JUDICIAL COUNCIL OF CALIFORNIA
RULES COMMITTEE

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RULES COMMITTEE

MINUTES OF OPEN MEETING WITH CLOSED SESSION

Thursdays, December 8, 2022
4:10 - 5:30 p.m.
Videoconference

Advisory Body Members Present:	Hon. Carin T. Fujisaki, Hon. Kevin C. Brazile, Ms. Rachel W. Hill, Mr. Shawn C. Landry, Hon Kimberly Merrifield, and Hon. David Rosenberg
Advisory Body Members Absent:	Hon Samuel K. Feng, Hon. Glenn Mondo, and Mr. Maxwell Pritt.
Staff Present:	Ms. Anne M. Ronan and Ms. Benita Downs
Others Present	Heather Anderson, James Barolo, Audrey Fancy, Michael Giden, Sarah Fleischer-Ihn, Tracy Kenny, Eric Long, Daniel Richardson, Sarah Namnama Saria, Christy Simons, and Marymichael Smrdeli

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 4:10 p.m., and Ms. Downs took roll call.

Approval of Minutes:

The committee unanimously approved the minutes of the November 1, 2022; and open session of November 16, 2022, Rules Committee meetings.

DISCUSSION AND ACTION ITEMS (ITEMS 1–6)

Item 01

Appellate Procedure: Costs on Appeal

The committee reviewed a recommendation from the Appellate Advisory Committee proposing amending the rules governing costs on appeal in civil actions to clarify that the general rule for awarding costs to the prevailing party is subject to exception for statutes requiring a different or additional finding, determination, or analysis. The proposal was responsive to a recent Supreme Court decision and the constitutional principle that rules of court may not be inconsistent with statute.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 02

Appellate Procedure: Reporter's Transcripts

The committee reviewed a recommendation from the Appellate Advisory Committee proposing amending several rules relating to the format of reporter's transcripts and borrowing the record on appeal. Code of Civil Procedure section 271 required that as of January 1, 2023, a reporter's transcript must be delivered in electronic form unless a party or person entitled to the transcript requests it in paper format. In recognition that most reporter's transcripts would be in electronic form, the proposal would allow the transcripts to be in a single volume in most cases and would allow a party lending the record to another party to ask the court reporter to provide a read-only electronic copy of the reporter's transcript to the borrowing party rather than sending its copy of the reporter's transcript to the borrowing party. In addition, the proposal clarified that, when it is submitted by a party in lieu of depositing the estimated cost of the transcript with the court, a certified transcript must comply with specified format requirements. The proposal originated with suggestions from the California Court Reporters Association

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 03

Unlawful Detainer: Opportunities for Settlement Before Trial

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee proposing a new rule and a new form for optional use in unlawful detainer cases to promote settlement opportunities through the use of alternative dispute resolution processes. The new rule states a policy favoring at least one opportunity for participation in some form of pretrial dispute resolution, and will allow a court to shorten the existing deadline for submitting a mandatory settlement conference statement. The proposed new form will allow parties to submit any settlement agreement they reached to the court and ask for either an order without judgment or a stipulated judgment.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 04

Criminal Procedure: Mental Competency Proceedings

The committee reviewed a recommendation from the Criminal Law Advisory Committee proposing amendments to rule 4.130 of the California Rules of Court to reflect the renumbering of Penal Code section 1001.36, statutory changes to Penal Code section 1369(a) regarding treatment with antipsychotic medication of a defendant found incompetent to stand trial, and minor, nonsubstantive technical revisions.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 05

Criminal Procedure: Petition for Resentencing Based on Health Conditions due to Military Service

The committee reviewed a recommendation from the Criminal Law Advisory Committee proposing revisions to the optional Judicial Council petition for resentencing based on health conditions due to military service to reflect statutory changes to Penal Code section 1170.91(b). The section was amended to delete the requirement that the petitioner was sentenced before January 1, 2015, and to add exclusions for petitioners convicted of specified serious and violent felony offenses and offenses requiring sex offender registration. The committee also recommended technical and formatting revisions to comply with Judicial Council form standards.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 06

Criminal Procedure: Defendant's Financial Statement

The committee reviewed a recommendation from the Criminal Law Advisory Committee proposing revisions to the optional Judicial Council form used by defendants to state financial eligibility for appointment of counsel and record on appeal at public expense to reflect the repeal of Penal Code section 987.8 by Assembly Bill 1869 (Stats. 2020, ch. 92). The repeal of section 987.8 removes the authority of the court to make a postproceeding determination of the defendant's ability to pay and to order the defendant to reimburse the county for the costs of the public defender.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 07

Juvenile Law: Changes to Implement New Disposition for Serious Offenses

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee proposing adopting three rules of court, amending four rules of court, and repealing one rule of court, as well as approving one optional form, revising eight forms, and revoking one form to reflect the closure of the Department of Juvenile Justice and create new procedures to assist courts in using the new secure youth treatment facility disposition. These revisions will become effective on July 1, 2023, to align with the closure of the Division of Juvenile Justice on June 30, 2023.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 08

Juvenile Law: Sex Offender Registration Termination

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee proposing the adoption of three mandatory forms and the approval of two optional forms to be used to petition the juvenile court for termination of sex offender registration for persons required to register as sex offenders as a result of a juvenile adjudication and commitment to the Division of Juvenile Justice. All

five forms were adapted from existing forms that were approved by the council for use in criminal courts and became effective July 1, 2021.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 09

Juvenile Law: Transfer of Jurisdiction to Criminal Court

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee proposing to amend one rule and revise one form to implement recent legislative changes requiring that the court find by clear and convincing evidence that a youth is not amenable to rehabilitation while under the jurisdiction of the juvenile court. Assembly Bill 2361 (Bonta; Stats. 2022, ch. 330) amended Welfare and Institutions Code section 707 to include that standard of proof, and to require the court to set forth the basis in an order entered upon the minutes for making that finding.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 10

Juvenile Law: Technical Changes to Juvenile Rules and Forms

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee proposing revising four forms to conform to recent statutory changes to section 300 of the Welfare and Institutions Code enacted by Senate Bill 1085 (Kamlager; Stats. 2022, ch. 832). The committee also had identified an error that is technical in nature in a form recently updated in a proposal implementing the federal Family First Prevention Services Act. The committee recommended that these revisions go into effect as soon as possible, without prior circulation, because they are minor, nonsubstantive changes unlikely to create controversy that merely make the forms conform to statute.

Action: Action:*The committee unanimously approved Family and Juvenile Law Advisory Committee's recommendation, which is to go to the Judicial Council for action at the January council meeting.*

ADJOURNMENT

There being no further business, the meeting was adjourned at 4:40 p.m.

CLOSED SESSION

Pursuant to California Rules of Court, rule 10.75(d)(3 & 10)

Item 01

Judicial Council Jury Instructions: Public Access and Publication

Action:

Adjourned closed session at 5:35.

Approved by the advisory body on enter date.

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RULES COMMITTEE

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RULES COMMITTEE

MINUTES OF OPEN MEETING

Thursdays, December 13, 2022
4:10 - 5:30 p.m.
Videoconference

Advisory Body Members Present:	Hon. Carin T. Fujisaki, Hon. Kevin C. Brazile, Hon Samuel K. Feng, Ms. Rachel W. Hill, Hon Kimberly Merrifield, Mr. Maxwell Pritt, and Hon. David Rosenberg.
Advisory Body Members Absent:	Hon. Glenn Mondo, and Mr. Shawn C. Landry
Staff Present:	Ms. Anne M. Ronan and Ms. Benita Downs
Others Present	Hon. Jayne Lee, Theresa Chiong, Charlene Depner, Anne Hadreas, Audrey Fancy, Michael Giden, Eric Long, and Corby Sturges.

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 4:10 p.m., and Ms. Downs took roll call.

DISCUSSION AND ACTION ITEMS (ITEMS 1–6)

Item 01

Jury Instructions: Public Access and Publication

The committee reviewed a recommendation from the Rules Committee proposing revising California Rules of Court, rule 2.1050, to express the council's continued interest in both free public access to the Judicial Council of California Civil Jury Instructions (CACI) and the Judicial Council of California Criminal Jury Instructions (CALCRIM) and having publishers accurately publish the instructions, properly attribute the council as the source of the instructions, and not claim copyright in them. The proposal originated with a suggestion from a nonprofit organization following a change in copyright law that impacts government bodies.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 20.

Item 02

Rules and Forms: Community Assistance, Recovery, and Empowerment Act

The committee reviewed a recommendation from the Probate and Mental Health Advisory Committee proposing eleven rules of court and eleven forms to implement requirements in the Community Assistance, Recovery, and Empowerment (CARE) Act. The CARE Act establishes a new, noncriminal proceeding that authorizes a court—in response to a petition and after determining by clear and convincing evidence that the subject of the petition meets the necessary statutory criteria—to order the county behavioral health agency to work with the subject to engage in treatment and determine whether a CARE agreement can be reached or, if those efforts are unsuccessful, to develop a CARE plan. Once the court has approved a CARE agreement or ordered a CARE plan, the court must hold regular hearings to review the progress of the subject and the county behavioral agency with the services ordered in the agreement or plan. The act requires the Judicial Council to develop a mandatory petition form, any other forms necessary for the court process, and rules of court to implement the act's procedural provisions.

Action: The committee unanimously approved the proposal for circulation on the regular winter cycle through January 27.

ADJOURNMENT

There being no further business, the meeting was adjourned at 5:05 p.m.

Item number: 01

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 2/16/23

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

Title of proposal: Jury Instructions: Criminal Jury Instructions (2023 Edition)

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
1. Adoption of new CALCRIM Nos. 352, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, and 3234;
2. Revisions to CALCRIM Nos. 301, 335, 336, 350, 358, 375, 418, 540A, 730, 736, 761, 763, 908, 1400, 1401, 1520, 2181, 2542, 2622, and 2623; and
3. Revocation of CALCRIM No. 1156.

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

*Staff contact (*name, phone and e-mail*): Kara Portnow, 415-865-4961, kara.portnow@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/1/22
Project description from annual agenda: Maintenance - Case Law and Legislation; Maintenance-Comments from Users; New Instructions and Expansion into New Areas; Technical Corrections.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

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

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-020
For business meeting on: March 24, 2023

Title
Jury Instructions: Criminal Jury Instructions (2023 Edition)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Criminal Jury Instructions

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

Agenda Item Type
Action Required

Effective Date
March 24, 2023

Date of Report
January 20, 2023

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 2023 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 24, 2023, approve the following changes to the criminal jury instructions prepared by the committee:

1. Adoption of new CALCRIM Nos. 352, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, and 3234;
2. Revisions to CALCRIM Nos. 301, 335, 336, 350, 358, 375, 418, 540A, 730, 736, 761, 763, 908, 1400, 1401, 1520, 2181, 2542, 2622, and 2623; and
3. Revocation of CALCRIM No. 1156.

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 September 2022 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.

CALCRIM No. 301, *Single Witness's Testimony*; No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*; No. 336, *In-Custody Informant*; No. 358, *Evidence of Defendant's Statements*; No. 761, *Death Penalty: Duty of Jury;* and No. 763, *Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating*
In *People v. Tran* (2022) 13 Cal.5th 1169 [298 Cal.Rptr.3d 150, 515 P.3d 1210], the California Supreme Court rejected a variety of challenges to several CALCRIM instructions. Specifically, the court held instructing the jury with CALCRIM Nos. 301, 335, 336, and 358 did not violate the defendant's "constitutional rights to present a defense and to proof beyond a reasonable doubt." (13 Cal.5th at pp. 1198–1201.) Later in the opinion, the court rejected challenges to CALCRIM Nos. 761 and 763, finding that "the penalty jury was properly instructed." (*Id.* at pp. 1220–1221.) The committee added *Tran* to the authority sections of the above instructions, and specifically noted in No. 763 that the instruction was upheld against a due process challenge to victim-impact factors.

Proposed new CALCRIM No. 352, *Character of Victim and of Defendant*
A trial court judge suggested that the committee draft a new instruction to address evidence admitted pursuant to Evidence Code section 1103. In her proposal, the commenter referred the committee to an instruction that the California Supreme Court approved in *People v. Fuiava* (2012) 53 Cal. 4th 622, 694–695 [137 Cal.Rptr.3d 147, 269 P.3d 568]. To draft this new instruction, the committee reviewed the *Fuiava* instruction as well as CALCRIM No. 350, *Character of Defendant*, and CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.* The committee included the preponderance standard of proof

[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."

language from No. 375 to inform the jury's consideration of the specific conduct evidence of the defendant's character for violence. The committee also made some conforming changes to Nos. 350 and 375.

CALCRIM No. 418, *Coconspirator's Statements*

A deputy attorney general alerted the committee to a potential error in the instructional duty section of the bench notes. This section stated that the court has a sua sponte duty to instruct on the use of a coconspirator's statement, as specified. However, the commenter pointed out legal authority that seemingly contradicted this assertion, including *People v. Carter* (2003) 30 Cal.4th 1166, 1198 ["as the Evidence Code makes clear, courts are required to [instruct on requisite foundational facts] only at a defendant's request"]; *People v. Lewis* (2001) 26 Cal.4th 334, 362 ["On its own terms, [Evidence Code section 403] makes it discretionary for the trial court to give an instruction regarding a preliminary fact unless the party makes a request"]; and *People v. Marshall* (1996) 13 Cal.4th 799, 833 [Evidence Code section 403(c) "clearly does not contemplate a sua sponte duty to instruct"].

The committee reviewed the authority provided by the commenter but ultimately concluded that the question has been left open by the California Supreme Court in *People v. Prieto* (2003) 30 Cal.4th 226, 251–252 [133 Cal.Rptr.2d 18, 66 P.3d 1123] and in *People v. Sully* (1991) 53 Cal.3d 1195, 1231–1232 [283 Cal.Rptr. 144, 812 P.2d 163]. The committee modified the instructional duty section accordingly and added the relevant case law.

CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act,* and No. 730, *Special Circumstances: Murder in Commission of Felony*

During this past year, several cases considered the meaning of "actual killer" in the revised felony-murder rule of Penal Code section 189(e)(1).[2] In *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293 Cal.Rptr.3d 272], the court concluded that this term "refers to someone who personally killed the victim and is not necessarily the same as a person who 'caused' the victim's death." Likewise, in *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806], the court held that the term limits liability "to the actual perpetrator of the killing, i.e., the person (or persons) who personally committed the homicidal act." Based on these holdings, the committee modified the final element of Nos. 540A and 730 to read, in part, "the defendant personally committed (an/the) act[s] that directly caused the death of another person."

People v. Garcia (2022) 82 Cal.App.5th 956 [299 Cal.Rptr.3d 131] also examined the meaning of "actual killer." In that case, the defendant—acting alone—robbed an 82-year-old man who died of a heart attack an hour later. (82 Cal.App.5th at p. 959.) In reviewing the denial of the defendant's resentencing petition, the court concluded that substantial evidence supported the trial court's finding that the defendant qualified as an "actual killer." (*Id.* at pp. 969–971.) The committee added *Garcia* to the bench notes and added it, *Lopez*, and *Vang* to the authority section. Finally, the committee added a related issues note to No. 540A that had been previously

[2] Senate Bill 1437 (Stats. 2018, ch. 1015) amended Penal Code section 189 to narrow the scope of felony-murder liability.

added to No. 730. This note cites a 2020 case (*People v. Garcia* (2020) 46 Cal.App.5th 123 [259 Cal.Rptr.3d 600]) and highlights the difference between being an actual killer and an aider and abettor.

CALCRIM No. 1156, *Loitering: For Prostitution*

Senate Bill 357 (Stats. 2022, ch. 86) repealed Penal Code section 653.22. As a result, the committee agreed that this instruction is no longer necessary and proposes that it be revoked.

CALCRIM No. 736, *Special Circumstances: Killing by Street Gang Member;* No. 1400, *Active Participation in Criminal Street Gang*; No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang*; and No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*

Two recent cases examined the new requirement of Penal Code section 186.22(f)[3] that gang members "collectively engage" in a pattern of criminal gang activity. In *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1072 [290 Cal.Rptr.3d 189], the court held that this requirement "means the People were required to prove that two or more gang members committed each predicate offense." Disagreeing with *Delgado*, the court in *People v. Clark* (2022) 81 Cal.App.5th 133, 144 [296 Cal.Rptr.3d 153], review granted October 19, 2022, S275746, concluded that "a pattern of criminal gang activity may be established by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion." The committee added a bench note in all four gang instructions that highlights this split in authority as to the meaning of "collectively" and also noted that the California Supreme Court granted review in *People v. Clark*.

Two other recent cases interpreted subdivision (b) of Penal Code section 186.22. In *People v. Renteria* (2022) 13 Cal.5th 951, 969 [297 Cal.Rptr.3d 344, 515 P.3d 77], the court held that this subdivision requires, in the case of a solo gang member committing a felony, "evidence connecting testimony about any general reputational advantage that might accrue to the gang because of its members' crimes to the defendant's commission of a crime on a particular occasion for the benefit of the gang, and with the specific intent to promote criminal activities by the gang's members." In *People v. Lopez* (2022) 12 Cal.5th 957, 975 [292 Cal.Rptr.3d 265, 507 P.3d 925], the court held that the alternative penalty provisions provided by subdivision (b)(4) apply only to completed target offenses, not to conspiracies. For CALCRIM No. 1401, the committee added *Renteria* to the authority section and added *Lopez* to the related issues section.

CALCRIM No. 2622, *Intimidating a Witness,* and No. 2623, *Intimidating a Witness: Sentencing Factors*

In *People v. Serrano* (2022) 77 Cal.App.5th 902, 912–913 [292 Cal.Rptr.3d 865], the court held that the trial court erred by failing to instruct on the malice element and by failing to define the term "malice," which "has a special definition for purposes of section 136.1." Meanwhile, in *People v. Johnson* (2022) 79 Cal.App.5th 1093, 1110 [295 Cal.Rptr.3d 353], the court held that

[3] Assembly Bill 333 (Stats. 2021, ch. 699) amended Penal Code section 186.22 in several ways, including changing the evidentiary requirements for establishing a pattern of criminal gang activity.

the reference to "third person" in Penal Code section 136.1(c)(1) means an outside party, not including the defendant. In response to *Serrano*, the committee added a bench note in both No. 2622 and No. 2623 to require defining the term "malice." In response to *Johnson*, the committee added instructional language to No. 2623 to clarify that the defendant is excluded from the statutory definition and added the case to the authority section.

Proposed new CALCRIM Nos. 3224–3234 (aggravating sentencing factors)

Senate Bill 567 (Stats. 2021, ch. 731) amended Penal Code sections 1170 and 1170.1 to limit the ability of the trial court to impose an upper sentencing term unless a jury finds aggravating factors beyond a reasonable doubt or the defendant admits to them.[4] Penal Code section 1170.1(d)(3) references the sentencing rules of the Judicial Council. California Rules of Court, rule 4.421 sets forth circumstances in aggravation for consideration at sentencing.

In response to this new legislation, several trial court judges and legal practitioners asked the committee to develop jury instructions for the aggravating factors listed in rule 4.421. The committee initially considered these proposals at its spring 2022 meeting but recognized the challenge presented and formed a subcommittee to draft them. In addition to four committee members, the subcommittee included Judge J. Richard Couzens (Ret.), who provided his sentencing expertise.

The subcommittee met several times over the summer months to draft 11 new instructions, based on 11 aggravating factors listed in rule 4.421.[5] Although this rule contains a total of 17 factors, the subcommittee selected factors that appeared to be the most common and/or relatively straightforward. The work group and then the full committee reviewed these drafts with painstaking attention to detail.

The minimal published case law interpreting the aggravating factors presented a challenge in developing these instructions. Further, as the California Supreme Court noted in *People v. Sandoval* (2007) 41 Cal.4th 825, 849 [62 Cal.Rptr.3d 588, 161 P.3d 1146],

[4] Excluded from this new mandate is evidence of prior convictions, which the trial court can separately determine as an aggravating factor.

[5] The 11 factors from rule 4.421 are (a)(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; (a)(2) The defendant was armed with or used a weapon at the time of the commission of the crime; (a)(3) The victim was particularly vulnerable; (a)(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission; (a)(5) The defendant induced a minor to commit or assist in the commission of the crime; (a)(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process; (a)(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism; (a)(9) The crime involved an attempted or actual taking or damage of great monetary value; (a)(10) The crime involved a large quantity of contraband; (a)(11) The defendant took advantage of a position of trust or confidence to commit the offense; and (b)(1) The defendant has engaged in violent conduct that indicates a serious danger to society.

> the aggravating circumstances listed in the rules were drafted for the purpose of guiding judicial discretion and not for the purpose of requiring factual findings by a jury beyond a reasonable doubt. Many of those circumstances are not readily adaptable to the latter purpose, because they include imprecise terms that implicitly require comparison of the particular crime at issue to other violations of the same statute, a task a jury is not well-suited to perform. For example, without some basis for comparing the instant offense to others, it would be difficult for a jury to determine whether "[t]he victim was *particularly* vulnerable," or whether the crime "involved ... taking or damage of *great* monetary value" or "a large quantity of contraband." (Cal. Rules of Court, rule 4.421(a)(3), (9) & (10), italics added.)

Consistent with the Supreme Court's observation, numerous commenters argue that Penal Code section 1170.1(d)(2) and (3)'s reliance on rule 4.421 does not provide the specificity necessary for the jury's decision. They urge clarification by the Legislature. In that event, we anticipate revision of the California Rules of Court to accord with the revised statute. Should the Legislature not act, rule 4.421—which was promulgated for judges—could be revised to address the role assigned to the jury by Penal Code section 1170.1.

In light of these concerns, the committee considered waiting for further guidance. However, trial judges urged the committee to develop instructions to be used in the interim. Simply put, the enactment of SB 567 made it imperative for the committee to forge ahead in spite of the inherent difficulties. The committee believes that its studied and well-considered approach will assist trial courts and counsel.

In addition to the issues identified in *Sandoval*, commenters raised multiple constitutional challenges: separation of powers, due process, and vagueness. However, legal arguments about the validity and infirmity of the aggravating factors are outside this advisory committee's purview. Once further clarification develops, either through statutory amendments, rule revision, or case law, the committee remains ready to further refine these instructions. Until then, the committee has discharged its duty, in the words of Supreme Court Associate Justice Carol A. Corrigan, "to write instructions that are both legally accurate and understandable to the average juror." (*CALCRIM* (2022 ed.), Preface, page xi.)

A question the committee pondered and the public comments address is whether the jury must be unanimous as to the facts or conduct supporting the finding that an aggravating factor is true or need only unanimously agree on the factor. Several commenters argued that some of the aggravating factors—and therefore the applicable instruction—improperly combine multiple aggravating factors. They contend that some of the instructions fail to instruct jurors of the requirement to agree on the specific underlying act or conduct. The committee carefully considered but ultimately rejected these arguments, noting that the rule of court refers to qualitative descriptions of the defendant's conduct related to a single count of conviction and does not require a finding concerning a specific act. In support of this position, the committee relied on the reasoning in *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d

32, 493 P.3d 815]. Although in the context of a death penalty case, *McDaniel* held "that neither article I, section 16 of the California Constitution nor Penal Code section 1042 provides a basis to require unanimity in the jury's determination of factually disputed aggravating circumstances." (12 Cal.5th at pp. 147–148.)

The public comments also urged the committee to add language to inform the jury that the act or conduct must be "distinctively worse than the ordinary." (See *People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) During the initial drafting process, the committee considered but did not include this language out of concern that it would be more confusing than helpful to jurors. Upon further reflection and in response to the public comments, the committee agreed that the "distinctively worse" admonition was essential and added the requirement to all the aggravating factor instructions. The committee also added a commentary to each instruction about *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem.

Other comments provided helpful suggestions to improve the wording in specific instructions. In response, the committee added and/or modified some of the language. Although the committee did not agree with all of the suggested edits, the committee considered and appreciated the robust public comments.

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, revisions, and revocation to *CALCRIM* circulated for public comment from November 21, 2022, through January 4, 2023. The committee received responses from 16 commenters. The commenters included 2 judicial officers, 1 district attorney's office, 11 public defender's offices, 1 individual public defender, and 1 county bar association. The public defenders generally disagreed with the new aggravating factor instructions (Nos. 3224–3234). The comments disagreeing with the new aggravating factor instructions, along with the committee's responses, are described above. The text of all comments received and the committee's responses are included in a chart of comments attached at pages 9–54.

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.

