated value: _____ Est. collection date: _____

12 Conservatee's Spouse's or Registered Domestic Partner's Information:

Name of conservatee's spouse or registered domestic partner: _____ Spouse Partner

Date of marriage or partnership: _____ Deceased (*date of death*): _____

Street or mailing address: _____ Phone: _____

City: _____ State: _____ Zip: _____

Name of employer (*if none, so state*): _____

Employer's address: _____ State: _____ Zip: _____

The conservatee's spouse or partner is is not managing, or following appointment of a conservator is planning to manage, some or all of the couple's community property outside the conservatorship estate.

If you selected "is" above: The income, money, and property shown on page 4 includes does not include the income and property managed, or expected to be managed, by the spouse/partner outside the estate.

Divorced (*date of final judgment or decree*): _____

Court: _____

Case Number: _____ Support order for conservatee? No Yes

Date of support order (*if multiple, date of latest*): _____ Monthly amount: _____

13 The Conservatee and Trusts:

The conservatee:

a. is is not a trustor or settlor of a trust.

b. is is not a beneficiary of a trust.

If you selected "Is" to complete any of the above statements, identify and provide, in an attachment to this *Request*, the current address and telephone number of the current trustee(s) of each trust, describe the general terms of and value of each trust and the nature and value of the conservatee's interest in each trust, and the amount(s) and frequency of any distributions to or for the benefit of the conservatee prior to your appointment as conservator of which you are aware. (*You may use Judicial Council form MC-025 for this purpose.*)

All applicants who checked item 8b or item 8c on page 2 must continue to and follow the instructions for completion of items 14–16 or items 14–18 on page 4, before signing below.

The information I have provided on this form and all attachments about the (proposed) ward or conservatee is true and correct to the best of my information and belief. The information I have provided on this form and all attachments concerning myself is true and correct. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

Print your name here

Sign here



Name of (Proposed) Ward or Conservatee:

Case Number:

If you checked 8a on page 2, do not fill out below. If you checked 8b, you must answer questions 14–16. If you checked 8c, you must answer questions 14–18. If you need more space, attach form MC-025 or attach a sheet of paper, and write "Financial Information" and the ward's or conservatee's name and case number at the top.

14 Check here if the ward's or conservatee's income changes a lot from month to month. If it does, complete the form based on his or her average income for the past 12 months.

15 Ward's or Conservatee's Gross Monthly Income

a. List the source and amount of any income the ward or conservatee gets each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

- (1) \$
(2) \$
(3) \$
(4) \$
(5) \$

b. Total monthly income: \$

16 Ward's or Conservatee's Household's Income

a. List the income of all other persons living in the ward's or conservatee's home who depend in whole or in part on him or her for support, or on whom he or she depends in whole or in part for support.

Table with columns: Name, Age, Relationship, Gross Monthly Income. Rows 1-10.

b. Total monthly income of persons above: \$

Total monthly income and household income (15b plus 16b): \$

17 Ward's or Conservatee's Household's Money and Property

a. Cash \$

b. All financial accounts (list bank name and amount):

- (1) \$
(2) \$
(3) \$

c. Cars, boats, and other vehicles

Table with columns: Make / Year, Fair Market Value, How Much You Still Owe. Rows 1-3.

d. Real estate

Table with columns: Address, Fair Market Value, How Much You Still Owe. Rows 1-2.

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

Table with columns: Describe, Fair Market Value, How Much You Still Owe. Rows 1-2.

18 Ward's or Conservatee's Household's Monthly Deductions and Expenses

a. List any payroll deductions and the monthly amount below:

- (1) \$
(2) \$
(3) \$
(4) \$

b. Rent or house payment and maintenance \$

c. Food and household supplies \$

d. Utilities and telephone \$

e. Clothing \$

f. Laundry and cleaning \$

g. Medical and dental expenses \$

h. Insurance (life, health, accident, etc.) \$

i. School, child care \$

j. Child, spousal support (another marriage) \$

k. Transportation, gas, auto repair and insurance \$

l. Installment payments (list each below):

- Paid to:
(1) \$
(2) \$
(3) \$

m. Wages/earnings withheld by court order \$

n. Any other monthly expenses (list each below):

- Paid to: How Much?
(1) \$
(2) \$
(3) \$

Total monthly expenses (add 18a – 18n above): \$

To list any other facts you want the court to know, such as the (proposed) ward's or conservatee's unusual medical expenses, etc, attach form MC-025 or attach a sheet of paper and write "Financial Information" and the (proposed) ward's or conservatee's name and case number at the top.
Check here if you attach another page.
Important! If the ward's or conservatee's financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010-GC.
Do not include income of guardian or conservator living in the household in item 16, his or her money and property in item 17, or his or her deductions and expenses in item 18 unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.