Attachments and Links

1. Chart of comments, at pages 9–54
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 55–191

Instruction No.	Commenter	Position	Comment	Committee Response
301, 335, 336, 358, 761, 763, 350, 375, 418, 540A, 730, 908, 1156, 1400, 1401, 736, 2542, 1520, 2181, 2622, 2623, 3226, 3233	Orange County Bar Association, by Daniel S. Robinson, President.	A	The Orange County Bar Association agrees with the above referenced proposals.	No response necessary.
352	Judge Mary Wiss, San Francisco Superior Court	AM	The title to proposed 352 is: 352. Character of Victim and Violent Character of Defendant I am very troubled by the title describing "Violent" Character of Defendant. The title in effect contrasts the "Character of Victim" with "Violent Character of Defendant." In my jury instructions handed out to the jury I always delete the title of an instruction but note that many judges leave in the title. As with the codes such as CCP or CC, the title is inserted by the editor (Wests or Lexis Nexis) and is not part of the statute. Thus, those publishers often times have different labels for the same statutes.	The title is technically correct because Evidence Code section 1103(b) restricts admission of evidence to the defendant's violent character. However, the committee agrees that the title could be problematic if seen by deliberating jurors. Therefore, the committee decided to change the title to "Character of Victim and of Defendant."
352	Orange County Bar Association, by Daniel S. Robinson, President.	AM	The limiting note for paragraph 2 should also be extended to paragraphs 3-5: *[#2] <Give only when specific conduct evidence of the defendant's character for violence has been admitted>* [The People presented evidence that the defendant (committed ([an]other offense[s]/the offense[s] of _____ *<insert description of alleged offense[s]>*/_____*<insert description of alleged conduct admitted under Evid. Code, § 1103(b)>*) that (was/were) not charged in this case. [#3] You may consider this evidence about the defendant only if the People have proved by a preponderance of the evidence that the defendant in fact committed the (uncharged offense[s]/act[s]). Proof by	This limiting note already applies to the language that the commenter seeks to have included. There is one opening bracket in front of "The People" and one closing bracket after "character trait" in the final sentence.

			a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [#4] If the People have not met this burden, you must disregard this evidence entirely. [#5] If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether the defendant (is a violent person/has a trait for violence) and acted in conformity with that character trait.]	
New 3224–3234	Assistant Presiding Judge Syda Cogliati, Santa Cruz County Superior Court	AM	With respect to the proposed new jury instructions on aggravating factors, the instructions should include an option for cases where the aggravating factors are alleged as to a conduct allegation that has a sentencing triad. For instance, the PC 12022.5 personal use of a firearm enhancement allegation has a sentencing triad, and the upper term could only be imposed with aggravating factors found as to that allegation. Thus, instead of referring only to "crimes," the instructions should also include an option for referencing "special allegations."	The committee declines to make this change. Where necessary, the trial court can modify the instructions.
New 3224–3234	San Francisco District Attorney's Office, by Allison Garbutt Macbeth, Assistant District Attorney.	AM	Non-Unanimity in Instructions: In general, the proposed CALCRIM instructions for aggravating factors include a "non-unanimity" clause, meaning that the jury need not agree on which facts show the particular aggravating factor. We respectfully request that the Judicial Council include the authority in the bench notes for all instructions that include that clause.	The committee has added *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 to the authority section of each instruction, with the following description: **Unanimity Not Required Regarding Facts Underlying the Aggravating Factor.**
New 3224–3234	Judith Gweon, Assistant Public Defender, County of Riverside	D	Please note that I disagree with the proposed CALCRIMs 3224, 3224, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, and 3234 on vagueness grounds. These proposed instructions fail to include as an element that for every alleged aggravating circumstance, the evidence must show beyond a reasonable doubt that the facts of the case are "distinctly worse" than the "ordinary case" (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110 ["The essence of 'aggravation' relates to the	The committee considered *Moreno* and added the following language to all of these instructions: **You may not find the allegation true unless all of you agree that the People have proved that the defendant's**

			effect of a particular fact in making the offense distinctively worse than the ordinary"].) Excluding such element renders these proposals vague and tips the scale in favor of the jury, finding that the circumstances are aggravating against the defendant. The CA Rules of Court 4.421 was intended to be used by judges, not jurors. As judges, they could compare the facts of the current case to other cases using 4.421's language as a guidepost and decide if the current charge was "distinctly worse" than the "ordinary" offense of that type. To make these CALCRIMs more balanced and not biased against the defendants, it is essential to add the language from *Moreno* that to find the aggravating circumstance true, the jury has to find that the facts alleged are "distinctly worse" than the "ordinary case." Thank you for your consideration.	**conduct was distinctively worse than an ordinary commission of the underlying crime.** The committee modified this sentence for CALCRIM No. 3234 because the aggravating factor of "serious danger to society" includes consideration of additional conduct beyond the underlying offense.[1]
New 3224–3234	Orange County Public Defender's Office, by Adam Vining, Assistant Public Defender.	D	The Office of the Orange County Public Defender DISAGREES with many of the proposed jury instructions 3224-3234 [Aggravating Factors]. The proposed instructions suffer from defects implicating issues regarding jury unanimity and impermissible vagueness. Most of the instructions improperly combine multiple aggravating factors as if they are one aggravating factor. The defect is a result of simply transferring each subdivision found in Rule 4.421 to a single instruction. Under California's determinate sentencing laws, before a court may rely upon an aggravating fact in sentencing, such fact must be proved at trial beyond a reasonable doubt to a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. (*Cunningham v. California* (2007) 549 U.S. 270.) In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148

[1] The added sentence for CALCRIM No. 3234 states: **You may not find the allegation true unless all of you agree that the People have proved that the defendant's violent conduct was distinctively worse than that posed by an ordinary commission of the underlying crime and that the violent conduct, considered in light of all the evidence presented[and the defendant's background], shows that the defendant is a serious danger to society.**

			Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." When the prosecution presents evidence of more than one act to prove an allegation, the court has a sua sponte duty to give a unanimity instruction. (CALCRIM 3500.) "You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed." (*Ibid.*) The bench notes to CALCRIM 3500 on Unanimity cite to the rule as dictated by the U.S. Supreme Court: "[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.' [Citation.]" (*People v. Russo, supra,* 25 Cal. 4th at p. 1132.) The court has no sua sponte duty to instruct on unanimity if the offense constitutes a "continuous course of conduct." (*People v. Maury* (2003) 30 Cal.4th 342, 423.) The court in *Russo* explains that, "[i]n deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should	[283 Cal.Rptr.3d 32, 493 P.3d 815].

			give the unanimity instruction." (*People v. Russo, supra,* 25 Cal. 4th at pp. 1134-35.) Unanimity is required as to the act[s] constituting the violation. Unanimity is not required as the what legal theory places the act within the meaning of the statute. Unanimity is not required as to every underlying fact that provides circumstantial evidence of the violation. But, unanimity is required as to the "fact" that is sought to be proven. Most of the proposed new instructions on aggravating factors contain language to the effect of "unanimity is not required," that render the instructions Constitutionally impermissible. In order to highlight the unanimity defect, consider the appropriateness of simply combining all aggravating factors into one jury instruction and telling the jury that no unanimity is required, as long as they each find any factor to be true. It should be clear that such an instruction would not pass muster.	
			Moreover, as a matter of Due Process the Defendant must be on notice of what alleged act[s] he is defendant himself against. Due Process "requires 'a reasonable degree of certainty in legislation, especially in the criminal law….' [Citation.]" (*People v. Maciel* (2003) 113 Cal.App.4th 670, 683.) "To withstand a facial vagueness challenge, a penal statute must satisfy two basic requirements. First, the statute must be definite enough to provide adequate notice of the conduct proscribed. (Citations.) […] Second, the statute must provide sufficiently definite guidelines…. (Citations.)" (*People v. Ellison* (1998) 68 Cal.App.3d 692, 698-699.) "If a criminal statute is not sufficiently certain and definite, it is unconstitutionally vague and therefore void." (*People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1116.) Several of the proposed instructions suffer from impermissible vagueness on their face. Others suffer from impermissible vagueness by not combining multiple aggravating factors into one instruction allowing each juror to choose any factor from the list while explicitly discounting any requirement of unanimity. If the Council prefers to place each subdivision of Rule 4.421 into a single instruction, perhaps the Rule itself should be revised to break up	The role of the CALCRIM committee is to review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required and—if so—to draft jury instructions that accurately and understandably state the law. Addressing the certainty or vagueness of the aggravating factors is not within its purview. Furthermore, vagueness concerns may be raised by counsel in individual cases. We forwarded this suggestion to the Criminal Law Advisory

			the subdivisions that contain multiple aggravators. Or perhaps the factor in aggravation should be reconsidered in entirety.	Committee which can propose revisions to the applicable rule.
New 3224–3234	Los Angeles Public Defender's Office, by Nick Stewart-Oaten, Deputy Public Defender.	D	This memo is intended as a response to the CALCRIM ITC2022-02 on behalf of the Los Angeles Public Defender's Office. As discussed below, the Public Defender has significant concerns about the proposed instructions for Penal Code section 1170(b) "aggravating circumstance" enhancements (NEW 3224 through NEW 3234) because the proposed instructions: (i) omit required elements; (ii) reduce the evidentiary requirements for conviction; and (iii) fail to define necessary elements. We recognize that rule 4.421, the rule on which these instructions are based, was never intended for use by a jury, and that any Committee tasked with translating its language into jury instructions has been handed a difficult if not impossible task. The solution cannot, however, be to rewrite that language or omit long-standing evidentiary requirements to make it easier for juries to convict defendants of an "aggravating circumstance." Our concerns regarding these proposed instructions are described in detail below. Please do not hesitate to contact our office with questions or requests for clarification.	
			Objections That Apply to All of the Proposed Instructions: ***Each Proposed Instruction Fails to Include the Legal Requirement that the Prosecution Prove Beyond a Reasonable Doubt That the Purported "Aggravating Circumstance" Is Not an "Ordinary" Part of the Charged Offense*** In the context of aggravating factors, "the essence of aggravation relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 682-683 [error to find an aggravating factor true unless the evidence	The committee considered *Moreno* and added the following language to all of the aggravating factor instructions: **You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an**

			establishes that the facts of the case are "distinctly worse" than those in the "ordinary" case of that type].) A fact-finder must therefore compare the facts of the defendant's case with those of involved in an *ordinary* offense of that type to determine if they are "aggravating" or merely an ordinary occurrence within the context of the charged offense. (*Fernandez* at p. 682; *People v. Sandoval* (2007) 41 Cal.4th 825, 840 ["Many of the aggravating circumstances set forth in [rule 4.421] require an imprecise quantitative *or comparative evaluation of the facts*"] emphasis added; *People v. Superior Court* (*Brooks*) 159 Cal.App.4th 1, 7 [jury trial on rule 4.421 aggravators requires a "comparative evaluation" of the facts of the case to other cases]; *Butler v. Curry* (2008) 528 F.3d 624, 649 [a determination as to whether an alleged fact is truly an aggravator requires the fact-finder to consider "other cases."].) As a result, an aggravating circumstance cannot be based on a fact that is an "ordinary" part of the charged offense, even if that fact is not an *element* of the charged offense. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358 [a crime cannot be aggravated by circumstances that are an ordinary part of the offense]; *Fernandez* at p. 680 [error to find defendant guilty of "planning and sophistication" aggravator in a child-molestation case, absent evidence that the planning and sophistication in defendant's case was "distinctly worse" than in the "ordinary" child molestation case].) In *Piceno*, for example, the defendant was charged with vehicular manslaughter after striking and killing a pedestrian while drunk driving. The trial court sentenced the defendant to high term, asserting that the offense was "aggravated" because, as a pedestrian, the victim was "particularly vulnerable," an aggravating factor listed in rule 4.421. The Court of Appeal reversed. The Court pointed out that every vehicular manslaughter case involves a person who was vulnerable to being killed if struck by a vehicle, and that a victim's "vulnerability" to that harm is therefore not an aggravator, but a routine part of the crime. (*Piceno* at p. 394 ["All victims of drunk drivers are 'vulnerable victims,' but it is	**ordinary commission of the underlying crime.**

			precisely because they are all vulnerable that [the decedent] cannot be considered to be vulnerable 'in a special or unusual degree, to an extent greater than in other cases."].) Respectfully, none of the proposed jury instructions capture the requirement that an alleged aggravating circumstance can only be based on facts or circumstances that are not "ordinary" parts of the crime – *even if they are not per se "elements" of the crime*. As written, the proposed CALCRIM 3226 ("particularly vulnerable victim"), for example, would have permitted the prosecutor in *Piceno* to argue that the pedestrian-victim was "particularly vulnerable" solely because they were a pedestrian…because being a pedestrian is not an *element* of vehicular manslaughter. The same is true in the context of the other proposed instructions. In Calcrim 3224 ("great violence" enhancement), for example, the proposed instruction only requires proof that the defendant's conduct "was distinctively worse than what was *necessary* to commit the crime." While it is true that proof that an alleged aggravating fact cannot be based on an event that was a "necessary" part of the crime, this instruction fails to capture the requirement that the defendant must also have done something distinctly worse than *ordinary*, or that the jury make that determination by comparing the facts of the case with those in other cases involving the same offense. (*Moreno* at p. 110, *Fernandez* at p. 680; *Sandoval* at p. 840; *Brooks* at p. 7.) Assault, for example, does not *require* the defendant to actually *strike* the victim, but routinely involves a defendant who has done so – a fact that certainly does not render an assault defendant's conduct "distinctly worse than ordinary." Under the currently proposed instruction, however, a prosecutor is free to charge (and a jury is free to convict) the defendant of this enhancement if he struck the victim…simply because striking the victim wasn't "necessary" to complete the offense. The same is true of proposed CALCRIM 3230 ("planning, sophistication" enhancement). Almost every crime, for example,	

			involves *some* level of "planning" (e.g., the defendant will "plan" to drive his car even though he is drunk, carry the illegal weapon, hit the victim, steal the purse, deposit the fake check, use the drugs, sell the drugs, etc.) but the proposed instruction does not require any proof whatsoever that the "planning" involved in the defendant's offense be something that renders his offense "distinctly worse than the ordinary" offense of that type. (*Moreno* at p. 110; see also *Fernandez* at p. 680 [error to claim that a child-molestation case was aggravated by "planning" because this would render every child molestation case an aggravated offense].) The same is true of proposed CALCRIM 3229 ("dissuading a witness" enhancement), particularly in the context of an alleged violation of section 136.2 (dissuading a witness). As written, the proposed instruction permits a prosecutor to charge (and a jury to convict) a defendant of this enhancement not just when the defendant has engaged in conduct that is "distinctly worse" than ordinary" for the charged offense, but when he has simply committed a violation of section 136.2 – the same offense with which he is charged. The practical result is that this instruction turns *every* violation of section 136.2 into an "aggravated" violation of 136.2. The same is true of proposed CALCRIM 3232 ("large amount of contraband" enhancement) and CALCRIM 3231 ("great monetary value" enhancement) because the currently proposed instructions would allow a jury to convict the defendant of this enhancement based on facts that are a necessary or ordinary part of the offense (e.g., when the underlying offense alleges that the defendant is charged with possessing a specific "large" amount of drugs, or with stealing or damaging a "great" amount of property).	
			Instructions Fail to Preclude Dual Use of Facts to Support Different Aggravators A fact-finder cannot use the same facts to find the defendant guilty of multiple aggravators. (*Fernandez* at p. 680 [error to use defendant's identity as victim's father to find true both the aggravating factor of	*Fernandez* is about the improper use of aggravating factors at sentencing and does not prohibit the jury from finding multiple aggravators based on the same

			"vulnerability" and the aggravating factor of "took advantage of a position of trust or confidence."].) None of the current instructions, however, require the prosecutor to identify the allegedly aggravating fact or facts that allegedly justify the aggravator, or inform the jury that the same facts cannot be dual-used to justify multiple aggravators.	conduct. The committee added a related issues note about *Fernandez* to each aggravating factor instruction with the heading: ***Prohibition Against Dual Use of Facts at Sentencing.***
			Instructions Improperly Allow Jurors to Convict on an Aggravator Without Unanimity Particularly because of the barrier to dual-use of facts to justify multiple aggravators, the proposed instructions are also flawed because, as currently drafted, the instructions allow jurors to convict the defendant of an aggravator *without* requiring that the jurors specify and agree on the factual basis for that aggravator (e.g., in CALCRIM 3224, the instructions says: "you need not all agree on the act[s] or conduct which constitute[s] the [aggravating circumstance]".) Such an instruction is not justified by the language of rule 4.421 or SB 567. First, as discussed in *Fernandez*, a fact-finder cannot use the same fact to find multiple aggravators. (*Fernandez* at p. 680.) The current instructions, however, would permit a defendant to be convicted of multiple aggravators on the same fact, because the instructions do not inform the jury that the same fact cannot be used to justify multiple aggravators. Under SB 567, jurors are stepping into a role previously held by a judge – who were not (and are not) permitted to find true an aggravating factor when they disagree with themselves about whether a specific fact justifies the use of that aggravating factor. In short, absent the overruling of *Fernandez* and clear guidance from the legislature or court of appeal on this issue, it is erroneous to assert that juries may find true an aggravating factor without agreeing on the facts that justify the use of that aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3224–3234	Santa Cruz County Office of the Public	D	The Santa Cruz County Office of the Public Defender joins the Los Angeles County Public Defender in their concern for the drafted jury	With the exception of the introductory paragraph, this

	Defender, by Jonathan Cruz, Chief Deputy Public Defender.		instructions regarding aggravating circumstances post SB 567. Attached you will find our memo outlining our concerns and objections. If the Advisory Committee would like to discuss anything in the memo further, please provide my contact information below. Thank you for your attention this matter. This memo is intended as a response to the CALCRIM ITC2022-02 on behalf of the Santa Cruz County Office of the Public Defender. As discussed below, the Public Defender has significant concerns about the proposed instructions for Penal Code section 1170(b) "aggravating circumstance" enhancements (NEW 3224 through NEW 3234) because the proposed instructions: (i) omit required elements; (ii) reduce the evidentiary requirements for conviction; and (iii) fail to define necessary elements. We recognize that rule 4.421, the rule on which these instructions are based, was never intended for use by a jury, and that any Committee tasked with translating its language into jury instructions has been handed a difficult if not impossible task. The solution cannot, however, be to rewrite that language or omit long-standing evidentiary requirements to make it easier for juries to convict defendants of an "aggravating circumstance." Our concerns regarding these proposed instructions are described in detail below. Please do not hesitate to contact our office with questions or requests for clarification. **Objections That Apply to All of the Proposed Instructions:** ***Each Proposed Instruction Fails to Include the Legal Requirement that the Prosecution Prove Beyond a Reasonable Doubt That the Purported "Aggravating Circumstance" Is Not an "Ordinary" Part of the Charged Offense*** In the context of aggravating factors, "the essence of aggravation relates to the effect of a particular fact in making the offense	comment is identical to the above comment from the Los Angeles Public Defender's Office. Please see the above responses.

			distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 682-683 [error to find an aggravating factor true unless the evidence establishes that the facts of the case are "distinctly worse" than those in the "ordinary" case of that type].) A fact-finder must therefore compare the facts of the defendant's case with those of involved in an *ordinary* offense of that type to determine if they are "aggravating" or merely an ordinary occurrence within the context of the charged offense. (*Fernandez* at p. 682; *People v. Sandoval* (2007) 41 Cal.4th 825, 840 ["Many of the aggravating circumstances set forth in [rule 4.421] require an imprecise quantitative *or comparative evaluation of the facts*"] emphasis added; *People v. Superior Court (Brooks)* 159 Cal.App.4th 1, 7 [jury trial on rule 4.421 aggravators requires a "comparative evaluation" of the facts of the case to other cases]; *Butler v. Curry* (2008) 528 F.3d 624, 649 [a determination as to whether an alleged fact is truly an aggravator requires the fact-finder to consider "other cases."].) As a result, an aggravating circumstance cannot be based on a fact that is an "ordinary" part of the charged offense, even if that fact is not an *element* of the charged offense. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358 [a crime cannot be aggravated by circumstances that are an ordinary part of the offense]; *Fernandez* at p. 680 [error to find defendant guilty of "planning and sophistication" aggravator in a child-molestation case, absent evidence that the planning and sophistication in defendant's case was "distinctly worse" than in the "ordinary" child molestation case].) In *Piceno*, for example, the defendant was charged with vehicular manslaughter after striking and killing a pedestrian while drunk driving. The trial court sentenced the defendant to high term, asserting that the offense was "aggravated" because, as a pedestrian, the victim was "particularly vulnerable," an aggravating factor listed in rule 4.421.	

			The Court of Appeal reversed. The Court pointed out that every vehicular manslaughter case involves a person who was vulnerable to being killed if struck by a vehicle, and that a victim's "vulnerability" to that harm is therefore not an aggravator, but a routine part of the crime. (*Piceno* at p. 394 ["All victims of drunk drivers are 'vulnerable victims,' but it is precisely because they are all vulnerable that [the decedent] cannot be considered to be vulnerable 'in a special or unusual degree, to an extent greater than in other cases."].) Respectfully, none of the proposed jury instructions capture the requirement that an alleged aggravating circumstance can only be based on facts or circumstances that are not "ordinary" parts of the crime – *even if they are not per se "elements" of the crime*. As written, the proposed CALCRIM 3226 ("particularly vulnerable victim"), for example, would have permitted the prosecutor in *Piceno* to argue that the pedestrian-victim was "particularly vulnerable" solely because they were a pedestrian…because being a pedestrian is not an element of vehicular manslaughter. The same is true in the context of the other proposed instructions. In Calcrim 3224 ("great violence" enhancement), for example, the proposed instruction only requires proof that the defendant's conduct "was distinctively worse than what was necessary to commit the crime." While it is true that proof that an alleged aggravating fact cannot be based on an event that was a "necessary" part of the crime, this instruction fails to capture the requirement that the defendant must also have done something distinctly worse than ordinary, or that the jury make that determination by comparing the facts of the case with those in other cases involving the same offense. (*Moreno* at p. 110, *Fernandez* at p. 680; *Sandoval* at p. 840; *Brooks* at p. 7.) Assault, for example, does not *require* the defendant to actually *strike* the victim, but routinely involves a defendant who has done so – a fact that certainly does not render an assault defendant's conduct "distinctly	

			worse than ordinary." Under the currently proposed instruction, however, a prosecutor is free to charge (and a jury is free to convict) the defendant of this enhancement if he struck the victim…simply because striking the victim wasn't "necessary" to complete the offense. The same is true of proposed CALCRIM 3230 ("planning, sophistication" enhancement). Almost every crime, for example, involves some level of "planning" (e.g., the defendant will "plan" to drive his car even though he is drunk, carry the illegal weapon, hit the victim, steal the purse, deposit the fake check, use the drugs, sell the drugs, etc.) but the proposed instruction does not require any proof whatsoever that the "planning" involved in the defendant's offense be something that renders his offense "distinctly worse than the ordinary" offense of that type. (*Moreno* at p. 110; see also *Fernandez* at p. 680 [error to claim that a child-molestation case was aggravated by "planning" because this would render every child molestation case an aggravated offense].) The same is true of proposed CALCRIM 3229 ("dissuading a witness" enhancement), particularly in the context of an alleged violation of section 136.2 (dissuading a witness). As written, the proposed instruction permits a prosecutor to charge (and a jury to convict) a defendant of this enhancement not just when the defendant has engaged in conduct that is "distinctly worse" than ordinary" for the charged offense, but when he has simply committed a violation of section 136.2 – the same offense with which he is charged. The practical result is that this instruction turns every violation of section 136.2 into an "aggravated" violation of 136.2. The same is true of proposed CALCRIM 3232 ("large amount of contraband" enhancement) and CALCRIM 3231 ("great monetary value" enhancement) because the currently proposed instructions would allow a jury to convict the defendant of this enhancement based on facts that are a necessary or ordinary part of the offense (e.g., when the underlying offense alleges that the defendant is charged with possessing	

			a specific "large" amount of drugs, or with stealing or damaging a "great" amount of property). ***Instructions Fail to Preclude Dual Use of Facts to Support Different Aggravators*** A fact-finder cannot use the same facts to find the defendant guilty of multiple aggravators. (*Fernandez* at p. 680 [error to use defendant's identity as victim's father to find true both the aggravating factor of "vulnerability" and the aggravating factor of "took advantage of a position of trust or confidence."].) None of the current instructions, however, require the prosecutor to identify the allegedly aggravating fact or facts that allegedly justify the aggravator, or inform the jury that the same facts cannot be dual-used to justify multiple aggravators. ***Instructions Improperly Allow Jurors to Convict on an Aggravator Without Unanimity*** Particularly because of the barrier to dual-use of facts to justify multiple aggravators, the proposed instructions are also flawed because, as currently drafted, the instructions allow jurors to convict the defendant of an aggravator without requiring that the jurors specify and agree on the factual basis for that aggravator (e.g., in CALCRIM 3224, the instructions says: "you need not all agree on the act[s] or conduct which constitute[s] the [aggravating circumstance]".) Such an instruction is not justified by the language of rule 4.421 or SB 567. First, as discussed in *Fernandez*, a fact-finder cannot use the same fact to find multiple aggravators. (*Fernandez* at p. 680.) The current instructions, however, would permit a defendant to be convicted of multiple aggravators on the same fact, because the instructions do not inform the jury that the same fact cannot be used to justify multiple aggravators. Under SB 567, jurors are stepping into a role previously held by a judge – who were not (and are not) permitted to find true an aggravating	

			factor when they disagree with themselves about whether a specific fact justifies the use of that aggravating factor. In short, absent the overruling of *Fernandez* and clear guidance from the legislature or court of appeal on this issue, it is erroneous to assert that juries may find true an aggravating factor without agreeing on the facts that justify the use of that aggravating factor.	
New 3224–3234	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	D	Proposed Objection The proposed instructions fail on several grounds, including separation of powers, vagueness, and due process. As the Supreme Court pointed out "[t]he sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to "provid[e] criteria for the consideration of the trial judge." (*People v. Sandoval* (2007) 41 Cal.4th 825, 840.) Using this Rule of Court "would pose difficult jury questions and potentially raise constitutional concerns." (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5 citing *People v. Sandoval* (2007) 41 Cal.4th 825, 840.) The Rules of Court were not meant to be used as jury instructions. "[B]ecause the rules provide criteria intended to be applied to a broad spectrum of offenses, they are 'framed more broadly than' criminal statutes and necessarily 'partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.'" (Citation omitted.) "Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether '[t]he victim was particularly vulnerable,' whether the crime 'involved a[] … taking or damage of great monetary value,' whether the 'quantity of contraband' involved was 'large.'" (Citation omitted.) "Many of those circumstances are not readily adaptable … because they include imprecise terms that implicitly require comparison of the particular crime at issue to other violations of the same statute, a task a jury is not well suited to perform. For example, without some basis for comparison "it would be difficult for a jury to determine whether '[t]he victim was particularly vulnerable,' or whether the crime 'involved … taking or damage of great monetary	Senate Bill 567, which amended Penal Code section 1170 to require that aggravating factors be proved beyond a reasonable doubt to a jury, implicitly encompassed the California Rules of Court governing aggravating sentencing factors. (See, e.g., *People v. Black* (2007) 41 Cal..4th 799, 817 ["Aggravating circumstances include those listed in the sentencing rules, as well as any facts "statutorily declared to be circumstances in aggravation" (Cal. Rules of Court, rule 4.421(c)) and any other facts that are "reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408(a).)]

			value' or 'a large quantity of contraband.' " (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.) Additionally, "[s]ome aggravating factors may not be identifiable until after the trial, such as whether the defendant 'unlawfully prevented or dissuaded witnesses from testifying … or in any other way illegally interfered with the judicial process.' " (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.) The use of the Rules of Court as jury instructions has been discouraged since 2007 before the change in the law.	
			<u>Separation of Powers</u> The Legislature may direct the Judicial Council to adopt rules of court to implement statutes that do not "'defeat' or 'materially impair' a court's exercise of its constitutional power or the fulfillment of its constitutional function." (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855; citing *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 58–59.).) Here, these proposed instructions violate the Separation of Powers. Specifically: 1. The Legislature did not authorize the Judicial Council to adopt jury instructions and elements of the law to implement section 1170(b). 2. The Legislature created aggravating circumstances and included them in the Penal Code. (See Penal Code section 1170.7 – 1170.89.) Proposed CALCRIM 3224–3234 are not anchored in any aggravating factor set forth by the Legislature in Penal Code sections 1170.7 to 1170.89. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision.	As stated above, Senate Bill 567 implicitly encompassed the California Rules of Court governing aggravating sentencing factors.