**INFORMATION SHEET ON WAIVER OF APPELLATE COURT FEES—
SUPREME COURT, COURT OF APPEAL, APPELLATE DIVISION**

If you file an appeal, a petition for a writ, or a petition for review in a civil case, such as a family law case or a case in which you sued someone or someone sued you, you must generally pay a filing fee to the court. If you are a party other than the party who filed the appeal or the petition, you must also generally pay a fee when you file your first document in a case in the Court of Appeal or Supreme Court. You and the other parties in the case may also have to pay other court fees in these proceedings, such as fees to prepare or get a copy of a clerk’s transcript in an appeal. However, if you cannot afford to pay these court fees and costs, you may ask the court to issue an order saying you do not have to pay these fees (this is called “waiving” these fees).

1. Who can get their court fees waived? The court will waive your court fees and costs if:

- **You are getting public assistance**, such as Medi-Cal, Food Stamps, Supplemental Security Income (not Social Security), State Supplemental Payment, County Relief/General Assistance, In-Home Supportive Services, CalWORKS, Tribal Temporary Assistance for Needy Families, or Cash Assistance Program for Aged, Blind, and Disabled.
- **You have a low income level.** Under the law you are considered a low-income person if the gross monthly income (before deductions for taxes) of your household is less than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income
1	\$1,415.63	3	\$2,398.96	5	\$3,382.30
2	\$1,907.30	4	\$2,890.63	6	\$3,873.96

If more than 6 people at home, add \$491.67 for each extra person.

- **You do not have enough income to pay for your household’s basic needs and your court fees.**

2. What fees and costs will the court waive? If you qualify for a fee waiver, the Supreme Court, Court of Appeal, or Appellate Division will waive the filing fee for the notice of appeal, a petition for a writ, a petition for review, or the first document filed by a party other than the party who filed the appeal or petition, and any court fee for participating in oral argument by telephone. The trial court will also waive costs related to the clerk’s transcript on appeal, the fee for the court to hold in trust the deposit for a reporter’s transcript on appeal under rule 8.130(b) or rule 8.834(b) of the California Rules of Court, and the fees for making a transcript or copy of an official electronic recording under rule 8.835. If you are the appellant (the person who is appealing the trial court decision), the fees waived include the deposit required under Government Code section 68926.1 and the costs for preparing and certifying the clerk’s transcript and sending the original to the reviewing court and one copy to you. If you are the respondent (a party other than the appellant in a case that is being appealed), the fees waived include the costs for sending you a copy of the clerk’s transcript. You can also ask the trial court to waive other necessary court fees and costs.

The court **cannot** waive the fees for preparing a reporter’s transcript in a civil case. A special fund, called the Transcript Reimbursement Fund, may help pay for the transcript. (See www.courtreportersboard.ca.gov/consumers/index.shtml#trf and Business and Professions Code sections 8030.2 and following for more information about this fund.) If you are unable to pay the cost of a reporter’s transcript, a record of the oral proceedings can be prepared in other ways, by preparing an agreed statement or, in some circumstances, a statement on appeal or settled statement.

3. How do I ask the court to waive my fees?

- **Appeal in Limited Civil Case (civil case in which the amount of money claimed is \$25,000 or less).** In a limited civil case, if the trial court already issued an order waiving your court fees *and that fee waiver has not ended* (fee waivers automatically end 60 days after the judgment), the fees and costs identified in item 2 above are already waived; just give the court a copy of your current fee waiver. If you do not already have an order waiving your fees or you had a fee waiver but it has ended, you must complete and file a *Request to Waive Court Fees* (form FW-001). If you are the appellant (the party who is appealing), you should check both boxes in item 4 on FW-001 and file the completed form with your notice of appeal. If you are the respondent (a party other than the appellant in a case that is being appealed), the completed form should be filed in the court when the fees you are requesting to be waived, such as the fee for the clerk’s transcript or telephonic oral argument, are due.

- **Writ Proceeding in Limited Civil Case (civil case in which the amount of money claimed is \$25,000 or less).** If you want the Superior Court to waive the fees in a writ proceeding in a limited civil case, you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box. The completed form should be filed with your petition for a writ.
- **If You Are a Guardian or Conservator.** If you are a guardian or conservator or a petitioner for the appointment of a guardian or conservator, special rules apply to your request for a fee waiver on an appeal from an order in the guardianship or conservatorship proceeding or in a civil action in which you are a party acting on behalf of your ward or conservatee. Complete and submit a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC) to request a fee waiver. See California Rules of Court, rule 7.5.
- **Appeal in Other Civil Cases.** If you want the court to waive fees and costs in an appeal in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than \$25,000), you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box to ask the Court of Appeal to waive the fee for filing the notice of appeal or, if you are a respondent (a party other than the one who filed the appeal), the fee for the first document you file in the Court of Appeal. Check both boxes if you also want the trial court to waive your costs for the clerk's transcript (if the trial court already issued an order waiving your fees *and that fee waiver has not ended*, you do not need to check the first box; the fees and costs identified in item 2 above are already waived, just give the court a copy of your current fee waiver). If you are the appellant, the completed form should be submitted with your notice of appeal (if you check both boxes in item 4, the court may ask for two signed copies of this form). If you are the respondent, the completed form should be submitted at the time the fee you are asking the court to waive is due. For example, file the form in the trial court with your request for a copy of the clerk's transcript if you are asking the court to waive the transcript fee or file the form in the Court of Appeal with the first document you file in that court if you are asking the court to waive the fee for filing that document. To request waiver of a court fee for telephonic oral argument, you should file the completed form in the Court of Appeal when the fee for telephonic oral argument is due.
- **Writ Proceeding in Other Civil Cases.** If you want the Supreme Court or Court of Appeal to waive the fees and costs in a writ proceeding in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than \$25,000), you must complete a *Request to Waive Court Fees* (form FW-001). If you are the petitioner (the party filing the petition), the completed form should be submitted with your petition for a writ in the Supreme Court or Court of Appeal clerk's office. If you are a party other than the petitioner, the completed form should be filed with the first document you file in the Supreme Court or Court of Appeal.
- **Petition for Review.** If you want to request that the Supreme Court waive the fees in a petition for review proceeding, you must complete a *Request to Waive Court Fees* (form FW-001) or a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC). If you are the petitioner, you should submit the completed form with your petition for review. If you are a party other than the petitioner, the completed form should be filed with the first document you file in the Supreme Court.

IMPORTANT INFORMATION!

- **Fill out your request completely and truthfully.** When you sign your request for a fee waiver, you are declaring under penalty of perjury that the information you have provided is true and correct.
- **The court may ask you for information and evidence.** You may be ordered to go to court to answer questions about your ability to pay court fees and costs and to provide proof of eligibility. Any initial fee waiver you are granted may be ended if you do not go to court when asked. You may be ordered to repay amounts that were waived if the court finds you were not eligible for the fee waiver.
- **If you receive a fee waiver, you must tell the court if there is a change in your finances.** You must tell the court immediately if your finances improve or if you become able to pay court fees or costs during this case (file form FW-010 with the court). You may be ordered to repay any amounts that were waived after your eligibility ended. If the trial court waived your fees and costs and you settle your case for \$10,000 or more, the trial court will have a lien on the settlement in the amount of the waived fees.
- **The fee waiver ends.** The fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case or when the court finds that you are not eligible for a fee waiver.

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILDREN'S NAMES:	
FINANCIAL DECLARATION—JUVENILE DEPENDENCY	
CASE NUMBER:	

1. Personal Information:

Name:		Social Security Number:	
Other names used:			
I.D. or Driver's License Number:		Date of Birth:	Age:
Relationship to Child: <input type="checkbox"/> Parent <input type="checkbox"/> Other Responsible Person (specify):			
Street or Mailing Address:			
City:	State:	Zip:	Phone: Alternate Phone:
Marital Status: <input type="checkbox"/> Married <input type="checkbox"/> Single <input type="checkbox"/> Domestic partner <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed			
Name of Spouse/Partner:		Number of dependents living with you:	
Names and ages of dependents:			

2. I receive (check all that apply): Medi-Cal SNAP (food stamps) SSI SSP
 County Relief/General Assistance CalWORKS or Tribal TANF (Temporary Assistance for Needy Families)
 IHSS (In-Home Supportive Services) CAPI (Cash Assistance Program for Aged, Blind, and Disabled)