			3. Rule 4.421's language is so expansive and, in turn, problematic because it can apply every defendant in every case. This effectively nullifies section 1170(b).	
			Vagueness Violates Due Process *The language used in the proposed jury instructions is based on Rule 4.421 which was only intended to guide a judge's use of discretion at sentencing. The language is "broad, imprecise, and vague" and does not give "advance warning" about the nature of the prohibited conduct. (*People v. Sandoval* (2007) 41 Cal.4th 825, 840 [rule 4.421 language is "broad, imprecise, and vague" and an attempt to use it to describe a specific offense at jury trial is therefore "impermissible"]; *People v. Superior Court* 159 Cal.App.4th 1, 7 ["a jury trial on the aggravated circumstances [listed in rule 4.421] would introduce to the jury imprecise standards and ones requiring comparative evaluation"]; *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [an allegation is unconstitutionally vague when it fails to give "fair warning as to what is prohibited"]; *People v. Thomas* (1979) 87 Cal.App.3d 1014, 1023 [this language "obviously" does not "give people advance warning of prohibited activities."].) The language in the proposed jury instructions is similar to language that has previously been found to violate the Eighth Amendment's vagueness standard. The United States Supreme Court has found words like "heinous, atrocious, or cruel" and "outrageously or wantonly vile, horrible or inhuman" are vague and do not inform or guide jurors sufficiently. (See *Maynard v. Cartwright* (1988) 486 U.S. 356 and *Godfrey v. Georgia* (1980) 446 U.S. 420.) Following the enactment of section 1170(b), defendants are supposed to be eligible for an enhanced sentence only when the prosecution has proven that their offense is "distinctly worse" than an "ordinary" offense of that type. (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110 ["the essence of aggravation relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].) Rule 4.421's language is so vague, however, that California prosecutors are	As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, vagueness concerns may be raised by counsel in individual cases.

			now claiming that 1170(b) enhancements apply to every defendant in every case. Additionally, the use of these vague standards deprives defendants of due process. "The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (*Johnson v. U.S.* (2015) 576 U.S. 591, 596 [vagueness prohibitions "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."].) "A vague law not only fails to provide adequate notice to those who must observe its strictures, but also impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (Sheena K.).) This instruction fails to define its key terms, fails to provide ordinary people with "advance warning of prohibited activities," and asks juries to make abstract value judgments untethered from "real-world facts or statutory elements," it "fails to provide adequate notice to those who must observe its strictures," and "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." (*Sheena K.* at p. 890; Johnson at p. 597; *Thomas* at p. 1023.) These failures make this allegation impermissibly vague. (*Sandoval* at p. 840; *Brooks* at p. 7.)	
			*The allegations are also constitutionally infirm because they require jurors to compare petitioner's offense with a hypothetical "ordinary" offense, in violation of the Supreme Court's holding in *Johnson*. (*Sandoval* at p. 840 [rule 4.421 language requires "a comparison of the particular crime at issue to other violations of the same statute"]; *Brooks* at p. 7 [the use of rule 4.421 at jury trial would require jurors to engage in "comparative evaluation"]; *Johnson* at p. 597 [an enhancement that requires a comparison between the charged offense and a hypothetical "ordinary" offense is unconstitutional].) Here, the case law cited as authority for the proposed jury instruction requires a	In response to the argument about *Johnson*, the committee has added the following commentary to the instructions: "The committee is aware *of Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes

			comparative analysis to determine whether there is "an extent greater than in other cases." This is exactly what has been found to be constitutionally infirm and dates back to a time when a sentencing judge, who could compare different circumstances, not a jury was making the comparison. In *Johnson*, the defendant was charged with an enhancement that required the factfinder to decide what facts or circumstances an "ordinary" crime might involve, and to then decide if those facts or circumstances included "a serious potential risk of physical injury to another." (*Johnson* at p. 596.) On appeal, the Supreme Court found that an allegation that requires a factfinder to "picture the kind of conduct that the crime involves in the ordinary case" is constitutionally infirm because, absent clear standards for making such a determination, each fact-finder's definition of "ordinary" will vary. (*Johnson* at p. 597 ["How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"].) Here, because the allegations require jurors to compare the alleged crime with a hypothetical "ordinary" crime to determine if the crime is "aggravated," the same issue arises. To paraphrase *Johnson*, how are jurors supposed to decide whether petitioner's violation of the law was "distinctly worse" than the "ordinary" violation of the law? A survey? Expert evidence? Google? Gut instinct? Because these questions are simply unanswered, the allegations are impermissibly vague. (*Sandoval* at p. 840; *Brooks* at p. 7.)	an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* at p. 110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime."
New 3224–3234	Santa Barbara Public Defender's Office, by Tracy Macuga, Public Defender Alameda County Public Defender's Office, by Brendon Woods, Public Defender.	D	The Public Defenders for the Counties of Santa Barbara, Alameda, Sacramento, San Francisco, Santa Clara, Santa Cruz, Contra Costa, and Yolo respectfully submit the following comments regarding ITC CALCRIM-2022-02. Recognizing that the legislation which amended Penal Code section 1170 to require that aggravating factors be proved beyond a reasonable doubt to a jury implicitly encompassed the California Rules of Court governing DSL Sentencing, and that those rules were drafted for an	The committee previously considered waiting for further development of statutory and/or case law authority but ultimately determined that delay would be a disservice to trial judges who need more immediate guidance. The committee hopes that its studied and well-considered

	Yolo County Public Defender's Office, by Tracie Olson, Public Defender. San Francisco Public Defender's Office, by Mano Raju, Public Defender. Contra Costa Public Defender's Office, by Ellen McDonnell, Public Defender. Sacramento Public Defender's Office, by Amanda Benson, Public Defender. Santa Clara Public Defender's Office, by Molly O'Neal, Public Defender. Santa Cruz Public Defender's Office, by Heather Rogers, Public Defender.[2]		entirely different purpose (to add sentencing judges in electing the appropriate term of a triad for a substantive offense or an enhancement after an adjudication of guilt), we have concerns about the vagueness of the language sought to be interpreted in the proposed instructions. Some of the rules and proposed instructions simply cannot provide the clarity needed for jurors to make beyond-a-reasonable doubt findings as to the truth or existence of a fact. Other instructions, by the very nature of the language of the rules of court, require that the factfinder compare the proven fact in the case at hand with other cases involving similar charges, and that is simply impossible. Additionally, it is inconceivable that a jury could make a finding as to whether a defendant poses a "serious danger to society," without the competent opinion of a qualified expert. Generally, we also have concern about the committee recommending that the Judicial Council promulgate jury instructions in a legal vacuum. There is a dearth of decision law regarding the aggravating factors in the Rules of Court, and they are treated superficially, and even in dicta, in the opinions cited in the Committee's comments. Finally, we have concerns about the Judicial Council promulgating these instructions at a time when their constitutional validity is being challenged by parties to criminal cases in appellate court proceedings. (see, e.g. Docket No. A166159 (First Appellate District).) Recognizing that these concerns cannot be addressed by this Committee, our comments are confined to suggestions regarding specific language which, we believe, should be modified. The suggestions are attached hereto, with changes tracked and comments inserted. We did not include the entirety of each instruction in each comment, believing that placement of the suggested modifications within each respective instructions was self-evident.	approach will be of assistance. Further, the arguments raised by the commenters here can be argued by counsel in individual cases.
New 3224	San Francisco District Attorney's Office, by	AM	Thank you for the opportunity to provide comments on the Proposed CALCRIM Jury Instructions. Our office reviewed the proposed jury	The committee agrees with this suggestion and has added the

[2] Subsequent comments by this group of commenters are collectively referred to as "Santa Barbara Public Defender's Office, et. al."

	Allison Garbutt Macbeth, Assistant District Attorney.		instructions for the aggravating factors and respectfully suggest the following: CALCRIM 3224: Aggravating Factor: Great Violence, Great Bodily Harm, or High Degree of Cruelty, Viciousness, or Callousness: Although the instruction includes a statement that "[v]iciousness is not the same as violence[,]" which is followed by examples, the instruction does not affirmatively define viciousness as it does for "cruelty" and "callousness." And in stating viciousness is not the same as violence, the instruction suggests that the term itself has a technical, legal meaning that differs from its nonlegal meaning, particularly when viciousness can be commonly understood as "dangerously aggressive" or "marked by violence or ferocity." (Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/viciousness [as of Jan. 3, 2023].) It is therefore suggested that CALCRIM 3224 include an affirmative definition of viciousness.	following definition of viciousness: ***Viciousness* means dangerously aggressive or marked by violence or ferocity.** The committee also changed "**many acts**" to "**some acts**" in the explanatory paragraph about viciousness.
New 3224	Santa Barbara Public Defender's Office, et. al.	AM	For the crime to have been committed with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness), the People need not prove beyond a reasonable doubt that a person was actually injured by the defendant's act.no one needs to actually have been injured by the defendant's act. ~~But if~~ If you do find that someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness).] Conversely, if you find that no one was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with great violence. Conversely, if you find that no one was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with great violence. *P v. Duran* (1982) 130 Cal.App.3d 987, 990.	The committee believes that the proposed draft adequately instructs the jury. The committee considered but rejected these suggested changes.
			Viciousness is not the same as violence. For example, many acts which may be described as vicious do not involve violence at all, but rather involve acts such as deceit and slander. On the other hand, many violent	The committee considered but rejected this suggested change. Instead, the committee added the

			acts do not indicate viciousness, but instead show fear, frustration, anger, or other emotional states. ~~justifiable rage, or self-defense.]~~ *P v. Reed* (1984) 157 Cal.App.3d 489, 492 – dicta, citing 1971 version of Webster's Third New International Dictionary. Not a statement of law. In the context of the rule, the reasonable meaning is dangerously aggressive: savage; marked by extreme violence or ferocity.) Why must rage be justifiable to not be vicious? And what is justifiable rage? Why would self-defense be included here? Why would we limit this to rage, rather than "anger"? An act discloses cruelty when it demonstrates the deliberate infliction of physical or mental suffering, unrelieved by leniency, and devoid of humane feelings.] https://www.merriam-webster.com/dictionary/cruel [An act discloses callousness when it demonstrates an utter lack of sympathy for the suffering of~~, or harm to~~ another human being, which cannot reasonably be accounted for by the circumstances.~~the victim~~[s].] In determining the truth of the allegation, you are required to consider the totality of the circumstances surrounding the offense, including, but not limited to any of the following, if proved true beyond a reasonable doubt: (1) That the victim was, or was not, particularly vulnerable to the degree of violence employed by the defendant in the commission of the crime; i.e. particularly fragile, youthful, infirm, or aged; (2) That the victim was, or was not, attacked under circumstances in which he had no opportunity to defend himself; (3) That the victim was, or was not, attacked without provocation; (4) That the victim was, or was not intentionally made to suffer over a substantial period of time;	following definition of viciousness: ***Viciousness* means dangerously aggressive or marked by violence or ferocity.** The committee also changed "**many acts**" to "**some acts**" in the explanatory paragraph about viciousness. The committee declined to add the language suggested here. The committee declined to modify the language suggested here. The committee declined to add these suggested six factors. Although these factors may be the proper subject of argument by counsel, including them in the instruction itself would unduly single them out.

			(5) That the degree of violence used by the defendant did or did not exceed the degree of violence necessary to commit the intended act or acts; and (6) That the manner in which the victim was treated during the commission of the crime does or does not reflect a high degree of cruelty, viciousness or callousness. (*People v. Curry* (2007) 158 Cal.App.4th 766 [woman in advanced stages of pregnancy kicked with both feet and left bruised and bleeding on the side of the road]; *People v. Nevill* (1985) 167 Cal.App. 3d 198 [shooting of unarmed and unsuspecting wife while toddle was standing beside her]; *People v. Harvey* (1984) 163 Cal.App.3d 90 [victim was unsuspecting, unarmed, and shooting was unprovoked and inexplicable]; *People v. Wilson* (1982) 135 Cal.App.3d 343 [defendant's beating of victim on buttocks with shoe while she was engaging in forcible intercourse with codefendant]; *People v. Duran* (1982) 130 Cal.App.3d 987 [repeated stabbing of defenseless victim in the chest, while victim was kicked by several other people]; *People v. Collins* (1981) 123 Cal.App.3d 535 [continual holding of cocked gun to victim's head])	
New 3224	Orange County Bar Association, by Daniel S. Robinson, President.	D	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines six possible aggravating factors found in CA Rule of Court, rule 4.421(a)(1): "*The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness*". Clearly, subd. (a)(1) contains **six** separate and distinct aggravating factors. For instance, a "crime which involved great violence" is not tantamount to a "crime which involved the threat of	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148

			great bodily harm". These are **not** synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the six. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "great violence" while allowing a few jurors to find "great bodily harm" and still others to conclude that " a high degree of cruelty" was involved. The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unanimity as to only one of the six listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	[283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3224	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find the defendant inflicted great bodily harm while the other 6 may find there was no great bodily harm but that the acts were callous. It should be split into four different instructions to avoid amalgamating. 1) Great Violence 2) Great Bodily Harm 3) Threat of Great bodily harm, or 4) Acts disclosing a high degree of cruelty, viciousness, or callousness.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. Further, the committee does not agree that a unanimity requirement exists for

			1, 2, 3, and 4 require different acts. In contrast, 4 requires the same act[s] but proof of the act fact can be arrived at based on three different theories (cruelty, viciousness, or callousness.) Unanimity – This instruction is contrary to the law. The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is in fact required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	each qualitative description within the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3224	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	D	While the jury instruction attempts to define several terms, those definitions remain vague. For example, violence is defined as "the use of physical force so as to injure, abuse, damage, or destroy." (See *United States v. Davis* (2019) 139 S.Ct. 2324 [the term "crime of violence" may be unconstitutionally vague]; *Johnson* at p. 596 [same].) Great violence? Viciousness? Callousness? High degree of cruelty (to be distinguished from low or moderate degree of cruelty)? What guidance is provided to the jurors who are not required to agree on the acts or conduct which constitute the use of great violence, infliction of bodily harm, threat to inflict bodily harm, or other acts showing a high degree of cruelty, viciousness, or callousness?	As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the CALCRIM committee's purview. Furthermore, arguments based on vagueness concerns may be raised by counsel in individual cases.
New 3225	Orange County Bar Association, by Daniel S. Robinson, President.	D	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines two possible aggravating factors found in CA Rule of Court, rule 4.421(a)(2): "*The*	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. Further, the committee does not agree that a unanimity requirement exists for

			*defendant was armed with **or** used a weapon at the time of the commission of the crime*". (Emphasis supplied.) Clearly, subd. (a)(2) contains two separate and distinct aggravating factors. Decisional and statutory law differentiate being "armed" from "use" of a weapon during the commission of a crime. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the two. While the paragraph containing the bracketed alternative proof language is helpful, a jury may be confused when instructed in combination by one of the two introductory paragraphs. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "armed" while allowing others to conclude that defendant "used a weapon". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the two listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	each qualitative description within the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3225	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find that the defendant was armed with a firearm while the other 6 find the defendant used a knife	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the

			to stab the victim. It should be split into two different instructions to avoid amalgamating. 1) Armed or 2) Used Weapon Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
			The definition of weapon must be modified. As written, an aggravating factor is proven if a person knowingly carries an object that is capable of being used to inflict injury or death. If a person had a pen in their front pocket the aggravating factor would be proven. See CALCRIM 875 re weapons. An object is a weapon if it is deadly or dangerous in the ordinary use for which it was designed. (A gun, a sword, a mace.) An object is also a weapon if it is capable of causing injury or death AND is used in a manner that is capable of causing and likely to cause injury.	In response to this comment, the committee has modified the definition of "weapon": **[A device, instrument, or object that is capable of being used to inflict injury or death may be a *weapon*. [In determining whether** _____ <*insert description*> **was a *weapon*, you may consider the totality of circumstances, including the manner in which it was used or possessed.]**
New 3225	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	D	The proposed jury instruction would allow an aggravated sentence and the imposition of the upper term when a defendant "knowingly carried" or "knowingly had a weapon available for use" even if not used. A defendant could be given the upper term for carrying car keys or wearing steel-toed boots. (See *People v. Koback* (2019) 36 Cal.App.5th 912 and *People v. Crites* (2006) 135 Cal.App.4th 1251.) A defendant could receive the upper term for carrying or having available for use a screwdriver while committing a non-violent offense. (*People v. Simons*	The committee modified the definition of weapon (please see the above response) to address some of the concerns raised here. Further, as previously noted, the jury is not required to agree on which acts or conduct constitute the aggravating factor. See *People*

			(1996) 42 Cal.App.4th 1100.) Even after providing vague guidance, the proposed jury instruction allows more ambiguity by failing to require the jurors to agree on which acts or conduct constitutes the arming or use of a weapon.	*v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
			Moreover, section 1170(b) does not allow an aggravating factor that is an element of the offense, but it is unclear based on the proposed instructions whether a defendant could violate a gun enhancement allegation (e.g. Penal Code 12022.5) and have the same weapon used to apply the upper term on the underlying offense. Finally, it is unclear from the Commentary of the proposed jury instruction whether a defendant could be found guilty of section 12022(a)(1) "whether or not the person is personally armed with a weapon" and receive the upper term if the defendant was not personally armed with a weapon was available for use.	The instruction contains the following bench note: Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).) The committee awaits the development of case law to determine the resolution of this issue.
New 3226	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender	A	Unanimity – This instruction is a correct statement of the law because it does not allow a risk of conviction without unanimity on the factor. There is no risk of amalgamation. "[Y]ou do not have to agree on which facts show that the victim was particularly vulnerable" is a correct statement of the law of circumstantial evidence. "You may not find the allegation proven unless all of you agree that the People have proved that the victim was particularly vulnerable" is a correct statement of the law of unanimity.	No response necessary.
New 3226	Santa Barbara Public Defender's Office, et al.	AM	Particularly vulnerable means ~~includes~~ being defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a higher degree than is usual or average ~~special or unusual degree~~.	The committee believes the definition in the draft is correct and does not agree with modifying it as proposed.
New 3226	Los Angeles Public Defender's Office, by Nick Stewart-Oaten, Deputy Public Defender.	D	***Objection to CALCRIM 3226 (Particularly Vulnerable Victim)*** Along with the omissions described above, the current proposed CALCRIM 3226 instruction is flawed because it omits the requirement that the prosecutor prove beyond a reasonable doubt that the defendant *know of the alleged vulnerability and targeted the victim because of that vulnerability*. (*Piceno* at p. 1358 [reversing court's use of "particularly vulnerable" aggravator because the evidence did not	Although knowledge and targeting may be relevant in some cases, they are not general requirements for this factor to apply. The committee added *Piceno* to the authority section with the following description:

			establish that the defendant sought to "take deliberate advantage of the vulnerability of victim."].)	**Factor Did Not Apply in Vehicular Manslaughter.**
New 3226	Santa Cruz County Office of the Public Defender, by Jonathan Cruz, Chief Deputy Public Defender.	D	***Objection to CALCRIM 3226 (Particularly Vulnerable Victim)*** Along with the omissions described above, the current proposed CALCRIM 3226 instruction is flawed because it omits the requirement that the prosecutor prove beyond a reasonable doubt that the defendant *know of the alleged vulnerability and targeted the victim because of that vulnerability*. (*Piceno* at p. 1358 [reversing court's use of "particularly vulnerable" aggravator because the evidence did not establish that the defendant sought to "take deliberate advantage of the vulnerability of victim."].)	Please see above response to the comment from Los Angeles County Public Defender.
New 3226	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	D	Penal Code 1170.85 (b) already defines a vulnerable victim as someone who is "particularly vulnerable, or unable to defend himself or herself, due to age or significant disability." Despite the existence of a legislatively created aggravating factor, allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature. As the Supreme Court pointed out, without some basis for comparison "it would be difficult for a jury to determine whether '[t]he victim was particularly vulnerable.'" (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.) Moreover, what does particularly vulnerable mean? The definition provided is much less clear than the word being defined—"defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a special or unusual degree." Does this mean that any victim without a weapon meets the definition of being defenseless? Does this mean that any victim who does not employ a personal security guard is unguarded? The vagueness of the definition is further	The committee is not aware of any case law that supports the commenter's argument that the statutory definition is the only permissible definition for aggravating a sentence. As stated previously, the committee has added a Commentary about *Johnson v. United States*. The committee believes that the proposed definition adequately informs the jury.

			exacerbated by the fact that the jurors do not have to agree on which facts show that the victim was particularly vulnerable.	
New 3227	Orange County Bar Association, by Daniel S. Robinson, President.	D	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines three possible aggravating factors found in CA Rule of Court, rule 4.421(a)(4): "*The defendant induced others to participate in the commission of the crime* ***or*** *occupied a position of leadership* ***or*** *dominance of other participant in its commission*". (Emphasis supplied.) Clearly, subd. (a)(4) contains three separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the three. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "defendant induced others to participate in the commission of the crime" while allowing other jurors to conclude that defendant "occupied a position of leadership". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

			Consistent with *Apprendi, supra.*, and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the three listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	
New 3227	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender	D	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find that the defendant induced a minor co-defendant while the other 6 find the defendant was in a position of leadership within an organization to an adult victim. It should be split into two different instructions to avoid amalgamating. 1) Induced Others to Participate 2) Occupied Position of Leadership or Dominance Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3227	San Diego Primary Public Defender's Office, by Troy Britt,	D	First, the Legislature did not authorize the Judicial Council to adopt jury instructions and elements of the law to implement section 1170(b). Second, a legislatively created aggravating circumstance exists in the	The committee believes that the proposed definitions adequately inform the jury.

	Deputy Public Defender.		Penal Code. (See Penal Code section 1170.7 – 1170.89.) Finally, the Legislature did not add a similar aggravated factor to the Penal Code. Moreover, how are jurors supposed to understand what "induced" means when the definition is overly broad and just includes synonyms for the word being defined? How much guidance is provided when the jurors are not required to agree on which acts or conduct constitutes inducing others to participate or occupying a position of leadership or trust?	As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments about vagueness concerns may be raised by counsel in individual cases.
New 3228	Orange County Bar Association, by Daniel S. Robinson, President.	D	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines two possible aggravating factors in the language found in CA Rule of Court, rule 4.421(a)(5): "*The defendant induced a minor to commit **or** assist in the commission of the crime*". (Emphasis supplied.) Clearly, subd. (a)(5) contains two separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the two. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "inducing the minor to commit the crime" while allowing others to conclude that defendant "induced the minor to assist in the commission of the crime".	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the committee does not agree that the instruction improperly combines multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

			The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unanimity as to only one of the two listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	
New 3228	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. It should be split into four different instructions to avoid amalgamating. 1) Induced a minor to commit 2) Induced a minor to assist Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3228	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	D	The Legislature, in Penal Code sections 1170.71 and 1170.72, provided for circumstances where a minor was used to commit or assisted in committing a crime. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the	The committee is not aware of any case law that supports the commenter's argument that the statutory definition is the only

			Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature.	permissible definition for aggravating a sentence.
			The word "induced" is not currently defined in the jury instructions. The proposed jury instruction, however, attempts to define "Induced" as "persuaded, convinced, influenced, or instructed." The word and definition are vague and do not provide adequate notice or guidance. And even if there was marginal guidance, nothing constrains the jurors when they do not need to agree on which acts or conduct constitute the inducement.	The committee believes that the proposed definitions adequately inform the jury.
New 3229	Santa Barbara Public Defender's Office, et al.	AM	[A threat is an expression of a person's intention to inflict evil, injury, or damage. To threaten a person is to convey a threat, specifically intending that the threat be received by the person who is the subject of the threat, and that the person take it seriously.] [A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.] ~~[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]~~ [Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].] [Dissuade means to turn a person toward or against doing something by the use of persuasive communication. To dissuade a person is to intentionally communicate information, through words or actions, to that person, with the intent that the person turn toward or against a particular course of action as a result. [Suborned perjury means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. In order to find that the	The proposed definition is too narrow. The factor relates to the common understanding of a threat, not the definition encompassed in Penal Code section 422. The committee disagrees with the suggestion to delete. The committee prefers the draft's current definition of "dissuade" which is clearer than the proposed replacement.

			defendant suborned perjury, the People must prove, beyond a reasonable doubt, not only that the sworn statement was actually false, but also that the defendant, at the time he encouraged, induced, or assisted the witness(es) to make the statement, knew that it was false. Induced means persuaded, convinced, influenced, or instructed.]	The committee agrees with this suggested language and has added it to the instruction.
New 3229	Orange County Bar Association, by Daniel S. Robinson, President.	D	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines multiple possible aggravating factors found in CA Rule of Court, rule 4.421(a)(6): "*The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process*". (Emphasis supplied.) Clearly, subd. (a)(6) contains several separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find that "*defendant threatened a witness*" while allowing other jurors to find "*defendant prevented a witness from testifying*". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

			guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury as it suggests that they do not have to be unanimous. Similarly, the paragraph which instructs the jury as to proof of the allegation is equally confusing and suggests unanimity is not required. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	
New 3229	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find the defendant threatened his mother on the date of arrest while the other 6 may find the defendant dissuaded his girlfriend from testifying through a phone call made from jail. It should be split into three different instructions to avoid amalgamating. 1) Threatened 2) Prevented 3) Dissuaded Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3229	San Diego Primary Public Defender's Office, by Troy Britt,	D	The Legislature, in Penal Code sections 1170.85 (enhancement for threatening, preventing, or dissuading witnesses) and 136.1 (crime of preventing or dissuading witness or victim from testifying or doing	The committee is not aware of any case law that supports the commenter's argument that the

	Deputy Public Defender		other acts) addressed this issue. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature.	statutory definition is the only permissible definition for aggravating a sentence.
			The proposed instruction proclaims to provide guidance to jurors and then fails to define in a meaningful way the terms used, including "other legal activity that interfered with the judicial process." Moreover, the proposed instruction does not require the jurors to agree on the acts or conduct that constitutes the aggravating factor. The proposed instruction is incapable of providing guidance. Like the description in *Brooks*, "whether the defendant 'unlawfully prevented or dissuaded witnesses from testifying … or in any other way illegally interfered with the judicial process' " whether a person threatened, prevented, dissuaded, or any other illegal activity that interfered with the judicial process in the current proposed jury instruction cannot be ascertained until after the trial. (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.)	The committee believes that the proposed definitions adequately inform the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments about vagueness concerns may be raised by counsel in individual cases.
New 3230	Santa Barbara Public Defender's Office, et. al.	AM	Planning refers to conduct before the crime preparing for its commission. Sophistication refers to conduct demonstrating knowledge ~~or awareness~~ of the complexities ~~or details~~ and subtleties involved in the cultivation and commission of ~~committing the~~ crime and can include conduct occurring before or after its commission. Professionalism refers to conduct demonstrating unusual experience or expertise in an activity or field or endeavor	The committee considered these proposed edits and added the word "particular" to modify the word "experience." The committee rejected the other suggested changes.
New 3230	Orange County Bar Association, by Daniel S. Robinson, President.	D	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction.

			Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines three possible aggravating factors found in CA Rule of Court, rule 4.421(a)(8): "*The manner in which the crime was carried out indicates planning, sophistication, **or** professionalism*". (Emphasis supplied.) Clearly, subd. (a)(8) contains three separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the three. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find that "*the manner in which the crime was carried out showed planning*" while allowing to find "*sophistication*" and still others to conclude that the manner demonstrated "professionalism". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury as it suggests that they do not have to be unanimous. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the three listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense	Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

			then a separate instruction for each aggravating factor should be required.	
New 3230	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find the defendant planned to rob the bank while the other 6 may find the defendant exhibited professionalism because he took the manager into the safe. It should be split into three different instructions to avoid amalgamating. 1) Planning 2) Sophistication 3) Professionalism Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3230	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	D	The proposed definitions do little more than restate the word being defined—planning is defined as preparing, sophistication is defined as knowledge or awareness of the complexities or details involved, and professionalism is defined as conduct demonstrating experience or expertise. Under the proposed instructions, someone who picked up a rock, broke a car window, and drove a car away could conceivably receive an upper term for planning the crime by picking up the rock, exercising sophistication for knowing to break the car window, and exhibiting professionalism for demonstrating experience driving the car away. The proposed instruction is overly broad. Nearly every crime where a person thinks about committing the crime, rather than spontaneously acting, could be sentenced to the upper term. To ensure that no one is left out, the proposed instruction does not require unanimity about	The committee believes that the proposed definitions adequately inform the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM

			which acts or conduct demonstrate that the manner of committing the crime involves planning, sophistication, or professionalism.	committee. Furthermore, arguments about vagueness concerns may be raised by counsel in individual cases.
New 3231	Santa Barbara Public Defender's Office, et. al.	AM	An item is of "great" monetary value if, based on its fair market value, its worth is remarkable, when compared to the threshold amount required for the offense and/or other evidence of the value of items taken in average or typical cases.	The committee considered this additional language but believes that the current draft adequately informs the jury.
New 3231	Orange County Bar Association, by Daniel S. Robinson, President.	D	1. In the Bench Notes, the subsections of the Rules of Court should be listed in order to make it clear which Aggravating Factor the instruction applies to. Many of the Aggravating Factors have similar names and it gets confusing. This would be listed as rule 4.421(a)(9) instead of 4.421. 2. In the Authority section, the cite to *People v. Wright* inaccurately states the law. The black letter of the holding was that the trial court "made no error" in considering the losses of $2300 and $3250. a. The portion stating "It would APPEAR out of line to impose the upper term on the basis of monetary losses [alone]..." is dicta. b. Furthermore, the Cal. Supreme Court vacated the holding, ruling only that "We agree with the [DCA's] resolution of these issues." c. Thus, there is no legal authority holding that losses of $2300 and $3250 do not qualify as "Great Monetary Value."	The specific applicable subsection is listed in the authority section for each instruction. It is unnecessary to list it twice. The committee has changed the description in the citation to state: "losses of $2,300 and $3,250 qualified."
New 3231	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction is vague as written, and it would violate due process protections to give this instruction. The instruction requires that everyone agree the amount was "great," but not that everyone agrees what "great" means. Here, the word "great" is not defined. Where there is no technical definition, the jury is instructed to use the common, everyday definition. However, "great," as defined by Merriam Webster is not a helpful guideline, as it simply says "notably large in size." "Great" essentially has a subjective definition, because a great amount for one juror might not be a great amount for another juror. The jury needs clear direction. The instruction should at least include—within the instruction, not the bench notes—that courts have rejected amounts as high as $3200 as being great, and have even suggested that "great" might be at least $25,000. (*People v. Bejarano* (1981) 114 Cal.App.3d	The committee believes that the draft's proposed definition adequately informs the jury. The committee disagrees with the suggestion to add the specific facts of these case holdings into the instruction itself.

			693, 705-706.) In addition to failing to provide the jury with useful guidelines, this does not adequately state what the proscribed conduct is. The subjective, vague nature of the word "great" means a reasonable person would not know whether their conduct would result in a lengthier prison term or not.	
New 3231	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	D	The proposed instruction is overly broad and does not have a set definition. The California Supreme Court specifically addressed the problem created by using the vague term "great monetary value" in *Sandoval*. What guidance does "great monetary value" provide to jurors? Particularly when the jurors do not have to agree on the specific monetary value? This is the epitome of creating a vague or subjective standard, requires imprecise quantitative or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	The committee believes that the draft's proposed definition adequately informs the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, vagueness concerns may be raised by counsel in individual cases.
New 3232	Santa Barbara Public Defender's Office, et. al.	AM	[A Quantity is "Large" if it exceeds most other things of like kind. In determining whether the quantity was large, you may consider all evidence presented on the issue of amount, including evidence comparing the quantity of contraband in the instant case to the statutory threshold or to quantities seized in similar cases.] https://www.merriam-webster.com/dictionary/large	The committee considered adding this suggested language but believes that the instructional draft adequately informs the jury.
New 3232	Orange County Bar Association, by Daniel S. Robinson, President.	D	In the Authority section, a cite to *People v. Maese*, 105 CA3d 710, would be appropriate ("Aggravation of defendant's sentence for possession of heroin and narcotics paraphernalia was proper based on a showing that he was in possession of almost one-half ounce of heroin.")	The committee previously considered including this case but decided against it because the opinion relies on a now repealed statutory prohibition.
New 3232	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction is vague as written, as there is no technical definition of "large" provided, and any common definition of "large" would be too subjective to be helpful to fact finders. The instruction requires that everyone agree the amount was "large," but does not provide an objective standard for what is large, and does not require that everyone agree what the threshold for "large" is. This fails to provide useful instruction to the jury, and fails to adequately state what the proscribed conduct is.	The committee believes that the draft's proposed definition adequately informs the jury.

New 3232	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	D	*The Legislature, in Penal Code section 1170.73 (quantity of controlled substance as aggravating circumstance) and Health and Safety Code section 11370.4 (Enhancement of punishment upon conviction related to unlawful possession or sale of controlled substances based on amount involved) addressed this issue. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature. The proposed instruction is overly broad and does not have a set definition. The California Supreme Court specifically addressed the problem created by using the vague term "large quantity of contraband" in *Sandoval*. What guidance does "large quantity of contraband" provide to jurors? Particularly when the jurors do not have to agree on the specific quantity? This is the epitome of creating a vague or subjective standard, requires imprecise quantitative or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	The committee is not aware of any case law that supports the commenter's argument that the statutory definition is the only permissible definition for aggravating a sentence. The committee believes that the draft's proposed definition adequately informs the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, vagueness concerns may be raised by counsel in individual cases.
New 3233	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	Unanimity - This instruction allows jurors to disagree as to which conduct constitutes "taking advantage" of the trust. The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done *something* sufficient to find true the aggravating factor.	The committee believes that unanimity is not required regarding facts underlying the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

New 3233	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	D	The Legislature did not enact an enhancement or allegation for taking advantage of a position of trust or confidence. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. The proposed instruction is overly broad and does not have a set definition. The California Supreme Court specifically addressed the problem created by using the vague term "large quantity of contraband" in *Sandoval*. What guidance does "took advantage of a position of trust or confidence" provide to jurors? Particularly when the jurors do not need to agree on which acts or conduct constitutes the taking advantage of a position of trust or confidence to commit the crime? Despite the title of the proposed jury instruction, "Position of Trust or Confidence," more is required. The defendant must take advantage of that position of trust or confidence. None of the terms are defined. This is the epitome of creating a vague or subjective standard, requires imprecise quantitative or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	As previously stated, Senate Bill 567 implicitly encompassed the California Rules of Court governing aggravating sentencing factors. See also *People v. Black* (2007) 41 Cal..4th 799, 817. The committee believes that the draft's proposed definition adequately informs the jury. Addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments based on vagueness concerns may be raised by counsel in individual cases.
New 3234	Orange County Bar Association, by Daniel S. Robinson, President.	D	The first element should say "The defendant has engaged in A PATTERN of violent conduct," which is consistent with Rule of Court 4.421(b)(1).	The current version of rule 4.421(b)(1) does not use the word "pattern." It states: "The defendant has engaged in violent conduct that indicates a serious danger to society."
New 3234	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	D	This instruction is impermissibly vague. It invites the jury to find every defendant found guilty of any crime a serious danger to society by providing no guidance. Unanimity - The instruction states "you do not need to agree on which violent conduct shows that the defendant is a serious danger to society." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the	The committee believes that the proposed draft adequately instructs the jury. The committee believes that unanimity is not required regarding facts underlying the aggravating factor. See *People v.*

			risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done *something* sufficient to find true the aggravating factor.	*McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3234	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	D	*The Legislature wisely chose to forego including an aggravating factor or enhancement for being a serious danger to society. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. The proposed instruction is overly broad and does not have a set definition. What guidance does "serious danger to society" provide to jurors? Particularly when the jurors do not need to agree on which violent conduct shows that the defendant is a serious danger to society? Another attempt at defining "Society" results in additional vagueness. "Society" is defined as "a large group of people who live together in an organized way, making decisions about how to do things and sharing the work that needs to be done." Given this definition, to prove that the defendant's future conduct will pose a "serious danger to society," must the prosecutor prove beyond a reasonable doubt that the defendant's future actions will threaten a "large group of people?" Is "society" in "serious danger" if the defendant's future actions will threaten only one or two individuals? How is a jury supposed to decide what the defendant's conduct "indicates" about his future actions, or how many people the defendant's likely future actions will threaten? (See, e.g., *Johnson* at p. 597 [an allegation that requires abstract value judgements untethered from "real world facts or statutory elements" is unconstitutional].) Similarly, does "danger to society" refer to a physical threat? A financial threat? Or does "danger to society" require proof of an existential threat "to society?" Does a defendant actually pose a "danger to society" if one or two individuals may face future economic loss because of the defendant? What if the defendant is likely to start bar	As stated previously, Senate Bill 567 implicitly encompassed the California Rules of Court governing aggravating sentencing factors. See also *People v. Black* (2007) 41 Cal..4th 799, 817. The committee believes that the proposed draft adequately instructs the jury. Addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments based on vagueness concerns may be raised by counsel in individual cases.

			fights in the future, but any harm is unlikely to mean that the victims will lose their ability to contribute "to society?" Alternatively, given the plain language of the allegation, must the prosecution prove beyond a reasonable doubt that the defendant's future conduct will cause significant harm to a "large group of people" that will "seriously" threaten their ability to "live together in an organized way" or their ability to "mak[e] decisions about how to do things and shar[e] the work that needs to be done?" What establishes that the future danger to society is "serious?" Is the danger "serious" if there is a 1% chance that the defendant will pose a "danger to society?" 20%? 50%? (See, *Johnson* at p. 597 [an allegation requiring a finder-of-fact to make abstract value judgments is unconstitutionally vague, because the verdict is not tied to "real-world facts or statutory elements."].) Similarly, is the danger to society "serious" if the defendant is likely to commit a crime against one or two people but society as a whole will be unaffected? Is the danger "serious" if the defendant is likely to steal cars in the future? To get in fights? To sell drugs? Is a prosecutor required to present expert testimony establishing the likelihood that the defendant will reoffend and the nature of those future crimes? Is the defendant permitted to present expert testimony establishing that, given his age, prospects, support system, and probable prison sentence without this enhancement, he is statistically unlikely to reoffend? (See, *Johnson* at p. 597 [enhancement was unconstitutional, in part, because it was unclear if a necessary element required expert testimony].) This is the epitome of creating a vague or subjective standard, requires imprecise quantitative or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	

CALCRIM Proposed Changes: Table of Contents

Instruction Number	Instruction Title
NEW 3224	Aggravating Factor: Great Violence, Great Bodily Harm, Threat of Great Bodily Harm, or Other Acts
NEW 3225	Aggravating Factor: Armed With or Used a Weapon
NEW 3226	Aggravating Factor: Particularly Vulnerable Victim
NEW 3227	Aggravating Factor: Induced Others or Occupied Leadership Position
NEW 3228	Aggravating Factor: Induced Minor
NEW 3229	Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses
NEW 3230	Aggravating Factor: Planning, Sophistication, or Professionalism
NEW 3231	Aggravating Factor: Taking or Damage of Great Monetary Value
NEW 3232	Aggravating Factor: Large Quantity of Contraband
NEW 3233	Aggravating Factor: Position of Trust or Confidence
NEW 3234	Aggravating Factor: Serious Danger to Society

301. Single Witness's Testimony

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

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

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

- Instructional Requirements. ▸ Evid. Code, § 411; *People v. Rincon-Pineda, supra,* ~~(1975)~~ 14 Cal.3d at p.~~864,~~ 885 ~~[123 Cal.Rptr. 119, 538 P.2d 247]~~.
- Corroboration Required. ▸ *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].
- No Corroboration Requirement for Exculpatory Accomplice Testimony. ▸ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

RELATED ISSUES

Uncorroborated Testimony of Defendant

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

Uncorroborated Testimony in Sex Offense Cases

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

SECONDARY SOURCES

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

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

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

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

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

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

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

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

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

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

New January 2006; Revised June 2007, April 2010, August 2012, February 2016, March 2019, March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

AUTHORITY

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

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

- Uncorroborated Accomplice Testimony May Establish Corpus Delicti. ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. ▸ *People v. Williams, supra,* ~~(1997)~~ 16 Cal.4th at p.~~635,~~ 679 ~~-~~[66 Cal.Rptr.2d 573, 941 P.2d 752].
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210]; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-367 [100 Cal.Rptr.3d 820].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other. ▸ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
- No Corroboration Requirement for Exculpatory Accomplice Testimony. ▸ *People v. Smith, supra,* ~~(2017)~~ 12 Cal.App.5th at pp.~~766,~~ 778-780 ~~[218 Cal.Rptr.3d 892]~~.

SECONDARY SOURCES

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

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

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

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

336. In-Custody Informant

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

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

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

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

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

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

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

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

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

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

<*Insert the name of the in-custody informant if his or her statement is not in dispute*>
[_____ <*insert name of witness*> **is an in-custody informant.]**

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

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

BENCH NOTES

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

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

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

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

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

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

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

AUTHORITY

- Instructional Duty. ▸ Pen. Code, §§ 1111.5, 1127a.
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other. ▸ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

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

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

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

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

350. Character of Defendant

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

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

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

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

New January 2006; Revised August 2012, March 2023

BENCH NOTES

Instructional Duty

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

AUTHORITY

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

RELATED ISSUES

No Discussion of Character Is Evidence of Good Character

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

Business Community

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

SECONDARY SOURCES

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

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

352. Character of Victim and of Defendant

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

<*Give only when specific conduct evidence of the defendant's character for violence has been admitted*>
[The People presented evidence that the defendant (committed ([an]other offense[s]/the offense[s] of _____ <*insert description of alleged offense[s]*>**)/_____**<*insert description of alleged conduct admitted under Evid. Code, § 1103(b)*>**) and was not charged with (that/those offense[s]/act[s]) in this case.**

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

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

If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether the defendant (is a violent person/has a trait for violence) and acted in conformity with that character trait.]

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

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

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

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

If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charge[s]*> **[or that the _____**<*insert allegation[s]*> **(has/have) been proved]. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

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

New March 2023

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Admissibility. ▸ Evid. Code, § 1103.
- "Victim" Defined. ▸ *People v. Tackett* (2006) 144 Cal.App.4th 445, 455 [50 Cal.Rptr.3d 449].
- "Character Evidence" Defined. ▸ *People v. Myers* (2007) 148 Cal.App.4th 546, 552–553 [56 Cal.Rptr.3d 27].

- Statute Constitutional. ‣ *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173 [13 Cal.Rptr.2d 176].
- Defendant's Character for Violence Must Be Relevant to Material Issue. ‣ *People v. Fuiava* (2012) 53 Cal.4th 622, 700 [137 Cal.Rptr.3d 147, 269 P.3d 568].
- Analysis Under Evidence Code Section 352 Applies. ‣ *People v. Fuiava, supra,* 53 Cal.4th at p. 700.
- Similar Instruction Upheld. ‣ *People v. Fuiava, supra,* 53 Cal.4th at pp. 694–695.
- Other Crimes Proved by Preponderance of Evidence. ‣ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62].

358. Evidence of Defendant's Statements

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

Related Instructions

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

AUTHORITY

- Instructional Requirements. ▸ *People v. Diaz*, *supra*, ~~(2015)~~ 60 Cal.4th at pp. 1187, 1190, 1192~~1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]~~; ~~*People v. Livaditis*, *supra*, (1992)~~ 2 Cal.4th at p.~~759,~~ 784~~ [9 Cal.Rptr.2d 72, 831 P.2d 297]~~.
- Custodial Statements by ~~Minors~~ Defendants Suspected of Murder. ▸ Pen. Code, § 859.5(e)(3)~~, effective 1/1/2014~~.
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ *<insert charge[s]>* **[or that the _____***<insert allegation[s]>* **has been proved]. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

New January 2006; Revised April 2008, February 2016, August 2016, March 2023

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced. (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].) The court is only required to give this instruction **sua sponte** in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie, supra,* 30 Cal.3d at pp. 63–64.)

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

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

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

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1101(b), then the court must specify for the jury what evidence it may consider under section 1101(b). (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771], superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742].) In alternative A, insert a description of the uncharged offense allegedly shown by the 1101(b) evidence. If the court has not admitted any

felony convictions or misdemeanor conduct for impeachment, then the court may give the alternative "another offense" or "other offenses" without specifying the uncharged offenses.

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

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

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

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

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

AUTHORITY

- Evidence Admissible for Limited Purposes. ▸ Evid. Code, § 1101(b); *People v. Ewoldt, supra,* ~~(1994)~~ 7 Cal.4th at pp.~~380,~~ 393–394 ~~[27 Cal.Rptr.2d 646, 867 P.2d 757]~~; *People v. Balcom, supra,* ~~(1994)~~ 7 Cal.4th at p.~~414,~~ 422 ~~[27 Cal.Rptr.2d 666, 867 P.2d 777]~~.
- Degree of Similarity Required. ▸ *People v. Ewoldt, supra,* ~~(1994)~~ 7 Cal.4th at pp.~~380,~~ 402–404 ~~[27 Cal.Rptr.2d 646, 867 P.2d 757]~~; *People v. Balcom, supra,* ~~(1994)~~ 7 Cal.4th at p.~~414,~~ 424 ~~[27 Cal.Rptr.2d 666, 867 P.2d 777]~~.

- Analysis Under Evidence Code Section 352 Required. ▸ *People v. Ewoldt, supra,* (1994) 7 Cal.4th at p.380, 404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom, supra,* (1994) 7 Cal.4th at pp.414, 426–427 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Instructional Requirements. ▸ *People v. Collie, supra,* (1981) 30 Cal.3d at pp.43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 790 [155 Cal.Rptr. 152].
- Other Crimes Proved by Preponderance of Evidence. ▸ *People v. Carpenter, supra,* (1997) 15 Cal.4th at p.312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Two Burdens of Proof Pose No Problem fFor Properly Instructed Jury. ▸ *People v. Virgil* (2011) 51 Cal.4thth 1210, 1258-1259 [126 Cal.Rptr.3d 465, 253 P.3d 553].

RELATED ISSUES

Circumstantial Evidence—Burden of Proof

The California Supreme Court has upheld CALJIC Nos. 2.50, 2.50.1, and 2.50.2 on the burden of proof for uncharged crimes and CALJIC No. 2.01 on sufficiency of circumstantial evidence. (*People v. Virgil, supra,* (2011) 51 Cal.4th at pp.1210, 1258–1259 [126 Cal.Rptr.3d 465, 253 P.3d 553].) *Virgil* explained it was not error to permit consideration of evidence by two different evidentiary standards: "If the jury finds the facts sufficiently proven [by a preponderance of the evidence] for consideration, it must still decide whether the facts are sufficient, taken with all the other evidence, to prove the defendant's guilt beyond a reasonable doubt." (*Id.*Id. at pp. 1259–1260.) Jury instructions on the People's burden of proof and circumstantial evidence eliminate any danger that the jury might use the preponderance of evidence standard to decide elemental facts or issues because together those instructions make clear that ultimate facts must be proved beyond a reasonable doubt. (*Ibid.*)

Issue in Dispute

The "defendant's plea of not guilty does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of proof." (*People v. Ewoldt, supra,* (1994) 7 Cal.4th at p.380, 400, fn. 4 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Rowland* (1992) 4 Cal.4th 238, 260 [14 Cal.Rptr.2d 377, 841 P.2d 897].) The defense may seek to "narrow the prosecution's burden of proof" by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106 [256 Cal.Rptr. 647].) "[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*People v. Scheid*

(1997) 16 Cal.4th 1, 16–17 [65 Cal.Rptr.2d 348, 939 P.2d 748].) However, an offer to stipulate may make the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [101 Cal.Rptr.2d 825] [observing that offer "not to argue" the issue is insufficient].) The court must also consider whether there could be a "reasonable dispute" about the issue. (See *People v. Balcom, supra,* ~~(1994)~~ 7 Cal.4th at pp.~~414,~~ 422–423 ~~[27 Cal.Rptr.2d 666, 867 P.2d 777]~~ [evidence of other offense not admissible to show intent to rape because if jury believed witness's account, intent could not reasonably be disputed]; *People v. Bruce, supra,* 208 Cal.App.3d at pp. 1103–1106 [same].)

Subsequent Offenses Admissible

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

Offenses Not Connected to Defendant

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

SECONDARY SOURCES

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

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

418. Coconspirator's Statements

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

1. **Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;**

2. _____ *<insert name[s] of coconspirator[s]>* **(was/were) [a] member[s] of and participating in the conspiracy when (he/she/they) made the statement;**

3. _____ *<insert name[s] of coconspirator[s]>* **made the statement in order to further the goal of the conspiracy;**

AND

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

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

***Proof by a preponderance of the evidence* is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that the fact~~it~~ is more likely than not to be ~~that the fact is~~ true.**

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

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

New January 2006; Revised August 2016, March 2023

BENCH NOTES

Instructional Duty

It is an open question whether ~~T~~the court has a **sua sponte** duty to instruct on the use of a coconspirator's statement to incriminate a defendant. (See *People v. Prieto* (2003) 30 Cal.4th 226, 251–252 [133 Cal.Rptr.2d 18, 66 P.3d 1123]; *People v. Sully* (1991) 53 Cal.3d 1195, 1231–1232 [283 Cal.Rptr. 144, 812 P.2d 163].) On request, the court must give this instruction if the statement has been admitted under Evidence Code section 1223. (See Evid. Code, § 403(c)(1); see also *People v. Carter* (2003) 30 Cal.4th 1166, 1198 [135 Cal.Rptr.2d 553, 70 P.3d 981]; *People v. Lewis* (2001) 26 Cal.4th 334, 362 [110 Cal.Rptr.2d 272, 28 P.3d 34]; *People v. Marshall* (1996) 13 Cal.4th 799, 833 [55 Cal.Rptr.2d 347, 919 P.2d 1280]~~*People v. Jeffery* (1995) 37 Cal.App.4th 209, 215 [43 Cal.Rptr.2d 526]; *People v. Herrera* (2000) 83 Cal.App.4th 46, 63 [98 Cal.Rptr.2d 911]~~.)

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

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

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

AUTHORITY

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

SECONDARY SOURCES

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

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

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

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

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

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

2. **The defendant intended to commit** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

AND

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

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

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

Drive-By Shooting

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

Related Instructions—Other Causes of Death

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

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

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131] [defendant liable as actual killer for robbing elderly victim who died of heart attack an hour later]; *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

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

AUTHORITY

- Felony Murder: First Degree. ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▸ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Merger Doctrine Does Not Apply to First Degree Felony Murder. ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].

- Meaning of "Actual Killer." *People v. Garcia* (2020) 46 Cal.App.5th 123, 151 [259 Cal.Rptr.3d 600]; *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293 Cal.Rptr.3d 272]; *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806]; *People v. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131].

RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder

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

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

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

Auto Burglary

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

Duress

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

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony

murder. (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753], disapproved on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1198-1199 [91 Cal.Rptr.3d 106, 203 P.3d 425].)

Actual Killer vs. Aider and Abettor

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

SECONDARY SOURCES

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

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

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

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

The defendant is charged with the special circumstance of murder committed while engaged in the commission of _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[in violation of Penal Code section 190.2(a)(17)].**

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;**

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

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

AND

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in

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

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

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

In addition, the court must give the final bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Kimble* (1988) 44 Cal.3d 480]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].)

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

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

Cal.Rptr.2d 802, 58 P.3d 931]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].) The court should then modify this instruction to specify intent to kill as an element.