3. My gross monthly household income (before deductions for taxes) is less than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$491.67 for each extra person.
1	\$1,415.63	3	\$2,398.96	5	\$3,382.30	
2	\$1,907.30	4	\$2,890.63	6	\$3,873.96	

4. I have been reunified with my child(ren) under a court order (attached).

5. I am receiving court-ordered reunification services.

CHILDREN'S NAMES:	CASE NUMBER:
RESPONSIBLE PERSON'S NAME:	

6. Employment:

Your Employment				Your Spouse/Partner's Employment			
Employer:				Employer:			
Address:				Address:			
City and Zip Code:		Phone:		City and Zip Code:		Phone:	
Type of Job:				Type of Job:			
How long employed:	Working now?	Monthly salary:	Take home pay:	How long employed:	Working now?	Monthly salary:	Take home pay:
If not now employed, who was your last employer? <i>(Name, Address, City, and Zip Code):</i>				If not now employed, who was this person's last employer? <i>(Name, Address, City, and Zip Code):</i>			
Phone number of last employer:				Phone number of last employer:			

7. Other Monthly Income and Assets:

Other Income	Assets: What Do You Own?
Unemployment \$	Cash \$
Disability \$	Real Property/Equity \$
Social Security \$	Cars and Other Vehicles \$
Workers' Compensation \$	Life Insurance \$
Child Support Payments \$	Bank Accounts (<i>list below</i>)..... \$
Foster Care Payments \$	Stocks and Bonds \$
Other Income \$	Business Interest \$
Total \$	Other Assets \$
	Total \$
	Name and branch of bank:
	 Account numbers:

CHILDREN'S NAMES:	CASE NUMBER:
RESPONSIBLE PERSON'S NAME:	

8. Expenses:

Monthly Household Expenses	Reunification Plan: Monthly Cost of Required Services
Rent or Mortgage Payment \$	Parenting Classes \$
Car Payment \$	Substance Abuse Treatment \$
Gas and Car Insurance \$	Therapy/Counseling \$
Public Transportation \$	Medical Care/Medications \$
Utilities (Gas, Electric, Phone, Water, etc.)... \$	Domestic Violence Counseling \$
Food \$	Batterers' Intervention \$
Clothing and Laundry \$	Victim Support \$
Child Care \$	Regional Center Programs \$
Child Support Payments \$	Transportation \$
Medical Payments \$	In-Home Services \$
Other Necessary Monthly Expenses \$	Other \$
Total \$	Total \$

9. Loan/Expense Payments (other than mortgage or car loan):

Name of lender and type of loan/expense	Monthly payment	Balance owed
	\$	\$
	\$	\$
	\$	\$
	\$	\$

I declare under penalty of perjury under the laws of the State of California that the above information is true and correct.

Date:

(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

FOR FINANCIAL EVALUATION OFFICER USE ONLY

TOTAL INCOME	\$	COST OF LEGAL SERVICES	\$
TOTAL EXPENSES	\$	MONTHLY PAYMENT	\$
NET DISPOSABLE INCOME	\$	TOTAL COST ASSESSED	\$

The above-named responsible person is presumed unable to pay reimbursement for the cost of legal services in this proceeding and is eligible for a waiver of liability because

- he or she receives qualifying public benefits
- his or her household income falls below 125% of the current federal poverty guidelines
- he or she has been reunified with the child(ren) under a court order and payment of reimbursement would harm his or her ability to support the child(ren).

Date:

(TYPE OR PRINT NAME)



(SIGNATURE OF FINANCIAL EVALUATION OFFICER)

Computation Sheet

Number in Family	2022 Federal Poverty Guidelines (A)	125% of Poverty Guidelines (B) (B = A x 125%)	2022 California Monthly Income (C) (C = B / 12)*
1	\$13,590.00	\$16,987.50	\$1,415.63
2	18,310.00	22,887.50	1,907.30
3	23,030.00	28,787.50	2,398.96
4	27,750.00	34,687.50	2,890.63
5	32,470.00	40,587.50	3,382.30
6	37,190.00	46,487.50	3,873.96
For each additional person, add:	4,720.00	5,900.00	491.67

*These amounts have been rounded up to the nearest whole cent. Language on the forms reflects this slight excess by stating that the household income is "less than" the amounts in the chart.