AUTHORITY

- Special Circumstance. ▸ Pen. Code, § 190.2(a)(17).
- Specific Intent to Commit Felony Required. ▸ *People v. Valdez* (2004) 32 Cal.4th 73, 105 [8 Cal.Rptr.3d 271, 82 P.3d 296].
- Provocative Act Murder. ▸ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].
- Concurrent Intent. ▸ *People v. Mendoza, supra,* ~~(2000)~~ 24 Cal.4th at p.~~130,~~ 183 ~~[99 Cal.Rptr.2d 485, 6 P.3d 150]~~; *People v. Clark, supra,* ~~(1990)~~ 50 Cal.3d at pp.~~583,~~ 608–609 ~~[268 Cal.Rptr. 399, 789 P.2d 127]~~.
- Felony Cannot Be Incidental to Murder. ▸ *People v. Green, supra,* ~~(1980)~~ 27 Cal.3d at p.~~1,~~ 61 ~~[164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]~~; *People v. Mendoza, supra,* ~~(2000)~~ 24 Cal.4th at p.~~130,~~ 182 ~~[99 Cal.Rptr.2d 485, 6 P.3d 150]~~.
- Instruction on Felony as Incidental to Murder. ▸ *People v. Kimble, supra,* ~~(1988)~~ 44 Cal.3d at p.~~480,~~ 501 ~~[244 Cal.Rptr. 148, 749 P.2d 803]~~; *People v. Clark, supra,* ~~(1990)~~ 50 Cal.3d at p.~~583,~~ 609 ~~[268 Cal.Rptr. 399, 789 P.2d 127]~~; *People v. Navarette, supra,* ~~(2003)~~ 30 Cal.4th at p.~~458,~~ 505 ~~[133 Cal.Rptr.2d 89, 66 P.3d 1182]~~.
- Proposition 115 Amendments to Special Circumstance. ▸ *Tapia v. Superior Court, supra,* ~~(1991)~~ 53 Cal.3d at p.~~282,~~ 298 ~~[279 Cal.Rptr. 592, 807 P.2d 434]~~.
- Meaning of "Actual Killer." ▸ *People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600]; *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293 Cal.Rptr.3d 272]; *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806]; *People v. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131].

RELATED ISSUES

Applies to Felony Murder and Provocative Act Murder

"The fact that the defendant is convicted of murder under the application of the provocative act murder doctrine rather than pursuant to the felony-murder doctrine

is irrelevant to the question of whether the murder qualified as a special-circumstances murder under former section 190.2, subdivision (a)(17). The statute requires only that the murder be committed while the defendant was engaged in the commission of an enumerated felony." (*People v. Briscoe, supra,* ~~(2001)~~ 92 Cal.App.4th at p.~~568,~~ 596 ~~[112 Cal.Rptr.2d 401]~~ [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].)

Concurrent Intent to Kill and Commit Felony

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

Multiple Special Circumstances May Be Alleged

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

Actual Killer vs. Aider and Abettor

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

SECONDARY SOURCES

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

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

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

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

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

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

1. **The defendant intentionally killed _____ <***insert name of victim***>;**

2. **At the time of the killing, the defendant was an active participant in a criminal street gang;**

3. **The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

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

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

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

<If criminal street gang has already been defined>
[A criminal street gang is defined in another instruction to which you should refer.]

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

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

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

AND

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

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

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

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

2. **At least one of those crimes was committed after September 26, 1988;**

3. **The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;**

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

5. **The crimes commonly benefitted a criminal street gang;**

AND

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

Related Instructions
CALCRIM No. 562, *Transferred Intent.*
CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

AUTHORITY

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

RELATED ISSUES

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

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

SECONDARY SOURCES

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

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

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

761. Death Penalty: Duty of Jury

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

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

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

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

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

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

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

New January 2006; Revised March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

- The court has a **sua sponte** duty to give CALCRIM No. 222, *Evidence* and CALCRIM No. 226, *Witnesses*. (See *People v. Miranda* (1987) 44 Cal.3d 57, 107-108 [241 Cal.Rptr. 594, 744 P.2d 1127].)

- The court has a **sua sponte** duty to give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, if the prosecution offers aggravating evidence of other criminal conduct or other felony convictions. However, the reasonable doubt standard does not apply to the question of whether the jury should impose the death penalty or to proof of other aggravating factors. (*People v. Miranda, supra,* 44 Cal.3d

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

- If the prosecution relies on circumstantial evidence to prove other criminal conduct, the court has a **sua sponte** duty to instruct on circumstantial evidence in the penalty phase. (See *People v. Brown* (2003) 31 Cal.4th 518, 564 [3 Cal.Rptr.3d 145, 73 P.3d 1137] [no error where prosecution relied exclusively on direct evidence].)

- When requested, the court must give instructions admonishing the jury not to consider the defendant's failure to testify during the penalty phase. (*People v. Melton* (1988) 44 Cal.3d 713, 757–758 [244 Cal.Rptr. 867, 750 P.2d 741].)

AUTHORITY

- Death Penalty Statute. ▸ Pen. Code, § 190.3.
- Must Tell Jury Which Instructions Apply. ▸ *People v. Babbitt, supra,* ~~(1988)~~ 45 Cal.3d at p.~~660,~~ 718, fn. 26 ~~[248 Cal.Rptr. 69, 755 P.2d 253]~~.
- Should Give Jury New Set of Instructions. ▸ *People v. Weaver, supra,* ~~(2001)~~ 26 Cal.4th at p.~~876,~~ 982 ~~[111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828]~~.
- Error to Instruct Not to Consider Sympathy. ▸ *People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934].
- Reasonable Doubt. ▸ *People v. Miranda, supra,* ~~(1987)~~ 44 Cal.3d at p.~~57,~~ 107 ~~[241 Cal.Rptr. 594, 744 P.2d 1127]~~; *People v. Rodriguez, supra,* ~~(1986)~~ 42 Cal.3d at pp.~~730,~~ 777–779 ~~[230 Cal.Rptr. 667, 726 P.2d 113]~~.
- Circumstantial Evidence. ▸ *People v. Brown, supra,* ~~(2003)~~ 31 Cal.4th at p.~~518,~~ 564 ~~[3 Cal.Rptr.3d 145, 73 P.3d 1137]~~.
- Defendant's Failure to Testify. ▸ *People v. Melton, supra,* ~~(1988)~~ 44 Cal.3d ~~713,~~at pp. 757–758 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~.
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1220–1221 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

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

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

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

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

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

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

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

The factors are:

(a) The circumstances of the crime[s] of which the defendant was convicted in this case and any special circumstances that were found true.

(b) Whether or not the defendant has engaged in violent criminal activity other than the crime[s] of which the defendant was convicted in this case. *Violent criminal activity* is criminal activity involving the unlawful use, attempt to use, or direct or implied threat to use force or violence against a person. [The other violent criminal activity alleged in this case will be described in these instructions.]

(c) Whether or not the defendant has been convicted of any prior felony other than the crime[s] of which (he/she) was convicted in this case.

(d) Whether the defendant was under the influence of extreme mental or emotional disturbance when (he/she) committed the crime[s] of which (he/she) was convicted in this case.

(e) Whether the victim participated in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct in committing the crime[s] of which (he/she) was convicted in this case.

(g) Whether at the time of the murder the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether, at the time of the offense, the defendant's capacity to appreciate the criminality of (his/her) conduct or to follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication.

(i) The defendant's age at the time of the crime[s] of which (he/she) was convicted in this case.

(j) Whether the defendant was an accomplice to the murder and (his/her) participation in the murder was relatively minor.

(k) Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above.

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

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

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

[Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once as an aggravating factor in your weighing process. Do not double-count that fact simply because it is both a "special circumstance" and a "circumstance of the crime."]
[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant's family influence your decision. [However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]]

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

BENCH NOTES

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

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

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

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

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

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

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

AUTHORITY

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

- "Aggravating and Mitigating" Defined. ▸ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].
- On Request Must Instruct to Consider Only Statutory Aggravating Factors. ▸ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].
- Mitigating Factors Are Examples. ▸ *People v. Melton, supra,* ~~(1988)~~ 44 Cal.3d at p.~~713,~~ 760 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].
- Must Instruct to Not Double-Count. ▸ *People v. Melton, supra,* ~~(1988)~~ 44 Cal.3d at p.~~713,~~ 768 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~.
- Threats of Violence Must Be Directed at Persons. ▸ *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [30 Cal.Rptr.2d 818, 874 P.2d 248].
- This Instruction Upheld Against Due Process Challenge to Victim-Impact Factors. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1220–1221 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

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

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

SECONDARY SOURCES

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

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

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

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

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

1. **The defendant was a *public officer*;**

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

<*instruct with elements 3 and 4 for assault*>

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

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

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

[AND]

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

[AND]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   OR

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

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

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

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

   AND

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

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

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

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

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

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

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

New September 2022; Revised March 2023

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5/7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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

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

AUTHORITY

- Elements. ▸ Pen. Code, § 149.
- Objectively Reasonable Force to Effect Arrest. ▸ Pen. Code, § 835a(b).
- Violation of Statute Does Not Include Detention Without Lawful Authority. ▸ *People v. Lewelling* (2017) 16 Cal.App.5th 276, 298 [224 Cal.Rptr.3d 255].
- "Willful" Defined. ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

- Least Touching. ‣ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Public Officer. ‣ See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421–422 [286 Cal.Rptr. 684]; *In re M.M.* (2012) 54 Cal.4th 530, 536–539 [142 Cal.Rptr.3d 869, 278 P.3d 1221]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Officer Includes De Facto Officer. ‣ *People v. Cradlebaugh* (1914) 24 Cal.App. 489, 491–492.
- "Peace Officer" Defined. ‣ Pen. Code, § 830 et seq.
- Without Lawful Necessity. ‣ *People v. Dukes* (1928) 90 Cal.App. 657, 661–662; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140 & fn.20 [142 Cal.Rptr.3d 423]; *People v. Lewelling, supra,* 16 Cal.App.5th at pp. 298–299; *People v. Perry* (2019) 36 Cal.App.5th 444 [248 Cal.Rptr.3d 522].
- Color of Authority. ‣ *People v. Plesniarski* (1971) 22 Cal.App.3d 108, 114 [99 Cal.Rptr. 196].

COMMENTARY

Graham Factors

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

RELATED ISSUES

Sexual Battery

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

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

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

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

1. **The defendant delayed or lingered in a public place;**

2. **When the defendant did so, (he/she) did not have a lawful purpose for being there;**

AND

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

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

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

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

- **[Repeatedly beckoned to, stopped, engaged in conversations with, or attempted to stop or engage in conversations with passersby in a way that indicated the solicitation of prostitution (./;)]**

- **[Repeatedly stopped or attempted to stop vehicles by hailing, waving, or gesturing, or engaged or attempted to engage drivers or passengers in conversation, in a way that indicated the solicitation of prostitution(./;)]**

- **[Circled an area in a vehicle and repeatedly beckoned to, contacted, or attempted to contact or stop pedestrians or other motorists in a way that indicated the solicitation of prostitution(./;)]**

- **[Has engaged in any behavior indicative of prostitution activity within the six months before (his/her) arrest in this case(./;)]**

- **[Has been convicted of this crime or of any other crime relating to or involving prostitution within five years of (his/her) arrest in this case.]**

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

AUTHORITY

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

SECONDARY SOURCES

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

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

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

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

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

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

1. **The defendant actively participated in a criminal street gang;**

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

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**

    a. **directly and actively committing a felony offense;**

OR

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

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

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

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

<If criminal street gang has already been defined.>
[A *criminal street gang* is defined in another instruction to which you should refer.]

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

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

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

AND

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

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

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

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

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

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

2. **At least one of those crimes was committed after September 26, 1988;**

3. **The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;**

4. **The crimes were committed on separate occasions or were personally committed by two or more members;**

5. **The crimes commonly benefitted a criminal street gang;**

AND

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

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

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

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

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

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

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

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

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

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

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

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

1. **A member of the gang committed the crime;**

2. **The defendant knew that the gang member intended to commit the crime;**

3. **Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;**

AND

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

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

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

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

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

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

AND

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

Defenses—Instructional Duty

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

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

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

Related Instructions

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

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

AUTHORITY

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

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

COMMENTARY

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

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

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

RELATED ISSUES

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

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

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

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

SECONDARY SOURCES

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

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

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

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

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

To prove this allegation, the People must prove that:

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

   AND

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

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

<*If criminal street gang has already been defined.*>
[A criminal street gang is defined in another instruction to which you should refer.]

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

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

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

AND

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

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>
[To decide whether the organized association or group has, as one of its primary activities, the commission of _____*<insert felony or felonies from Pen. Code, § 186.22(e)(1)>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

2. **At least one of those crimes was committed after September 26, 1988;**

3. **The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;**

4. **The crimes were committed on separate occasions or were personally committed by two or more members;**

5. **The crimes commonly benefitted a criminal street gang;**

AND

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>
[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)>*, **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

Related Instructions

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

AUTHORITY

- Enhancement. ▸ Pen. Code, § 186.22(b)(1).
- "Specific Intent" Defined. ▸ *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- "Criminal Street Gang" Defined. ▸ Pen. Code, § 186.22(f).
- "Pattern of Criminal Gang Activity" Defined. ▸ Pen. Code, § 186.22(e), (g); see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- "To Benefit, Promote, Further, or Assist" Defined. ▸ Pen. Code, § 186.22(g).
- Active or Current Participation in Gang Not Required ▸ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- "Primary Activities" Defined. ▸ *People v. Sengpadychith, supra,* 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member. ▸ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 [150 Cal.Rptr.3d 533].
- Crimes Committed After Charged Offense Not Predicates. ▸ *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. ▸ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].
- Evidence Required for Gang Member Acting Alone. ▸ *People v. Renteria* (2022) 13 Cal.5th 951, 969 [297 Cal.Rptr.3d 344, 515 P.3d 77].

RELATED ISSUES

Commission On or Near School Grounds

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

Enhancements for Multiple Gang Crimes

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

Wobblers

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

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

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

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

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

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

SECONDARY SOURCES

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

New January 2006; Revised September 2018, March 2023

BENCH NOTES

Instructional Duty

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

AUTHORITY

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

SECONDARY SOURCES

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

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

1521–1529. Reserved for Future Use

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

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

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

1. **A peace officer driving a motor vehicle was pursuing the defendant;**

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

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

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

[OR]

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

[OR]

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

AND

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

(a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;

(b) The defendant either saw or reasonably should have seen the lamp;

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

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

AND

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

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

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Inherently Dangerous Felony

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

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

SECONDARY SOURCES

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

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

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

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

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

To prove this allegation, the People must prove that:

1. **When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;**

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

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**

    a. **Directly and actively committing a felony offense;**

    OR

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

2. **At least one of those crimes was committed after September 26, 1988;**

3. **The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the currently charged offense;**

4. **The crimes were committed on separate occasions or were personally committed by two or more members;**

5. **The crimes commonly benefitted a criminal street gang;**

AND

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

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

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

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

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

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

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

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

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

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

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

1. **A member of the gang committed the crime;**

2. **The defendant knew that the gang member intended to commit the crime;**

3. **Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;**

AND

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

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

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

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

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

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

AND

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related Instructions
CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.
CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor))*.

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

AUTHORITY

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

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

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent
In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

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

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

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

SECONDARY SOURCES

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

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

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

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

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

<Alternative 1A—attending or giving testimony>

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

<Alternative 1B—report of victimization>

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

<Alternative 1C—causing prosecution>

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

<Alternative 1D—causing arrest>

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

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

AND

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

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

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

<Give the appropriate bracketed paragraph[s].>

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

  [OR]

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

  [OR]

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

  [OR

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

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

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

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

New January 2006; Revised September 2020, March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

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

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

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

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

SECONDARY SOURCES

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

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

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

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

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

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

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

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

[AND]

<Alternative A—furtherance of a conspiracy>

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

<Alternative B—used or threatened force>

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

<Alternative C—financial gain>

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

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

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

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

New January 2006; Revised September 2020, March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

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

SECONDARY SOURCES

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

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

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

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

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

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

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

To prove this allegation, the People must prove that:

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

   AND

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

[For the crime to have been committed with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness), no one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness).]

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

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

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

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

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(1).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Force, Violence, or Threat Beyond What is Necessary to Accomplish Criminal Purpose. ▸ *People v. Karsai* (1982) 131 Cal.App.3d 224, 239 [182 Cal.Rptr. 406]; see also *People v. Cortez* (1980) 103 Cal.App.3d 491, 496 [163 Cal.Rptr. 1]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 116 [208 Cal.Rptr. 910]; *People v. Garcia* (1989) 209 Cal.App.3d 790, 793–794 [257 Cal.Rptr. 495].
- Viciousness Not Equivalent To Violence. ▸ *People v. Reed* (1984) 157 Cal.App.3d 489, 492 [203 Cal.Rptr. 659].
- Actual Bodily Harm Not Required. ▸ *People v. Duran* (1982) 130 Cal.App.3d 987, 990 [182 Cal.Rptr. 17].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3225. Aggravating Factor: Armed or Used Weapon

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant was armed with or used a weapon, to wit: _____ <*insert description of weapon*>, during commission of the crime[s] in Count[s] _____.]

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

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

[A device, instrument, or object that is capable of being used to inflict injury or death may be a *weapon*. In determining whether _____<*insert description*> was a *weapon*, you may consider the totality of circumstances, including the manner in which it was used or possessed.]

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(2).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Arming Includes Available for Use. ▸ *People v. Garcia* (1986) 183 Cal.App.3d 335, 350 [228 Cal.Rptr. 87].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

Penal Code section 12022

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

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3226. Aggravating Factor: Particularly Vulnerable Victim

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that _____***<insert name of victim>* **was a particularly vulnerable victim.]**

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

To prove this allegation, the People must prove that:

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

AND

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

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

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

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(3).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496,

512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].

- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Victim" Defined. ▸ *People v. Simon* (1983) 144 Cal.App.3d 761, 765 [193 Cal.Rptr. 28].
- "Particularly Vulnerable" Defined. ▸ *People v. DeHoyos* (2013) 57 Cal.4th 79, 154–155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223 [59 Cal.Rptr.2d 627]; *People v. Price* (1984) 151 Cal.App.3d 803, 814 [199 Cal.Rptr. 99]; *People v. Ramos* (1980) 106 Cal.App.3d 591, 607 [165 Cal.Rptr. 179]; *People v. Smith* (1979) 94 Cal.App.3d 433, 436 [156 Cal.Rptr. 502].
- Vulnerability Cannot Be Based Solely on Age if Age Is Element of Offense. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 [249 Cal.Rptr. 435], disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 244–245 [119 Cal.Rptr.3d 775, 245 P.3d 410]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 476–477 [175 Cal.Rptr. 383]; *People v. Flores* (1981) 115 Cal.App.3d 924, 927 [171 Cal.Rptr. 777].
- Factor Did Not Apply in Vehicular Manslaughter. ▸ *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358–1359 [241 Cal.Rptr. 391].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

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

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

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

To prove this allegation, the People must prove that:

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

   OR

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

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(4).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- More Than One Participant Required. ▸ *People v. Berry* (1981) 117 Cal.App.3d 184, 198 [172 Cal.Rptr. 756, 763–764].
- Leadership Not Equivalent to Dominance. ▸ *People v. Kellett* (1982) 134 Cal.App.3d 949, 961 [185 Cal.Rptr. 1].

- Factor Requires More Than Being Willing Participant. ‣ *People v. Searle* (1989) 213 Cal.App.3d 1091, 1097 [261 Cal.Rptr. 898].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3228. Aggravating Factor: Induced Minor to Commit or Assist

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant induced a minor to commit or assist in the commission of the crime[s][in Count[s] __].]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the defendant induced a minor to commit or assist in the commission of the crime[s].]

To prove this allegation, the People must prove that:

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

   OR

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

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

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

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(5).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court

held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

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

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant[in Count[s] __] (threatened witnesses[,]/ [or]unlawfully prevented or dissuaded witnesses from testifying[,]/ [or]suborned perjury[,]/ [or]**_____*<insert other illegal activity that interfered with the judicial process>***).]**

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

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

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

<Give the appropriate bracketed paragraph[s].>

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

  [OR]

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

  [OR]

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

  [OR

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

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

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

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

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

[*Suborned perjury* means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. In order to find that the defendant suborned perjury, the People must prove, beyond a reasonable doubt, not only that the sworn statement was actually false, but also that the defendant, at the time (he/she) encouraged, induced, or assisted the witness(es) to make the statement, knew that it was false.]

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(6); see also
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Witness" Defined. ▸ Pen. Code, § 136(2).
- "Threat" Defined. ▸ Pen. Code, § 76(5).
- Attempted Subornation of Perjury. ▸ *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

Perjury

Perjury committed by the defendant can constitute "an illegal activity that interfered with the judicial process." (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002 [21 Cal.Rptr.2d 676].) If it is alleged that the defendant committed perjury, the jury must find all the elements of a perjury violation. *Id.* at

p. 1004 [holding that the court is constitutionally required to make findings encompassing the elements of perjury: "a willful statement, under oath, of any material matter which the witness knows to be false."]; see also *United States v. Dunnigan* (1993) 507 U.S. 87, 96 [113 S.Ct. 1111, 122 L.Ed.2d 445].) The concern, essentially, is that a sentence may be aggravated if the defendant actually committed perjury by being untruthful, but not if the defendant merely gave inaccurate testimony because of confusion, mistake, faulty memory, or some other reason besides a willful attempt to impede justice. (*Howard*, *supra*, 17 Cal.App.4th at p.1005; *Dunnigan*, *supra*, 507 U.S. at pp. 95–96.)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3230. Aggravating Factor: Planning, Sophistication, or Professionalism

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the offense was carried out with planning, sophistication, or professionalism.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the offense was carried out with planning, sophistication, or professionalism.]

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

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

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

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

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factors. ▸ California Rules of Court, rule 4.421(a)(8).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Planning, Sophistication, Professionalism" Defined. ▸ *People v. Mathews* (1980) 102 Cal.App.3d 704, 710 [162 Cal.Rptr. 615]; *People v. Stewart* (1983) 140 Cal.App.3d 11, 17 [189 Cal.Rptr. 141]; *People v. Charron* (1987) 193 Cal.App.3d 981, 994–995 [238 Cal.Rptr. 660]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695 [53 Cal.Rptr.2d 282], disapproved on other grounds in

People v. Hammon (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3231. Aggravating Factor: Great Monetary Value

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved [(a/an)] [attempted] [or] [actual] (taking/ [or] damage) of great monetary value.]

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

To prove this allegation, the People must prove that:

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

   AND

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

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(9).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Great Monetary Value. ▸ *People v. Wright* (1982) 30 Cal.3d 705, 707 & 714 [180 Cal.Rptr. 196, 639 P.2d 267] [losses of $2,300 and $3,250 qualified]; *People v. Berry* (1981) 117 Cal.App.3d 184, 197 [172 Cal.Rptr. 756] [damage of $450 did not qualify]; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 705–706 [173 Cal.Rptr. 71] [loss of rifle, shotgun, and television did not qualify].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3232. Aggravating Factor: Large Quantity of Contraband

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved a large quantity of contraband.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved a large quantity of contraband.]

To prove this allegation, the People must prove that:

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

AND

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

[*Contraband* means illegal or prohibited items.]

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(10).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute

may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3233. Aggravating Factor: Position of Trust or Confidence

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant took advantage of a position of trust or confidence to commit the crime.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s]__] that the defendant took advantage of a position of trust or confidence to commit the crime.]

To prove this allegation, the People must prove that:

> **1. (Prior to/During) the commission of the crime, the defendant (had/developed) a relationship with _____** *<insert name of victim or other person>***;**
>
> **2. This relationship allowed the defendant to occupy a position of trust or caused _____***<insert name of victim or other person>* **to have confidence in the defendant;**
>
> **AND**
>
> **3. The defendant took advantage of this position of trust or confidence to commit the crime.**

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(11).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Factor Focuses on Special Status to Victim. ▸ *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262–1263 [131 Cal.Rptr.2d 628] [quasi-paternal relationship]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694–1695 [53 Cal.Rptr.2d 282] [defendant intentionally cultivated friendship], disapproved

on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 337–338 [30 Cal.Rptr.2d 376] [stepfather entrusted with care]; *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [15 Cal.Rptr.2d 709] [stepfather entrusted with care]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [14 Cal.Rptr.2d 9] [legal parent].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3234. Aggravating Factor: Serious Danger to Society

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether the People have proved the additional allegation that _____***<insert name of defendant>* has engaged in violent conduct, to wit:_____** *<insert description of conduct>***, which indicates (he/she) is a serious danger to society.]**

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

To prove this allegation, the People must prove that:

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

   AND

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

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant's violent conduct was distinctively worse than that posed by an ordinary commission of the underlying crime and that the violent conduct, considered in light of all the evidence presented[and the

defendant's background], shows that the defendant is a serious danger to society.

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

New March 2023

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Aggravating Factors. ▸ California Rules of Court, rule 4.421(b)(1).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Danger to Society: Subsequent Conduct Can Be Considered. ▸ *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [256 Cal.Rptr. 669].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

Item number:02

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: February 16, 2023

Rules Committee action requested [Choose from drop down menu below]**:**
Submit to JC (without circulating for comment)

Title of proposal: Court Fees: 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:
JC Staff

*Staff contact (*name, phone and e-mail*): James Barolo, 415-865-8928 james.barolo@jud.ca.gov*
Kendall Hannon, 415-865-7653 kendall.hannon@jud.ca.gov
Daniel Richardson, 415-865-7619 daniel.richardson@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): Not on annual agenda--Technical change to conform forms to change in law
Project description from annual agenda:

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
Tehcnical change to conform forms to change elegibility figures, based on changes to federal poverty level and to list additional qualifying benefits from recent statutory amendment

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

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-072
For business meeting on: March 23–24, 2023

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
James Barolo, Attorney
Legal Services
Daniel Richardson, Attorney
Center for Families, Children & the Courts

Agenda Item Type
Action Required

Effective Date
April 1, 2023

Date of Report
January 30, 2023

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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. Staff also recommend that, at the same time, one of the forms also be revised to reflect recent additions to the qualifying public benefits listed in the fee waiver statute, Government Code section 68632(a).

Recommendation

Judicial Council staff recommend that the Judicial Council, effective April 1, 2023, revise the following documents to reflect 2023 increases in the federal poverty guidelines and, for form JV-132, recent changes to Government Code section 68632:

- *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 5–15.

Relevant Previous Council Action

The council last revised forms FW-001, FW-001-GC, and APP-015/FW-015-INFO effective August 1, 2022, to reflect new fee waiver eligibility requirements in Government Code section 68632(a) and (b), enacted in Assembly Bill 199 (Stats. 2022, ch. 57). The council last revised form JV-132 effective March 14, 2022, to reflect the most recent change in the federal poverty guidelines.

Analysis/Rationale

Judicial Council forms containing figures based on the federal poverty guidelines and listing qualifying public benefits need to be revised to conform to the current guidelines and current law.

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 200 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 8b 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.

The monthly income figures currently on the three fee waiver forms reflect 200 percent of the *2022* poverty guidelines established by the HHS. The HHS released revised federal poverty guidelines in January 2023.[1] As a result, these items on the Judicial Council fee waiver forms must be revised to reflect the *2023* federal poverty guideline revisions. To determine the new monthly income figures for the forms, the federal poverty guidelines must be multiplied by 200

[1] The 2023 figures have been published in the Federal Register. See U.S. Department of Health and Human Services, Annual Update of the HHS Poverty Guidelines, 88 FR 3424. (See Link A.)

percent and divided by 12.[2] The new figures are reflected in the revised tables on the attached forms.

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. (Cal. Rules of Court, App. F.) 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. (Cal. Rules of Court, App. F, § 6(d)(1)(A).)[3] *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.

The monthly income figures currently on form JV-132 reflect 125 percent of the *2022* poverty guidelines established by the HHS. As noted above, those guidelines were revised by HHS in January. As a result, the figures in this item, like those on the fee waiver forms, must be revised to reflect the *2023* federal poverty guideline revisions. To determine the new monthly income figures for form JV-132*,* the federal poverty guidelines must be multiplied by 125 percent and divided by 12.[4] The new figures are reflected in revised item 3 on the attached form JV-132.

In addition to the presumptive inability to pay based on income, a presumptive inability to pay is established in Appendix F if the individual receives public benefits under any of the programs listed in Government Code section 68632(a). (Cal. Rules of Court, App. F, § 6(d)(1)(A).) This proposal also includes revisions to form JV-132 to reflect a recent change in qualifying benefits listed in that statute that was made by Assembly Bill 199. Government Code section 68632(a) was amended to add two benefit programs:

---

[2] See Attachment A for the Computation Sheet for Fee Waiver Forms. The monthly income figures in the tables on the forms slightly exceed 200 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.

[3] The Family and Juvenile Law Advisory Committee is considering a proposal to amend the *Guidelines for the Juvenile Dependency Counsel Collections Program* in Appendix F of the California Rules of Court to increase, from 125 percent of the federal poverty guidelines to 200 percent of the federal guidelines, the income level at or below which a responsible person is presumed unable to pay the cost of appointed counsel in a juvenile dependency proceeding. That proposal would circulate for comment in the 2023 spring cycle, but because it would not have an effective date until 2024, the revisions proposed here are needed so that the forms comply with the current standard.

[4] See Attachment B for the Computation Sheet for Juvenile Form. 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.

1. California Special Supplemental Nutrition Program for Women, Infants, and Children (WIC Program), and

2. Unemployment compensation.

The list of qualifying public benefits in item 2 of form JV-132 has been expanded to include these two new benefits.[5]

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 immediately 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 rapid 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 minor noncontroversial revisions to implement changes in law, 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 2023 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 for determining ability to pay.

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 5–15
2. Attachment A: Computation Sheet for Fee Waiver Forms
3. Attachment B: Computation Sheet for Juvenile Form
4. Link A: Annual Update of the HHS Poverty Guidelines, *www.federalregister.gov/index/2023*

[5] Similar revisions were already approved by the council in the fee waiver forms.

FW-001 Request to Waive Court Fees

CONFIDENTIAL

Clerk stamps date here when form is filed.

DRAFT
1/30/2023
NOT APPROVED BY THE JUDICIAL COUNCIL

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.

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 ☐ WIC ☐ Unemployment

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
1	$2,430.00	3	$4,143.34	5	$5,856.67
2	$3,286.67	4	$5,000.00	6	$6,713.34

If more than 6 people at home, add $856.67 for each extra person.

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: _____ **Case Number:**

*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):* $_____

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.**

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):* $_____

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Print this form | Save this form | Clear this form

FW-001-GC **Request to Waive Court Fees (Ward or Conservatee)**

CONFIDENTIAL

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DRAFT
1/30/2023
NOT APPROVED BY THE 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:

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.

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: _____ Email: _____

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, you may have to go to a hearing to explain why you are asking the court to waive the fees.

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: _____ Email: _____

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)
☐ Special Supplemental Nutrition Program for Women, Infants, and Children (WIC Program)
☐ Unemployment Compensation

(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 the amount listed below. *(If you check 8b, you **must** fill out items 14, 15, and 16 on page 4 of this form.)**

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	
1	$2,430.00	3	$4,143.34	5	$5,856.67	*If more than 6 people at home, add $856.67 for each extra person.*
2	$3,286.67	4	$5,000.00	6	$6,713.34	

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.

	Name	Age	Relationship	Gross Monthly Income
(1)				$
(2)				$
(3)				$
(4)				$
(5)				$
(6)				$
(7)				$
(8)				$
(9)				$
(10)				$

b. **Total monthly income of persons above:** $_____

Total monthly income *and* household income *(15b plus 16b):* $_____

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.

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

	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)		$	$

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):* $_____

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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; Cash Assistance Program for Aged, Blind, and Disabled; Special Supplemental Nutrition Program for Women, Infants, and Children (WIC Program); or unemployment compensation.
- **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	$2,430.00	3	$4,143.34	5	$5,856.67
2	$3,286.67	4	$5,000.00	6	$6,713.34

If more than 6 people at home, add $856.67 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.

CONFIDENTIAL

JV-132

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not approved by the Judicial Council** **JV-132.v2.013023.cz**
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: ☐ Parent ☐ Other Responsible Person *(specify):*				
Street or Mailing Address:				
City:	State:	Zip:	Phone:	Alternate Phone:
Marital Status: ☐ Married ☐ Single ☐ Domestic partner ☐ Separated ☐ Divorced ☐ 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)*
   - ☐ California Special Supplemental Nutrition Program for Women, Infants, and Children *(WIC Program)*
   - ☐ Unemployment compensation

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	
1	$1,518.75	3	$2,589.59	5	$3,660.42	If more than 6 people at home, add $535.42 for each extra person.
2	$2,054.17	4	$3,125.00	6	$4,195.84	

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: RESPONSIBLE PERSON'S NAME:	CASE NUMBER:

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? *(Name, Address, City, and Zip Code):*				If not now employed, who was this person's last employer? *(Name, Address, City, and Zip Code):*			
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 *(list below)*	$
Foster Care Payments	$	Stocks and Bonds	$
Other Income	$	Business Interest	$
Total	$	Other Assets	$
		Total	$
		Name and branch of bank:	
		Account numbers:	

CHILDREN'S NAMES: RESPONSIBLE PERSON'S NAME:	CASE NUMBER:

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 for Fee Waiver Forms

Number in Family	2023 Federal Poverty Guidelines (A)	200% of Poverty Guidelines (B) (B = A x 200%)	2023 California Monthly Income (C) (C = B / 12)*
1	$14,580.00	$29,160.00	$2,430.00
2	19,720.00	39,440.00	3,286.67
3	24,860.00	49,720.00	4,143.34
4	30,000.00	60,000.00	5,000.00
5	35,140.00	70,280.00	5,856.67
6	40,280.00	80,560.00	6,713.34
For each additional person, add:	5,140.00	10,280.00	856.67

* 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.

Computation Sheet for Juvenile Form

Number in Family	2023 Federal Poverty Guidelines (A)	125% of Poverty Guidelines (B) (B = A x 125%)	2023 California Monthly Income (C) (C = B / 12)*
1	$14,580.00	$18,225.00	$1,518.75
2	19,720.00	24,650.00	2,054.17
3	24,860.00	31,075.00	2,589.59
4	30,000.00	37,500.00	3,125.00
5	35,140.00	43,925.00	3,660.42
6	40,280.00	50,350.00	4,195.84
For each additional person, add:	5,140.00	6,425.00	535.42

* 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.

Item number:03

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 2/16/2023

Rules Committee action requested [Choose from drop down menu below]**:**
Approve

Title of proposal: Amend 2023 CLAC Annual Agenda

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

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:
Annual agenda approved by Rules Committee on (*date*):
Project description from annual agenda:

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)
Request to amend the 2023 CLAC annual agenda to develop proposals on rules/forms for the Racial Justice Act and AB 256 and revising the felony plea form.

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

LEGAL SERVICES

455 Golden Gate Avenue • San Francisco, California 94102-3688

Telephone 415-865-7446 • Fax 415-865-7664 • TDD 415-865-4272

MEMORANDUM

Date
January 20, 2023

To
Rules Committee

From
Criminal Law Advisory Committee
Brian M. Hoffstadt, Chair

Subject
Addition of Project to Annual Agenda

Action Requested
Approve Addition to Annual Agenda

Deadline
February 16, 2023

Contact
Sarah Fleischer-Ihn, Criminal Justice Services
415-865-7702, sarah.fleischer-ihn@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee requests approval to add two projects to its annual agenda: 1) developing forms to implement the Racial Justice Act (RJA) (Assembly Bill 2542; Stats. 2020, ch. 317) and Assembly Bill 256 (Stats. 2022, ch. 739, and 2) revising the felony plea form to incorporate a waiver of the right to a trial on aggravating factors that can be used to sentence the defendant to the upper term of a criminal offense or enhancement. Because these projects would incorporate current law, the committee would like to add them to its 2023 annual agenda.

Action Requested

The Criminal Law Advisory Committee asks that the Rules Committee approve adding to the 2023 Annual Agenda of the Criminal Law Advisory Committee:

1. A project to develop rules and forms to implement the Racial Justice Act and AB 256; and

2. A project to revise the felony plea form to incorporate a waiver of the right to a trial on aggravating factors that can be used to sentence the defendant to the upper term of a criminal offense or enhancement.

Basis for Request

Racial Justice Act forms

The Racial Justice Act (RJA) (Assembly Bill 2542; Stats. 2020, ch. 317) prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin. This legislation only applied to cases in which a judgment had not been entered prior to January 1, 2021.

Assembly Bill 256 (Stats. 2022, ch. 739) made the RJA apply retroactively to cases in which a judgment was entered prior to January 1, 2021. The legislation dictates a phased implementation of retroactivity, starting in 2023 with cases in which a petitioner is sentenced to death or facing immigration consequences. In 2024, the eligibility expands to petitioners currently incarcerated, and in 2025 and 2026, the eligibility expands to all felony convictions.

The RJA allows defendants to file a motion in the trial court or, if judgment has been entered, a petition for writ of habeas corpus (see Pen. Code, §1473(f)) or a motion under Penal Code section 1473.7 (see Pen. Code, § 1473.7(a)(3)). The Judicial Council has existing forms for a noncapital petition for writ of habeas corpus (form HC-001) and a motion under Penal Code sections 1473.7(a)(1) and (2)[1] (form CR-187), but the forms do not address relief under the RJA.

The committee did not initially anticipate the need for a Judicial Council rule or form, but upon further discussion, decided that statewide guidance would be useful for court users and courts due in part to the potential magnitude of cases. Because of the complexity of the project, the committee anticipates working on this project throughout 2023 and circulating for public comment this winter for an effective date of September 1, 2024.

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[1] (a) A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for any of the following reasons:

(1) The conviction or sentence is legally invalid due to prejudicial error damaging 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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

(2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

Felony plea form

Under SB 567 (Stats. 2021, ch. 731), 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. A court executive officer requested a revision of form CR-101, the optional felony plea form, to incorporate a waiver of the right to a trial on aggravating factors that can be used to sentence the defendant to the upper term of a criminal offense or enhancement. The request was made after the annual agenda process but the committee believes it is an important statutory change that should be reflected in the plea form. The committee anticipates an effective date of January 1, 2024 for this proposal.

Annual Agenda

The Criminal Law Advisory Committee proposes that projects to develop forms to implement the Racial Justice Act and revise the felony plea form be added to its Annual Agenda. The projects are included in the attached 2023 Criminal Law Advisory Committee Annual Agenda as items 13 and 14 on pages 13–14.

Rules and forms to implement the Racial Justice Act (AB 2542) and AB 256

- Priority: 1(b)
- Strategic Plan Goal: I, IV
- Project Summary: Develop a proposal for rules or forms to implement the Racial Justice Act (AB 2542) and AB 256
- Status/Timeline: Anticipate circulating for comment in winter cycle, and effective September 1, 2024
- Fiscal Impact/Resources: Committee staff
- Internal/External Stakeholders: Trial courts, justice system partners
- AC Collaboration: None

Revise the felony plea form

- Priority: 1(a), 1(b)
- Strategic Plan Goal: I, IV
- Project Summary: Develop a proposal to revise the felony plea form to incorporate a waiver of the right to a trial on aggravating factors that can be used to sentence the defendant to the upper term of a criminal offense or enhancement, to reflect statutory changes under SB 567 (Stats. 2021, ch. 731).
- Status/Timeline: Anticipate circulating for comment in spring cycle, and effective January 1, 2024
- Fiscal Impact/Resources: Committee staff
- Internal/External Stakeholders: Trial courts
- AC Collaboration: None

Attachments

1. 2023 revised CLAC Annual Agenda, at pages 4–17

Criminal Law Advisory Committee
Annual Agenda[1]—2023
Approved by Rules Committee: November 1, 2022

I. COMMITTEE INFORMATION

Chair:	Hon. Brian M. Hoffstadt, Chair, Associate Justice of the Court of Appeal, Second Appellate District Hon. Lisa Rodriguez, Vice Chair, Judge, Superior Court of San Diego County
Lead Staff:	Sarah Fleischer-Ihn, Attorney, Criminal Justice Services Office

Committee's Charge/Membership:

Rule 10.42(a) of the California Rules of Court states the charge of the Criminal Law Advisory Committee, which is to make recommendations to the Judicial Council for improving the administration of justice in criminal proceedings.

Rule 10.42(b) sets forth the membership categories of the committee. The Criminal Law Advisory Committee currently has 21 voting members. The current committee roster is available on the committee's webpage.

Subcommittees/Working Groups[2]:

1. Protective Orders Working Group (POWG)
2. New - Criminal remote proceedings working group. This working group of committee members and an ITAC liaison will develop any necessary rules and standards of judicial administration regarding criminal remote proceedings.
3. New - Joint subcommittee to review mental health legislation with the Collaborative Justice Courts Advisory Committee. This joint subcommittee will promote efficiencies due to joint review of legislation that is under the purview of both committees, and allow for alignment in committee decisionmaking early in the legislative review process.

Meetings Planned for 2023[3] (Advisory body and all subcommittees and working groups)

Date/Time/Location or Videoconference:

- January 2023 (in-person meeting to discuss and review spring cycle proposals)

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.

[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

[3] Refer to *Operating Standards for Judicial Council Advisory Bodies* for governance on in-person meetings.

- February/March 2023 (videoconference to discuss and review spring cycle proposals and discuss pending legislation)
- April 2023 (videoconference to discuss pending legislation)
- May 2023 (videoconference to discuss pending legislation)
- June 2023 (videoconference to discuss pending legislation)
- July 2023 (videoconference to make final recommendations on spring cycle proposals and discuss pending legislation)
- August 2023 (videoconference to discuss pending legislation)
- September 2023 (videoconference to discuss pending legislation)
- November 2023 (videoconference to discuss spring cycle proposals)
- Other videoconference meetings as needed to address urgent items

☐ Check here if exception to policy is granted by Executive Office or rule of court.

II. COMMITTEE PROJECTS

#	New or One-Time Projects[4]	
1.	***Placeholder for projects assigned by the Ad-Hoc Workgroup on Post-Pandemic Initiatives (P3)***	***Priority 1[5]***
		Strategic Plan Goal III, IV[6]
	Project Summary[7]: The Ad Hoc Workgroup on Post-Pandemic Initiatives (P3) is working to identify successful court practices that emerged during the COVID-19 pandemic. P3 recommendations may be referred to specific advisory bodies for development and/or implementation. ***Status/Timeline***: TBD ***Fiscal Impact/Resources:*** TBD ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** TBD ***AC Collaboration:*** TBD	
2.	***Revise Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense***	***Priority 1(a)***
		Strategic Plan Goal IV

[4] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[5] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.
[6] Indicate which goal number of The Strategic Plan for California's Judicial Branch the project most closely aligns.
[7] A key objective is a strategic aim, purpose, or "end of action" to be achieved for the coming year.

#	New or One-Time Projects[4]	
	Project Summary: Develop a proposal to revise *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form CR-105) to reflect the repeal of Penal Code section 987.8 by AB 1869 (Stats. 2020, ch. 92). ***Status/Timeline***: Anticipate circulating for comment in winter cycle, and effective September 1, 2023 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Trial courts, justice system partners ***AC Collaboration:*** None	
3.	***Amend Cal. Rules of Court, rule 4.117, qualifications for appointed counsel in capital cases***	***Priority 1(a)*** ***Strategic Plan Goal IV***
	Project Summary: Develop a proposal to amend the rule to clarify that qualified counsel must be appointed when special circumstances are charged. ***Status/Timeline***: Anticipate circulating for comment in spring cycle, and effective January 1, 2024 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Justice system partners ***AC Collaboration:*** None	
4.	***Rules and forms to implement court reporting requirements on a person's competency to vote***	***Priority 1(a), 1(b)*** ***Strategic Plan Goal IV***

#	New or One-Time Projects[4]
	Project Summary: Develop rules and forms to implement AB 2841 (Stats. 2022, ch. 807), which requires the Judicial Council to adopt rules and forms for courts to use to notify the Secretary of State of findings regarding a person's competency to vote. ***Status/Timeline***: Anticipate circulating for comment in spring cycle, and effective January 1, 2024 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** California Secretary of State, trial courts ***AC Collaboration:*** This would be a joint project with the Probate and Mental Health Advisory Committee

#	New or One-Time Projects[4]	
5.	***Amend Cal. Rules of Court, rule 4.130, mental competency proceedings***	***Priority 1(a), 1(b)***
		Strategic Plan Goal I
	Project Summary: Develop a proposal to amend rule to 4.130 to reflect changes to Penal Code section 1369 et seq., by (1) SB 184 (Stats. 2022, ch. 47), regarding the court's finding on whether antipsychotic medication is appropriate for the defendant; and (2) SB 1223 (Stats. 2022, ch. 735) regarding mental health diversion eligibility. ***Status/Timeline:*** Anticipate circulating for comment in spring cycle, and effective September 1, 2023 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Justice system partners ***AC Collaboration:*** None	
6.	***Revise Petition for Resentencing Based on Health Conditions Due to Military Service***	***Priority 1(a), 1(b)***
		Strategic Plan Goal I, IV
	Project Summary: Develop a proposal to revise *Petition for Resentencing Based on Health Conditions Due to Military Service* (form CR-412) to implement SB 1209 (Stats. 2022, ch. 721). SB 1209 amends Penal Code section 1170.91 to allow a defendant to petition for recall and resentencing without regard to whether the defendant was sentenced prior to January 1, 2015. ***Status/Timeline:*** Anticipate circulating for comment in winter cycle, and effective September 1, 2023 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee	

#	New or One-Time Projects[4]	
7.	***Petitions and applications for relief under Penal Code section 653.29***	***Priority 1(a), 1(b)***
		Strategic Plan Goal I, IV
	Project Summary: Develop a proposal for new forms to implement Penal Code section 653.29, which allows record cleaning relief for persons with convictions for repealed Penal Code section 653.22, loitering with intent to commit prostitution. Penal Code section 653.29(f) requires the Judicial Council to "promulgate and make available all necessary forms to enable the filing of petitions and applications provided in this section." ***Status/Timeline:*** Circulating for comment in fall 2022, and anticipate effective March 1, 2023 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Justice system partners ***AC Collaboration:*** None	
8.	***Revising definition of firearm in multiple forms***	***Priority 1(a), 1(b)***
		Strategic Plan Goal I
	Project Summary: Develop a proposal to revise two mandatory protective forms, two firearm relinquishment forms, and two optional plea forms to reflect statutory changes to the definition of *firearm* in Penal Code section 16520(b), as amended by AB 1621 (Stats. 2022, ch. 76). ***Status/Timeline:*** Circulating for comment in fall 2022, and anticipate effective March 1, 2023 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Justice system partners ***AC Collaboration:*** None	

#	New or One-Time Projects[4]	
9.	***Revise record cleaning forms to reflect various statutory changes***	***Priority 1(a), 1(b)***
		Strategic Plan Goal I, IV
	Project Summary: Develop a proposal to revise various record cleaning forms to incorporate statutory changes made by AB 1281 (Stats. 2021, ch. 209), which specifies that a dismissal under Pen. Code, §§ 1203.4, 1203.4a, 1203.4b, or 1203.425 does not invalidate an unexpired criminal protective order; incorporate statutory changes made by AB 1793 (Stats. 2018, ch. 993), which automates record relief for specified marijuana-related convictions; and recommend a standard signature line for use by either counsel or a self-represented petitioner. AB 1803 (Stats. 2022, ch. 494; ability to pay reimbursement fees for dismissal petitions), SB 1106 (Stats. 2022, ch. 734; court prohibited from denying relief based on unpaid restitution or restitution fine), SB 731 (Stats. 2022, ch. 814; automated record relief under Penal Code section 1203.425), and AB 160 (Stats. 2022, ch. 771: extending relief under Penal Code section 1203.4b to individuals who participated in institutional firehouse programs) will also be implemented in this proposal. ***Status/Timeline:*** Anticipate circulating for comment in spring cycle, and effective January 1, 2024 , ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Reentry advocates, justice system partners ***AC Collaboration:*** None	
10.	***Develop rules and standards of judicial administration for remote criminal proceedings with working group***	***Priority 1(b)***
		Strategic Plan Goal I, III, IV, VI
	Project Summary: Develop rules of court and standards of judicial administration for remote criminal proceedings as required by Penal Code section 977(i), which was added by AB 199 (Stats. 2022, ch. 57). ***Status/Timeline:*** Anticipate circulating for comment in winter cycle, and effective July 1, 2023 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.*	

#	New or One-Time Projects[4]	
	Internal/External Stakeholders: Justice system partners ***AC Collaboration:*** Information Technology Advisory Committee, P3	
11.	***Amend Cal. Rules of Court, rule 4.421, circumstances in aggravation***	***Priority 1(b), 2(b)*** ***Strategic Plan Goal I***
	Project Summary: The committee will consider amending rule 4.421, circumstances in aggravation, for use by a jury when considering aggravating circumstances under Penal Code sections 1170(b)(2) and 1170.1(d)(2). These sections were amended by SB 567 (Stats. 2021, ch. 731), which requires charged aggravating factors to be proved to a jury. ***Status/Timeline:*** If going forward, anticipate circulating for comment in spring cycle, and effective January 1, 2024 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Justice system partners ***AC Collaboration:*** Criminal Jury Instructions Advisory Committee	
12.	***Revise firearm relinquishment form***	***Priority 1(f), 2(b)*** ***Strategic Plan Goal I***
	Project Summary: The committee will consider revising *Prohibited Persons Relinquishment Form Findings* (CR-210) based on feedback from the CA Department of Justice, Bureau of Firearms that additional information on the form would be helpful for tracking relinquishment compliance. ***Status/Timeline:*** If going forward, anticipate circulating for comment in spring cycle, and effective January 1, 2024 ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.*	

#	New or One-Time Projects[4]	
	Internal/External Stakeholders: CA Department of Justice, Bureau of Firearms ***AC Collaboration:*** None	
13.	***Rules and forms to implement the Racial Justice Act (AB 2542) and AB 256***	***Priority 1(b)*** ***Strategic Plan Goal I, IV***
	Project Summary: Develop a proposal for rules or forms to implement the Racial Justice Act (AB 2542) and AB 256. ***Status/Timeline:*** Anticipate circulating for comment in winter cycle, and effective September 1, 2024. ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Trial courts, justice system partners. ***AC Collaboration:*** None	
14.	***Revise the felony plea form***	***Priority 1(a), 1(b)*** ***Strategic Plan Goal I, IV***
	Project Summary: Develop a proposal to revise the felony plea form to incorporate a waiver of the right to a trial on aggravating factors that can be used to sentence the defendant to the upper term of a criminal offense or enhancement, to reflect statutory changes under SB 567 (Stats. 2021, ch. 731). ***Status/Timeline:*** Anticipate circulating for comment in spring cycle, and effective January 1, 2024. ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Trial courts.	

#	New or One-Time Projects[4]
	AC Collaboration: None

#	Ongoing Projects and Activities[4]	
1.	***Review recently enacted legislation***	***Priority 1***
		Strategic Plan Goal III
	Project Summary: Review enacted legislation that may have an impact on criminal court administration and propose rules and forms as may be appropriate for implementation of the legislation. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Governmental Affairs ***AC Collaboration:*** None	
2.	***Review pending legislation***	***Priority 1***
		Strategic Plan Goal III
	Project Summary: Review pending criminal law legislation and make recommendations as to whether the Judicial Council should support or oppose the legislation. Provide subject matter expertise on pending criminal law legislation. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Governmental Affairs	

#	Ongoing Projects and Activities[4]	
	AC Collaboration: None	
3.	***Criminal justice and mental health***	***Priority 1***
		Strategic Plan Goal III, IV
	Project Summary: Review pending legislation related to criminal justice and mental health, make recommendations as to whether the Judicial Council should support or oppose the legislation, and provide subject matter expertise on pending criminal justice and mental health legislation and related issues. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** Governmental Affairs ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee, Legislation Committee	
4.	***Provide subject matter expertise for other advisory committees***	***Priority 1***
		Strategic Plan Goal III
	Project Summary: Provide subject matter expertise for other advisory committees and working groups developing proposals involving or relevant to criminal law and procedure, including providing input to the Probate and Mental Health Advisory Committee, as requested, on the implementation of the CARE Act (SB 1338; Stats. 2022, ch. 319). ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.*	

#	Ongoing Projects and Activities[4]	
	Internal/External Stakeholders: Governmental Affairs ***AC Collaboration:*** Judicial Council advisory committees and working groups	
5.	***Participate in the Protective Orders Working Group***	***Priority 1*** ***Strategic Plan Goal III, IV***
	Project Summary: Continue participation in the Protective Orders Working Group, which assists in ensuring consistency and uniformity in the different protective orders used in family, juvenile, civil, criminal, and probate proceedings, and helps to develop and update protective order forms and rules of court. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ☐ *This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.* ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Family and Juvenile Law Advisory Committee, Civil and Small Claims Advisory Committee, Probate and Mental Health Advisory Committee	

III. LIST OF 2022 PROJECT ACCOMPLISHMENTS

#	Project Highlights and Achievements
1.	***Amend mental competency proceeding rule.*** In a May 2022 circulating order, the Judicial Council approved amendments to Cal. Rules of Court, rule 4.130, mental competency proceedings, to reflect statutory changes to various incompetent to stand trial code sections.
2.	***Revise motion and order to vacate conviction or sentence forms.*** At its September 2022 meeting, the Judicial Council approved revisions to forms CR-187 and CR-188, motion and order to vacate conviction or sentence, to reflect statutory changes to Penal Code section 1473.7(a)(1) and case law interpreting that section.
3.	***Adopt conviction relief forms.*** It is anticipated that at its November 2022 meeting, the Judicial Council will adopt new forms implementing Penal Code section 653.29, which allows petitions for relief from convictions for loitering with intent to commit prostitution.
4.	***Amend felony sentencing rules.*** At its March 2022 meeting, the Judicial Council approved amendments to multiple felony sentencing rules to implement changes to Penal Code sections 654, 1170, and 1385 made by ABs 124 and 518 and SBs 81 and 567.
5.	***Revise mandatory forms - Criminal Protective Order – Domestic Violence (form CR-160), Criminal Protective Order – Other Than Domestic Violence (form CR-161), and Order to Surrender Firearms in Domestic Violence Case (form CR-162).*** It is anticipated that at its November 2022 meeting, the Judicial Council will approve revisions to three mandatory forms to implement statutory changes and increase accessibility of the forms.
6.	***Review pending legislation.*** CLAC provided subject matter expertise or a recommended position on over 75 criminal law bills, including **AB 256**, Criminal procedure: discrimination; **AB 931**, Sentencing: dismissal of enhancements; **AB 960**, Medical parole; **AB 1223,** Mental Health Diversion; **AB 1209**, Veterans - Trauma – Resentencing; **AB 1613**, Theft: jurisdiction; **AB 1630**, Competence to stand trial: statewide application; **AB 1641,** sexually violent predators; **AB 1706**, Cannabis crimes: resentencing; **AB 1744,** Probation and mandatory supervision: flash incarceration; **AB 1750**, Controlled substances: treatment; **AB 1803**, Probation: ability to pay; **AB 1816,** Reentry Housing; **AB 1847**, Criminal procedure: victims' rights; **AB 1924,** Criminal law: certificate of rehabilitation; **AB 2017**, Evidence: hearsay: exceptions; **AB 2023,** Jails: discharge plans; **AB 2027**, Enhancements; **AB 2083**, Criminal procedure; **AB 2167**, Alternatives to Incarceration, **AB 2169**, Criminal Procedure; **AB 2435**, Jury instructions: lesser-related offenses; **AB 2799**, Jury instruction: creative expression; **SB 262,** Bail; **SB 357**, Crimes: loitering for the purpose of engaging in a prostitution offense; **SB 731**, Criminal records: relief; **SB 841,** Sexually violent predators; **SB 1034**, Sexually violent predators; **SB 1106**, Criminal Resentencing: Restitution; **SB 1129,** Felony murder: resentencing: peace officer victims; **SB 1171**, Hearsay evidence: exceptions: medical diagnosis or treatment; **SB 1178**, Criminal procedure: sentencing; and **SB 1262**, Courts: indexes.
7.	***Provide subject matter expertise for other advisory committees.*** The committee provided subject matter expertise to the Information Technology Advisory Committee on a proposal regarding remote access to criminal electronic records.

Item number: 04

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: February 16, 2023

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

Title of proposal: Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adopt Cal. Rules of Court, rule 5.806

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

*Staff contact (*name, phone and e-mail*): Tracy Kenny, 916-263-2838*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 2, 2021
Project description from annual agenda: Secure Youth Treatment Facility (SYTF) Offense Classification Matrix
Division of Juvenile Justice (DJJ) Realignment Trailer Bill (SB 92) requires the Judicial Council by July 1, 2023 to develop and adopt an offense classification matrix to be used by juvenile court judges when committing wards to secure youth treatment facilities. The statute requires that the council be advised by "a working group of stakeholders, which shall include representatives from prosecution, defense, probation, behavioral health, youth service providers, youth formerly incarcerated in the Division of Juvenile Justice, and youth advocacy and other stakeholders and organizations having relevant expertise or information on dispositions and sentencing of youth in the juvenile justice system." This working group would be charged with developing the matrix, circulating it for public comment, and then bringing its final product to the committee before it is submitted to the council for final approval.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
The legislation requiring the adoption of the matrix requires it to be in place by July 1, 2023, and required it to be developed by a working group with specified stakeholders who needed to consider an array of information. It circulated for comment for 45 days in a special cycle and a revised proposal has been prepared by the working group and approved by the Family and Juvenile Law Advisory Committee.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)
The Family and Juvenile Law Advisory Committee is recommending that this item be placed on the council's discussion agenda because it is the product of an unusual delegation of authority to the council to establish baseline terms for serious juvenile offenses.

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☒ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on March 23–24, 2023

Title
Juvenile Law: Secure Youth Treatment Facility Offense-Based Classification Matrix

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 5.806

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
July 1, 2023

Date of Report
January 26, 2023

Contact
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Stephanie Lacambra,
stephanie.lacambra-t@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends the adoption of a rule of court to implement Welfare and Institutions Code section 875(h), which requires the council to develop and adopt a matrix of offense-based classifications to be used by all juvenile courts when setting baseline terms for youth committed to a Secure Youth Treatment Facility (SYTF) disposition. The statute calls for the matrix to assign a baseline term of years to each offense for which a youth can be committed to an SYTF. The offenses are to be grouped into offense categories that are linked to a standard baseline term of years for each offense category. The proposed matrix in the rule would include four total offense categories, with each category assigned a range of years as the standard baseline term. To assist the court in determining a baseline term for each youth within the range, the rule sets forth criteria for the court to weigh in making its decision.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective July 1, 2023, adopt California Rules of Court, rule 5.806 to include the matrix for setting baseline terms as well as criteria for the court to apply when selecting a term within the range.

The proposed rule is attached at pages 13–17.

Relevant Previous Council Action

No previous action has been taken by the Judicial Council or one of its internal committees as this concerns the implementation of a new law and classification framework.

Analysis/Rationale

Background

Realignment of the Division of Juvenile Justice

In 2020, the Governor and the Legislature reached agreement on a framework to close the Division of Juvenile Justice (DJJ) and reallocate funding to counties to allow them to meet the needs of youth who would previously have been committed to the DJJ in local or regional programs. The details of this framework were spelled out in detail in Senate Bill 92 (Stats. 2021, ch. 18), which was enacted in May of 2021.

Senate Bill 92 added a new article to the Welfare and Institutions Code for secure youth treatment facilities that set forth a new dispositional option for juveniles ages 14 and over who are adjudicated for a Welfare and Institutions Code section 707(b) offense and for whom a less restrictive alternative disposition is unsuitable. If a court commits a youth to an SYTF disposition, it must set a baseline term of commitment that must "represent the time in custody necessary to meet the developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community."[1] This term is to be based on an offense-based classification matrix to be developed and adopted by the Judicial Council by July 1, 2023. In the interim, the baseline term is governed by the discharge consideration guidelines that apply to the DJJ, which can be found in California Code of Regulations, title 9, sections 30807 through 30813.

SYTF Offense-Based Classification Matrix Working Group

Senate Bill 92 specified that in developing the matrix, the council would be advised by a working group of stakeholders to include "representatives from prosecution, defense, probation, behavioral health, youth service providers, youth formerly incarcerated in the Division of Juvenile Justice, and youth advocacy and other stakeholders and organizations having relevant

[1] Welf. & Inst. Code, § 875(b).

expertise or information on dispositions and sentencing of youth in the juvenile justice system."[2] To fulfill this requirement, the Judicial Council's Family and Juvenile Law Advisory Committee established a subcommittee to perform this task, and solicited nominations from the public. On November 2, 2021, the Chief Justice appointed the members of the SYTF Offense-Based Classification Matrix Working Group (hereafter the working group) and they began meeting in mid-December of 2021 (see Attachment A).

The statute directed that the council take into account the following in its development process: "youth sentencing and length-of-stay guidelines or practices adopted by other states or recommended by organizations, academic institutions, or individuals having expertise or having conducted relevant research on dispositions and sentencing of youth in the juvenile justice system."[3] The working group held numerous meetings ensuring that it was informed by all of these sources before beginning work in earnest on developing the proposed matrix, hearing from another state juvenile justice agency that recently implemented a similar matrix after conducting a review of their data, a professor with expertise on length of stay and juvenile recidivism, as well as from leadership at the DJJ and from California probation departments. The working group also discussed how the proposed matrix relates to the goals, structure, and implementation of the 2020–21 DJJ realignment legislation, including the potential impact of the matrix on prosecutor decisions to maintain juvenile jurisdiction under the SYTF sentencing structure or to pursue transfer of the case to adult criminal court.

After the information-gathering phase was completed, the working group proceeded with the development of the matrix itself, beginning with a set of objectives designed to guide the rest of the process. The working group settled on three primary objectives for the matrix, as well as the following explanations of those objectives:

Positive Youth Development
A primary objective of a commitment to an SYTF must be an evidence-based and trauma-responsive effort to promote healthy adolescent development by providing positive incentives for long-term prosocial behavior, and targeting the treatment needs of the youth to ensure healing and rehabilitation. The ultimate goal of an SYTF commitment is to provide an enduring foundation to support successful reentry into the community, emphasizing family and community connections with extended support at the time of release from the SYTF.

Public and Community Safety
An SYTF commitment is only permissible when community safety and rehabilitation of the youth cannot be accomplished with a less restrictive disposition; thus, protecting the public and the community is a central objective of the matrix. To accomplish this goal, use of the matrix helps ensure that the term of commitment is no longer than necessary to protect the public, by working to prevent the likelihood that the youth will reoffend, but is of sufficient

[2] Welf. & Inst. Code, § 875(h)(1).

[3] Welf. & Inst. Code, § 875(h)(1).

length to assure the victim and the community that the harm committed can be redressed by the juvenile justice system in a developmentally appropriate manner and thus reduce the need for the youth to be transferred to criminal court.

Flexible and Fair Terms of Commitment
A baseline term should be based on the needs of the individual being committed, and not simply the seriousness of the offense for which the youth was adjudicated. Evidence demonstrates that recidivism is more highly correlated with the extent to which the treatment offered by the juvenile justice system can address the unique strengths and needs of individual youth, rather than the nature of the offense. The matrix provides flexibility for the court and positive incentives for the youth to reduce the baseline term. This flexibility is intended to meet the statutory mandate to "represent the time in custody necessary to meet the developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community."[4] This individualized approach must be balanced with the goal of the fair and just application of the matrix across California jurisdictions and an awareness that racial and ethnic disproportionality has been a failing of our juvenile justice system that all stakeholders must seek to remedy at each decision point.[5]

With these objectives in mind, the working group held a series of meetings, informed by a series of surveys of working group members, to determine the number of categories needed, assign each of the 707(b) offenses to those categories, and then assign the baseline term range to the category. The working group reached consensus early on that it would be preferable to provide the court with a range of years from which a baseline term could be selected to ensure that the key matrix objectives could be achieved. In addition, the working group reached consensus that implementing such an approach would require the court to exercise some structured discretion in selecting the baseline term, and thus the proposed rule sets forth some basic criteria to be evaluated by the court in setting the term.

Rule 5.806

Commitment to a secure youth treatment facility
Subdivision (a) (Eligibility) echoes the new Welfare and Institutions Code section 875(a), which defines when a youth may be committed to a secure youth treatment facility.

Setting the baseline term
The proposed rule directs the court when setting the baseline term to apply the range set forth in the matrix for the category under which the commitment offense falls and then to assign a specific term to each youth based on the court's review and consideration of four criteria. An analysis of these criteria will provide a basis for the court to more effectively accomplish the statutorily mandated goal that the term "represent the time in custody necessary to meet the

[4] Welf. & Inst. Code, § 875(b).

[5] The committee notes that these objectives which the matrix is designed to advance cannot be accomplished for youth committed to an SYTF by the matrix alone.

developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community."[6] To assist the court in applying the criteria, the rule includes a set of nonexclusive factors that the court may take into consideration in its review of each criterion.

- **Circumstances and gravity of the offense**
  The first criterion for the court to evaluate is the specific facts of the offense that resulted in the youth's commitment to the SYTF. Unlike the DJJ regulations that currently govern the expected length of stay in an SYTF, the proposed matrix does not put the same offense in different categories depending on the facts of the offense (e.g., whether a firearm was used or the degree of harm to the victim). Instead, the breadth of the ranges allows the court to look at all the specific offense factors in assessing the gravity of the offense in relationship to the appropriate baseline term. Specific proposed factors that the court is encouraged to consider include the severity of the offense, the extent of harm to the victims, the role of the youth and any co-participants, and any exculpatory circumstances.

- **Youth's history in the juvenile justice system**
  SYTF commitments are reserved for youth who were at least 14 when the offense was committed and who cannot be served in a less restrictive setting. Typically, such youth have prior history in the juvenile justice system and have continued to commit law violations despite less restrictive interventions. This criterion directs the court to evaluate any such prior history and suggests that it weigh factors including prior offense history, the success of prior rehabilitative efforts, and the environmental and family system factors that may have influenced the youth's prior involvement in the juvenile justice system.

- **Confinement time necessary to rehabilitate the youth**
  This criterion directly reflects the statutory language on the baseline term and ensures that the commitment is focused on the individual rehabilitation of the youth. The factors that the court should focus on include the programming that the youth has already received and what programming the court anticipates the youth will need in the SYTF, as well as the youth's specific circumstances and characteristics that may influence the time needed to be rehabilitated, such as specific mental health or substance abuse needs or being pregnant or currently parenting a child.

- **Youth's developmental history**
  This criterion calls on the court to consider the maturity of the youth as well as the youth's exposure to trauma (including involvement in the child welfare system) and its impact on the youth's development and maturity. This criterion takes into account the significant role that developmental immaturity plays in influencing antisocial behavior in

[6] Welf. & Inst. Code, § 875(b).

youth and the objective that the SYTF promote prosocial positive youth development as the key factor in preventing recidivism when the youth is returned to the community.

Adjusting the baseline term at the progress review hearings

Welfare and Institutions Code section 875 provides that the court review the progress of each youth committed to an SYTF at least every six months, and that at each hearing the court may reduce the youth's baseline term by up to six months. The statute also provides that the matrix may provide for positive incentives for youth. The proposed rule would incorporate positive incentives into this progress review process by requiring the probation agency to track the youth's positive behavior in a systematic way and to report on those results at the progress review hearing, as well as to make a recommendation to the court on any reduction in the baseline term that should be ordered based on the youth's behavior. The working group proposed this approach to positive incentives because it incorporates the evidence-based practice of positive behavioral incentives in a manner that allows each SYTF program the flexibility needed to implement a specific behavioral incentive structure.

Offense-based classification matrix

Subdivision (d) of the proposed rule contains the matrix that is required by the statute. It divides the 30 listed offenses in Welfare and Institutions Code section 707(b) into four categories, A through D, and assigns each category a range of baseline terms from which the court can select a specific term for each commitment. Category A contains murder, kidnapping with bodily harm involving death or substantial injury, and torture, for which the range of baseline terms is 4 to 7 years. Thus, for a youth committed to an SYTF for an offense in Category A, the court would need to select a baseline term of at least 4 and no more than 7 years. Category B contains the most serious sex offenses, the kidnapping offenses that do not result in death or substantial injury, attempted murder, and voluntary manslaughter, and has a range of 3 to 5 years. Category C contains many of the most commonly adjudicated 707(b) offenses, including arson, robbery, serious assaults, and carjacking, and has a range of 2 to 4 years. Category D has only two offenses, the one controlled substance offense in section 707(b) and witness intimidation, and has a range of 1 to 2 years.

The committee intentionally created ranges with some overlap in recognition of the great variety of variables and factors present for each youth and their committing offenses. The proposed matrix ensures that there will be adequate time to provide rehabilitative services to the youth and protect community safety, while also providing ample opportunities for the youth to demonstrate positive development and to have the baseline term reduced at the six-month progress review hearings. Offenses were grouped based on their underlying severity, with an eye toward maintaining consistency with the DJJ guidelines, as well as an estimate of the level of programming needed to address the behavior, with the ranges providing a level of flexibility that ensures that the matrix can be applied to each youth fairly, taking into account their specific needs and the risks that they pose to the community.

Policy implications

The recommended rule will further the policy of transferring the jurisdiction of youth from the Division of Juvenile Justice to local county jurisdictions in accordance with the new law. Providing a structured matrix for the exercise of judicial discretion in setting the baseline terms for the transfer of youth out of the DJJ promotes statewide consistency and provides a road map that courts can follow for compliance with the statutory authority for the closure of the DJJ.

Comments

This proposal was circulated for public comment from September 23 to November 4, 2022, as part of a special invitation to comment cycle. Ten organizations (including five district attorney offices, the California District Attorneys' Association, the Chief Probation Officers of California, the Pacific Juvenile Defender Center and two superior courts), one coalition of 33 organizations, and four individuals submitted comments on this proposal. Two commenters agreed with the proposal. Ten organizations agreed if the proposal was modified, and three individual commenters did not indicate a position but expressed significant reservations about some aspects of the proposal. A chart with the full text of the comments received and the committees' responses is attached at pages 18–68.

Comments on modifying the proposed sentencing ranges

Both a large coalition of youth advocates and the Pacific Juvenile Defender Center recommended modifying the lower end of the range for Category C offenses from 2 years to 18 months because under existing regulations for the DJJ, adjudications for two of the Category C offenses, Penal Code sections 211 ("unarmed robbery") and 245(a)(4) ("assault by means likely to cause great bodily injury") currently have a minimum confinement of 18 months. These commenters raised concerns that the proposed rule would increase the potential sentences for these offenses by a third, thus lengthening the potential incarceration time, contrary to the goals of DJJ realignment and the statutory mandate.

The working group reviewed and discussed the commenters' concerns, but believes that two years is the appropriate bottom of the range for Category C because these SYTF commitments are intended to be imposed only for youth whose behavior cannot be addressed in a less restrictive setting. The committee notes that while two years is the initial minimum baseline term, all youth committed to this disposition will have their progress reviewed every six months and can earn a reduction of up to six months at each of those review hearings. As a result, a two-year baseline term might be reduced to a one-year term if the youth is accomplishing their rehabilitative goals. In addition, youth can make a motion for a step-down in programming at each review hearing, if appropriate. For these reasons, the committee has concluded that the two-year minimum is not likely to result in an increase in confinement time for these offenses, and will serve as a reminder that SYTF commitments are to be used sparingly, and only when less restrictive alternatives are not appropriate.

A number of commenters, including the California District Attorneys Association and four district attorneys, raised concerns that the SYTF matrix sentencing ranges did not reflect the maximum commitment time available before youth would age out of the juvenile court's

jurisdiction for the listed offenses and were not severe enough to promote accountability, protect community safety, and allow for the flexibility and time needed to address the rehabilitative needs of confined youth. They proposed that the range for Category A be extended to be 5 to 11 years. In addition, some individual commenters recommended increases in all the ranges other than Category D to make them a bit broader.

After further discussion and review, the committee concluded that the 4- to 7-year range for Category A is sufficient to provide substantial time and flexibility to achieve rehabilitation for the most serious juvenile offenses. Seven years was the discharge guideline for the DJJ, and the committee found no evidence that this term was insufficiently long to provide programming and treatment for these youth. The committee concurs that courts need flexibility and that is why a range of years is proposed rather than one set term. The committee also considered the significant time that these adjudications can take and the information that the court has been able to gather about the youth's progress in treatment while in juvenile detention. The 4- to 7-year term will provide the court with flexibility while also ensuring that youth with the most serious needs can receive extended programming and intervention for up to 7 years, with the opportunity to extend by an additional year if the youth still poses an imminent risk of harm to the community. A term longer than 7 years seems punitive rather than rehabilitative, and therefore at odds with the objectives of the juvenile court.

Comments on modifying the categorization of offenses within the matrix

The Orange County and Yolo County district attorneys proposed moving some of the more serious offenses—kidnapping, attempted murder, torture, and aggravated mayhem—into Category A, in part because portions of some of these offenses were previously in DJJ Category I and they warned that failing to increase the sentencing ranges by shifting the offenses into a higher sentencing category will lead to an increase in the number of transfer requests to adult criminal court, resulting in a "net widening" of juveniles tried as adults. The San Diego County district attorney proposed that forcible sex crimes also be listed in this category because of the current limits on transfer to criminal court (note that they were not in DJJ Category I but in Category II). The Los Angeles County District Attorney's Office recommended that the one sex offense in Category C, "(6) A lewd or lascivious act, as provided in Penal Code section 288(b)," be moved to Category B.

The committee agreed with most of this suggestion in its recommendation and moved "Torture, as described in Penal Code sections 206 and 206.1" and "Kidnapping with bodily harm resulting in death or substantial injury" into Category A. This change will make Category A consistent with DJJ Category I and therefore reduce any incentive to seek transfer motions for these offenses as an unintended consequence of the adoption of the matrix. The committee has left all other "kidnapping with bodily harm" offenses that do not result in death or substantial injury in Category B, also consistent with the DJJ categorization, and in recognition that Category A has a very high maximum term that should be reserved for only the most serious offenses.

While attempted murder and aggravated mayhem are serious crimes, the former was in DJJ Category II and the latter in DJJ Category III, while both are in Category B of rule 5.806. The

committee believes that a baseline term of 3 to 5 years is appropriate for these offenses. In its work to assign each of the 707(b) offenses to a category, the committee was significantly guided by the DJJ categories, and the resulting matrix is mostly consistent in its assignment of offenses.

One exception is the offenses in Penal Code section 288(b), which the committee assigned to proposed Category C, when it had been assigned to DJJ Category II, because there is a qualitative difference between most of these offenses and the forcible sex offenses listed in Welfare and Institutions Code section 707(b). The committee agreed that Penal Code section 288(b) charges can encompass a broad range of circumstances and that the range for Category C adequately addresses that range. The committee noted that because the matrix in rule 5.806 has ranges rather than set terms, the court can set a baseline term for this offense at up to 4 years, which is the same as the DJJ Category II guideline. With this flexibility, the committee believes that the term for Category C will allow for the court to address these cases appropriately, providing longer terms when needed and shorter terms in those cases that require less extensive interventions.

Comments on modifying the factors for consideration in sentencing

A coalition of juvenile justice advocates requested that the factor for the court to consider in rule 5.806(b)(3)(B)—capacity of the SYTF to provide suitable treatment and education for the youth—be removed because it was outside the youth's control and should not be used to extend the baseline term of commitment. An individual commenter suggested that the factor in subdivision (b)(4)(E)—discrimination experienced by the ward based on gender, race, ethnicity, sexual orientation, or other factors—be eliminated because any social disparities that can be attributed to such factors are captured by other paragraphs of subdivision (b)(4).

The committee agrees that no youth should receive a longer baseline term because of a factor outside the youth's control and in response has amended subdivision (b) of the proposed rule to expressly include that "[t]he court must select a baseline term that is no longer than necessary to meet the developmental needs of the youth and to prepare the youth for discharge to a period of probation supervision in the community. Enumerated factors listed below that are outside the youth's control must not result in a longer baseline term than otherwise needed to meet this objective." Accordingly, inadequate SYTF program capacity or trauma from past discrimination should not result in a longer baseline term. The committee concluded that these factors may be taken into account, when appropriate, so long as they do not mechanically extend the baseline term.

Some commenters requested that the rule explicitly articulate that the factors contained in rule 5.806(b)(4) are intended to be used only as mitigating factors in support of lower commitments. When the working group developed the list of factors, it decided not to flag them as mitigating or aggravating because the goal was a holistic review of the youth. Instead, the committee has amended proposed subdivision (b) to include clarifying language that factors beyond the youth's control should not result in a longer baseline term.

Comments regarding progress review provisions of rule 5.806
Two commenters suggested that rule 5.806 should allow for the court to make upward adjustments to the baseline term at the progress review hearings for youth committed to an SYTF to respond to the progress of the youth in the program and deter the filing of transfer motions. The committee understands the concern but was restricted from including such authority in the rule as section 875(e)(1) provides that the court can only reduce or maintain the baseline term at each progress review. One commenter was concerned about the phrase "probation departments operating a secure youth treatment facility" in a provision of the rule requiring that probation implement a system for tracking the positive behavior of youth in the SYTF and report to the court on any downward adjustment that should be made based on that behavior because the rule only referred to probation departments, and not to other entities that might operate an SYTF. The committee concluded that the rule was appropriate in its application to probation departments which serve as an arm of the juvenile court and concluded that this provision of the rule would not apply to an entity other than probation operating an SYTF. The committee declined to address such a contingency in the rule because no such facility is currently operating or planned, and thus the committee does not have sufficient information to craft an alternative rule within the rulemaking authority of the council.

Issues outside the scope of the proposal
The committee also received comments seeking to revise the proposal in ways that went beyond the scope of the statutory delegation to the council and appeared to require further legislative clarification. These included a suggestion that the rule of court prohibit plea bargaining involving the provisions of the rule as well as a suggestion that the rule of court require courts to collect and publish data about SYTF commitments and baseline terms.

The committee recognized that setting a baseline term is plainly a judicial function under section 875 but notes that the statute makes no reference to plea bargaining or any limitations on plea bargaining with regard to baseline terms. Existing case law allows plea bargains in juvenile matters, and the Legislature neither changed that law in the new statute, nor delegated such action to the council. The committee notes that the court is never required to accept a plea bargain and that a youth and the youth's counsel are under no obligation to agree to a plea bargain if they would prefer to seek a judicial resolution.

The committee understood that transfer motions may be used as leverage by some prosecuting attorneys to secure an agreement to a longer baseline term but notes that these motions can only be brought for older youth and now require the prosecution to show by clear and convincing evidence that the youth cannot be rehabilitated under juvenile court jurisdiction and that determination must be made by the court. Thus, even youth subject to transfer have options other than a stipulation if they wish to have the juvenile court make these determinations.

The committee also recognized the vital role that data collection and analysis play in ensuring that baseline terms are applied fairly across California, but the statute does not require any data collection and reporting. Placing such a requirement on the courts, who are not part of a statewide juvenile justice data collection system, would be a significant workload burden for

which the council would need to seek public comment from the courts. The committee is hopeful that existing efforts at the state level led by the Department of Justice will result in an effective and efficient means of collecting such data in a manner that can be used by to ensure that courts are applying the matrix fairly. In the meantime, the committee has tried to address this issue within its charge by adding a sentence to the advisory committee comment encouraging courts and probation to monitor implementation of this rule to ensure that it is fairly and consistently applied.

Alternatives considered

The committee considered a number of revisions to the matrix rule based on the comments, including whether to reduce the bottom of the range for Category C to 18 months, and to increase the range for Category A from 4 to 7 years to 5 to 11 years. For the reasons described above, the committee concluded that the matrix ranges as circulated for comment were appropriate.

As the working group was developing the matrix proposal it spent considerable time discussing alternative approaches to the rule that circulated for comment and is proposed here. One of the threshold issues was whether the matrix should provide for just one baseline term for each category, like the current regulations that apply to DJJ commitments, or if more flexibility was preferred. The working group had strong consensus that a more flexible approach was best suited to address individual case circumstances and to determine the appropriate baseline term for each youth. This was seen as preferable to applying a fixed term of years for each offense category subject to deviations up or down.

Similarly, the working group considered including risk and needs assessments in the matrix to provide for longer terms for higher risk youth and lower terms for those with lower risk scores. However, the working group concluded that too many measures of risk and need reinforce racial and ethnic biases and disparities, and that it would be unworkable to require all courts and probation agencies to use one risk assessment tool. Thus, the working group opted instead to require the court to consider the factors in each case when selecting the baseline term for each youth and to articulate its analysis on the record to promote transparency and prevent bias.

The working group also considered whether the matrix should include credits for time served as authorized in the statute but concluded that a separate credit system was not necessary because under current law, pre-commitment confinement time must already be credited against the youth's maximum confinement time. Additionally, the proposed criteria for selecting a term of years within a category range permits the judge to take into account the amount of time the youth has already spent in custody. The working group was mindful that in some cases, youth spend excessive time in predisposition detention such that they may be subject to extended time in secure confinement, but noted that recent trailer bill clarifications expressly authorize the court to set a maximum confinement time that is less than the statutorily allowable maximum, and that this provision provides a safety valve to prevent excessive confinement without including day-for-day credits against the baseline term for predisposition detention time.

Fiscal and Operational Impacts

Implementation of SB 92 will create new costs, primarily derived from the legislation rather than the matrix. Judges, probation agencies, prosecutors, and defense counsel will need to be trained on the structure and requirements of the proposed rule and matrix. Case management systems may need to be modified to track relevant information. Probation agencies will need to ensure that they are tracking the positive behavior of the youth committed to their SYTF programs and can collect needed information to make a recommendation to the court at each progress review hearing on reductions that should be made to the baseline term as a reward for positive behavior. Notably, two courts indicated that three months would not be enough time to implement the rule, but given the firm statutory deadline, the rule must become effective by July 1, 2023.

Attachments and Links

1. Cal. Rules of Court, rule 5.806 at pages 13–17
2. Chart of comments, at pages 18–68
3. Attachment A: Secure Youth Treatment Facility Offense-Based Classification Matrix Working Group Roster
4. Link A: Welf. & Inst. Code, § 875, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=297.&lawCode=WIC*

Rule 5.806 of the California Rules of Court is adopted, effective July 1, 2023, to read:

Rule 5.806. Secure youth treatment facility baseline term

(a) Category for baseline term based on most serious recent offense

If the court orders the youth committed to a secure youth treatment facility, the court must set a baseline term of months, years, or months and years falling within the range for the offense category, based on the most serious recent offense that is the basis for the youth's commitment to the secure youth treatment facility, as provided in the matrix contained in (d) of this rule.

(b) Selecting the baseline term with the range for the offense category

The baseline term must be set by the court based on the individual facts and circumstances of the case. In its selection of the individual baseline term, the court must review and consider each of the criteria listed in paragraphs (1) through (4). When evaluating each of the criteria, the court may give weight to any relevant factor, including but not limited to the factors listed below each one. The court must select a baseline term that is no longer than necessary to meet the developmental needs of the youth and to prepare the youth for discharge to a period of probation supervision in the community. Enumerated factors listed below that are outside the youth's control must not result in a longer baseline term than otherwise needed to meet this objective. The court must state on the record its reasons for selecting a particular term, referencing each of the criteria and any factors the court deemed relevant.

(1) *The circumstances and gravity of the commitment offense*

(A) The severity and statutory degree of the offense for which the youth has been committed to the secure youth treatment facility;

(B) The extent of harm to victims occurring as a result of the offense;

(C) The role and behavior of the youth in the commission of the offense;

(D) The role of co-participants or victims in relation to the offense; and

(E) Any exculpatory circumstances related to the commission of the offense including peer influence, immaturity or developmental delays, mental or physical impairment, or drug or alcohol impairment.

(2) *The youth's prior history in the juvenile justice system*

(A) The youth's offense and commitment history;

(B) The success of prior efforts to rehabilitate the youth; and

(C) The effects of the youth's family, community environment, and childhood trauma on the youth's previous behavior that resulted in contact with the juvenile justice system.

(3) *The confinement time considered reasonable and necessary to achieve the rehabilitation of the youth*

(A) The amount of time the youth has already spent in custody for the current offense and any progress made by the youth in programming and development;

(B) The capacity of the secure youth treatment facility to provide suitable treatment and education for the youth;

(C) Special needs the youth may have in relation to mental health, intellectual development, academic or learning disability, substance use recovery, and other special needs that must be addressed during the term of confinement;

(D) Whether the youth is pregnant, is a parent, or is a primary caregiver for children; and

(E) The availability of programs and services in the community to which the youth may be transitioned from secure commitment to less restrictive alternatives.

(4) *The youth's developmental history*

(A) The age and overall maturity of the youth;

(B) Developmental challenges the youth may have in relation to mental health, intellectual capacity, educational progress or learning disability, or other developmental deficits, including specific medical or health challenges;

(C) The youth's child welfare and foster care history including abandonment or abuse by parents or caregivers or the incarceration of parents;

(D) Harmful childhood experiences including trauma and exposure to domestic or community violence, poverty, and other harmful experiences; and

(E) Discrimination experienced by the ward based on gender, race, ethnicity, sexual orientation, or other factors.

(c) Adjusting the baseline term at review hearings

As provided in Welfare and Institutions Code section 875(e)(1), the court must review the progress of a youth committed to a secure youth treatment facility at least every six months, and may modify the baseline term downward by up to six months at each hearing. To provide an incentive for each youth to engage productively with the individual rehabilitation plan approved by the court under section 875(b)(1), each probation department operating a secure youth treatment facility must implement a system to track the positive behavior of the youth in a regular and systematic way and report to the court at every progress hearing on the youth's positive behavior, including a recommendation to the court on any downward adjustment that should be made to the baseline term in recognition of the youth's positive behavior and development. In developing this recommendation, the probation department must consult with and report on the input of all other agencies or entities providing services to the youth.

(d) Secure youth treatment facility offense-based classification matrix

The court must select a baseline term within the range set for the category that has been assigned to the Welfare and Institutions Code section 707(b) commitment offense as provided in this matrix:

Category	Offense *(Listed with reference to paragraph within section 707(b))*	Term
A	(1) Murder. (11) Kidnapping with bodily harm involving death or substantial injury. (23) Torture, as described in Penal Code sections 206 and 206.1.	4 to 7 years
B	(4) Rape with force, violence, or threat of great bodily harm. (5) Sodomy by force, violence, duress, menace, or threat of great bodily harm. (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. (8) An offense specified in Penal Code section 289(a). (9) Kidnapping for ransom.	3 to 5 years

	(10) Kidnapping for purposes of robbery. (11) Kidnapping with bodily harm not involving death or substantial injury. (12) Attempted murder. (24) Aggravated mayhem, as described in Penal Code section 205. (26) Kidnapping for purposes of sexual assault, as punishable in Penal Code section 209(b). (27) Kidnapping, as punishable in Penal Code section 209.5. (29) The offense described in Penal Code section 18745. (30) Voluntary manslaughter, as described in Penal Code section 192(a).	
C	(2) Arson, as provided in Penal Code section 451(a) or (b). (3) Robbery. (6) A lewd or lascivious act, as provided in Penal Code section 288(b). (13) Assault with a firearm or destructive device. (14) Assault by any means of force likely to produce great bodily injury. (15) Discharge of a firearm into an inhabited or occupied building. (16) An offense described in Penal Code section 1203.09. (17) An offense described in Penal Code section 12022.5 or 12022.53. (18) A felony offense in which the minor personally used a weapon described in any provision listed in Penal Code section 16590. (21) A violent felony, as defined in Penal Code section 667.5, that also would constitute a felony violation of Penal Code section 186.22(b). (22) Escape, by the use of force or violence, from a county juvenile hall, home, ranch, camp, or forestry camp in violation of Penal Code section 871(b) if great bodily injury is intentionally inflicted on an employee of the juvenile facility during the commission of the escape. (25) Carjacking, as described in Penal Code section 215, while armed with a dangerous or deadly weapon. (28) The offense described in Penal Code section 26100(c).	2 to 4 years
D	(19) A felony offense described in Penal Code section 136.1 or 137. (20) Manufacturing, compounding, or selling one-half ounce or more of a salt or solution of a controlled substance specified in Health and Safety Code section 11055(e).	1 to 2 years

Advisory Committee Comment

In developing the matrix for baseline terms required by Welfare and Institutions Code section 875, the committee sought to accomplish three primary goals that should serve as objectives for the court when setting a baseline term: positive youth development, public and community safety, and the establishment of flexible and fair commitment terms.

A primary objective of a commitment to a secure youth treatment facility must be an evidence-based and trauma-responsive effort to promote healthy adolescent development. This objective will be achieved by providing positive incentives for prosocial behavior, focusing on the treatment needs of the youth to ensure healing and rehabilitation, and with a persistent focus on the end goal of successful reentry into the community. The flexibility inherent in the matrix is intended to result in a baseline term of commitment that is no longer than necessary to protect the public but is of sufficient length to assure the victim and the community that the harm committed can be redressed by the juvenile justice system in a developmentally appropriate manner and thus reduce the need for the youth to be transferred to criminal court.

A baseline term should be based on the needs of the individual being committed and not simply the seriousness of the offense for which the youth was adjudicated. This individualized approach must be balanced with the goal of fair and just application of the matrix across California jurisdictions and an awareness that racial and ethnic disproportionality has been a failing of our juvenile justice system that all stakeholders must seek to remedy at each decision point. To advance this goal the advisory committee encourages juvenile courts and probation departments to monitor implementation of this rule to ensure that it is fairly and consistently applied.

SP22-14

Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
1.	California Alliance for Youth and Community Justice, by Israel Villa Deputy Director W. Haywood Burns Institute Coalition, Oakland, by Laura Ridolfi Policy Director Human Rights Watch Elizabeth Calvin, by Senior Advocate, Children's Rights 3rd Street Youth Center & Clinic Joi C. Jackson-Morgan Executive Director Center on Juvenile and Criminal Justice Brian Goldstein Director of Policy and Development Children's Defense Fund-California Aditi Sherikar Youth Justice Policy Associate Club Stride Rhonda Renfro Executive Director Community Interventions Ucedrah Osby	AM	Thank you for the invitation to comment on proposed California Rule of Court, rule 5.806 related to Secure Youth Treatment Facility Offense-Based Classification Matrix. We write to express general support for the proposed rule. We are pleased to see that it shifts from an offense-based classification structure with a fixed time based solely on offense to one that allows for a range of time aimed to address the unique strengths and needs of individual youth. We believe that this flexibility will allow courts to meet the statutory mandate "to represent the time in custody necessary to meet the developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community." We are, however, concerned about several components. Our recommendations for changes are below. We thank the Judicial Council and the Workgroup for your hard work. We believe our suggestions will assist in ensuring that the rules are aligned with the existing law, and promote community safety and equity. See comments on specific provisions below.	No response required. The committee appreciates the attention to this proposal from this broad stakeholder coalition and the overall support for the flexible approach in the proposed matrix. See responses to specific issues below.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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	Commenter	**Position**	**Comment**	**Committee Response**
	Executive Director Communities United for Restorative Youth Justice John Vasquez Policy & Legal Services Manager CARAS Marty Estrada Director of Community Development Community Works Kyle Magallanes Castillo Deputy Director Fresh Lifelines for Youth Cassidy Higgins Chief Strategy Officer End Poverty in CA Jasmine Dellafosse Director of Organizing + Community Engagement Fresno Barrios Unidos Ruben Espinoza Policy Advocate Fresno County Public Defender's Office JoAnna Edwards Chief Defense Attorney - Juvenile Division			

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	Humboldt County Transition Age Youth Collaboration Kelsey Reedy Youth Organizer, Youth Advocacy Board Leaders			
	Humboldt County JJDPC Mark Taylor Commissioner			
	Indigenous justice Morning Star Gali Project Director			
	MILPA Cesar Lara Programs and Policy Director			
	National Institute for Criminal Justice Reform David Muhammad Executive Director			
	Pacific Juvenile Defender Center Alisa Blair Policy Director			
	Restore 180 Misty L. Franklin Executive Director			
	San Francisco Court Appointed Special			

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Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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	Commenter	**Position**	**Comment**	**Committee Response**
	Advocates Kate Durham Executive Director San Mateo County Private Defender Program Ron Rayes Managing Attorney Juvenile Division Santa Cruz Barrios Unidos Sam Cunningham Youth Outreach Specialist Sigma Beta Xi, Inc. Jessica Aparicio Director of Engagement & Social Impact Silicon Valley De-Bug Andrew Bigelow Participatory Defense Organizer Sunset Youth Services Dawn Stueckle Executive Director Urban Peace Movement Sandy Valenciano Campaign and Organizing Director Young Women's Freedom Center Analisa Ruiz			

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	Policy Director Youth ALIVE! Anne Marks Executive Director Youth Alliance Diane Ortiz CEO Youth Law Center Meredith Desautels Staff Attorney			
2.	California District Attorneys' Association By Tim Ward, Tulare County District Attorney, California District Attorneys' Association President	AM	CDAA is committed to the overarching goals of the Juvenile Court in its approach to Minors under its jurisdiction. "Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstance." (Welf. & Inst. Code § 202(b).) We are guided by both the pursuit of public safety and the care and treatment that is in the best interest of Minors in juvenile court. We agree that Minors are deserving of an individualized approach under this matrix. Further, we agree that flexibility must be built into the system to allow for the proper creation	The committee shares the goal of ensuring that juvenile justice courts carry out their statutory mandate as set forth in section 202. The committee appreciates the support for its overarching objectives for the matrix and the emphasis on fair and flexible baseline terms to meet the individual needs of youth committed to an SYTF.

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			of a path forward into ensured healing, rehabilitation, and eventual reentry of the Minor into the community. Finally, we applaud the inclusion of adverse childhood experiences of the Minor into the algorithm of variable in determining what is a fair and flexible term of confinement.	
			Like you, we want the Minors who enter into juvenile court to emerge as community members and neighbors. We want age appropriate and developmentally appropriate dispositions that have the best opportunity to redress the circumstances of a Minor's experience. We want to identify the most traumatized and we want to give them the best shot possible.	The committee notes this common purpose to ensure that the SYTF commitment will meet the developmental needs of youth and provide for rehabilitation.
			Thank you for your thoughtful approach to this important work and consideration of our amendments.	No response required.
			See comments on specific provisions below.	See responses to specific comments below.

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3.	Chief Probation Officers of California By Rosemary Lamb McCool, Deputy Director	AM	The Chief Probation Officers of California (CPOC) write to offer our public comment to the draft Juvenile Law: Secure Youth Treatment Facility (SYTF) Offense-Based Classification Matrix released on September 22, 2022. We commend the Judicial Council, Family and Juvenile Law Advisory Committee and the SYTF Sentencing Matrix Workgroup for their dedication and thoughtfulness towards the drafting this proposal. We offer our comments to further the intent of the matrix and state our overall support of the work in total while noting additional areas we believe should be considered as outlined below. We respectfully ask the Judicial Council and workgroup to consider and discuss the following additions to the matrix: See comments on specific provisions below.	The committee appreciates the review of its proposal by the Chief Probation Officers of California, and its overall support for the proposal. See responses to specific comments below.
4.	Chris [Last name not provided]	N	See comments on specific provisions below.	See responses to specific comments below.

SP22-14

Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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	Individual from Oxnard			
5.	Community Agency for Resources, Advocacy and Services (C.A.R.A.S.) By Marty Estrada, Director of Community Development, Gilroy	AM	Thank you for the invitation to comment on proposed California Rule of Court, rule 5.806 related to Secure Youth Treatment Facility Offense-Based Classification Matrix. We write to express general support for the proposed rule. We are pleased to see that it shifts from an offense-based classification structure with a fixed time based solely on offense to one that allows for a range of time aimed to address the unique strengths and needs of individual youth. We believe that this flexibility will allow courts to meet the statutory mandate "to represent the time in custody necessary to meet the developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community." We are, however, concerned about several components. Our recommendations for changes are below. See comments on specific provisions below.	The committee appreciates the review of its proposal and the overall support for the approach taken in the matrix. See responses to specific comments below.
6.	Thomas Harp Sacramento	NI	Flexible and Fair commitment - The more flexible commitments are, the more room you give potential biases to manifest. The proposal states that "...racial and ethnic disproportionality has been a failing of our juvenile justice system..." If this is true, the only way to eliminate all bias is to eliminate the ability to sentence those who the system is biased toward to longer sentences to those it's biased against.	The committee notes that there is a tension between providing flexibility to meet individual needs and ensuring that youth with similar circumstances are treated similarly, but trusts that judges, with the guidance provided in rule 5.806(b) will be able to fairly apply the matrix.

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			See comments on specific provisions below.	See responses to specific comments below.
7.	Los Angeles County District Attorney's Office By Frank C. Santoro, II Assistant Head Deputy Juvenile Division	AM	See comments on specific provisions below.	See responses to specific comments below.
8.	Orange County District Attorney Todd Spitzer	NI	See comments on specific provisions below.	See responses to specific comments below.
9.	Pacific Juvenile Defender Center By, Brooke Harris Executive Director & Laurel Arroyo President, on Behalf of the PJDC Board of Directors	AM	We write with comments related to the Secure Youth Treatment Facility Offense-Based Classification Matrix ("Matrix"), and the proposal to adopt rule 5.806 of the California Rules of Court. We support adoption of the proposed matrix in its current form, with the additions and clarifications explained below. The Pacific Juvenile Defender Center (PJDC) was founded in 1999 as an affiliate of the National Juvenile Defender Center (now the Gault Center) with an overall mission to promote justice for all youth by ensuring excellence in juvenile defense and advocating for systemic reforms to the delinquency system. Today, PJDC has a membership of over 1,600 defenders and advocates across California. To further its mission, PJDC engages its members through four main areas: (1) Training and Technical Assistance; (2) Communications and Outreach; (3) Research and (4) Policy and Legal Reform. We strongly support a number of elements of	The committee appreciates the review of the Pacific Juvenile Defender Center and its support for the structure and goals of the proposed matrix. No response required. The committee appreciates the support for many

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			the current proposal. These include the three identified primary objectives for the matrix; the move to range categories; the direction to the court to set the range based on youth- and offense-specific factors; the requirement that probation departments track and report on the youth's positive behavior and achievements at each six-month progress review hearing; and the recognition that the court should consider time the youth has already spent in detention and any pre-adjudication progress in treatment when setting the baseline term. These aspects of the proposed Matrix are consistent with positive youth development principles and provide important guidance to the court when considering an SYTF disposition. We also have several concerns about the proposed Matrix, and request the Committee make adjustments to the proposal before finalizing and adopting rule 5.806. See comments on specific provisions below.	of the key provisions and objectives of the matrix proposal. See responses to specific comments below.
10.	Jeff Rhoades Senior Deputy Probation Officer Sacramento County Probation	AM	I've taken the time to review the SYTF Classification Matrix. I believe this will be helpful to guide Court decisions and provide a degree of fairness and uniformity for SYTF commitments across the state. I also generally agree with the principles of the proposal, the concept of offering a range for base terms, and most of the factors considered when setting a	The committee appreciates the time taken to review this proposal and the support for the principles underlying the matrix.

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			base term. Since it was specifically requested that Juvenile Justice Stakeholders provide comments, I will briefly mention my background. I have worked in Juvenile Probation for the past 10 years. In the last 6 years, I have been directly involved with DJJ reentry support and field supervision. I am actively involved in my Department's efforts to transition to the SYTF program. My critiques of this proposal are below: See comments on specific provisions below.	No response required. See responses to specific comments below.
11.	Ryan [Last name not provided] Deputy Probation Officer Sacramento County Probation	N	See comments on specific provisions below.	See responses to specific comments below.
12.	San Diego County District Attorney Summer Stephan	AM	Incarceration within the Juvenile Justice System, when necessary, is focused on rehabilitation and restoration of youth so they can thrive when returned to our communities. At the San Diego District Attorney's Office, we take this seriously and have implemented reforms that invest in our youth early to prevent or address trauma and break the cycles of abuse, addiction and violence. In 2021, we began the Juvenile Diversion Initiative (JDI) which provides pre-filing diversion to youth on non-violent felonies and to date has served over 350 youth and their families. JDI provides youth with the opportunity to attempt to repair the harm they caused and understand the impact of	The committee appreciates this context on the more specific critiques of the proposal and commends the San Diego District Attorney's Office for its efforts to use confinement of youth only when no less restrictive alternative is available.

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			their choices while avoiding formal entry into the juvenile justice system. For most crimes committed by youth, alternatives to incarceration are sufficient to appropriately address the root causes of the behavior, hold the youth accountable and protect the public. This discussion is specific to the most violent crimes, such as murder and forcible sex crimes, that devastate victims and profoundly impact communities and public safety. See comments on specific provisions below.	See responses to specific comments below.
13.	Superior Court of Los Angeles By Bryan Borys	A	The Court does not anticipate cost savings from the proposal. To the contrary there will be implementation costs and additional resources required and associated with updating the Case Management System (CMS) to reflect the new criteria and factors to be implemented, facilitating training for judicial officers and court staff, creating current quick reference guides (QRGs), and additional hearings. Additionally, judicial officers and court staff will need to be trained on the new offense-based baseline categories, how to enter the SYTF sentences and reduce them on subsequent hearings, and how to capture the Court's findings at the time the baseline sentence is ordered. Reference materials will also need to be created to assist staff with these updated procedures. Due to current workload, scheduled go-live on a new case management system at the end of the	The committee acknowledges that the proposal, which is statutorily required, is unlikely to provide any cost savings to the court and will note these implementation costs in its report to the council. The committee appreciates the challenges for courts in implementing a rule like this with a

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			year, and for the reasons listed above, 3 months would be insufficient time to implement; 180 days would provide more time to ensure effective implementation.	short turn around time, but the statute requires that the rule be in place by July 1, 2023, so there is no ability to provide additional time for implementation.
14.	Superior Court of Orange By Vivian Tran Operations Analyst	A	▪ Does the proposal appropriately address the stated purpose? ▫ Yes, the proposal appropriately addresses the stated purpose. ▪ Given that Welfare and Institutions section 875 directs that the matrix reflect the expertise of the following stakeholders: "representatives from prosecution, defense, probation, behavioral health, youth service providers, youth formerly incarcerated in the Division of Juvenile Justice, and youth advocacy and other stakeholders and organizations having relevant expertise or information on dispositions and sentencing of youth in the juvenile justice system" the committee is particularly interested in hearing from the stakeholders regarding the extent to which the matrix would further the goals of the juvenile justice realignment legislation, and if it does not, how it might be revised? ▫ The matrix does further the goals of the juvenile justice realignment legislation by providing a baseline confinement term for specific offenses.	The committee appreciates the support for the proposal from the Superior Court of Orange County. The committee concurs that the matrix is consistent with the objectives of the realignment legislation.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			▪ Would the proposal provide cost savings? If so, please quantify. ▫ The proposal does not appear to provide any cost savings. ▪ 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? ▫ The implementation for the courts would include the following: – Revise procedure to include matrix. – Update case management system by modifying minute order macros/activities and system tracking information. – Inform court staff of implementation in staff meeting (1 hour). – Inform judicial officers of implementation (1 hour). – ▪ Would 3 months from Judicial Council	The committee concurs that no cost savings is likely. The committee will note these impacts in its report to the Judicial Council.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			approval of this proposal until its effective date provide sufficient time for implementation? No, six months would be needed to revise procedure, make changes to the case management system, and conduct training.	The committee appreciates the challenges for courts in implementing a rule like this with a short turn-around time, but the statute requires that the rule be in place by July 1, 2023, so there is no ability to provide additional time for implementation.
15.	Ventura County District Attorney Erik Nasarenko	AM	See specific comments below.	See responses to specific comments below.
16.	Yolo County District Attorney Jeff Reisig	AM	In response to the Judicial Council of California - Invitation to Comment SP22-14 "Juvenile Law: Secure Youth Treatment Facility Offense-Based Classification Matrix", the Office of the District Attorney of Yolo County has two paramount issues regarding the proposed SYTF matrix. They are outlined in the attached letter. See comments on specific provisions below.	The committee appreciates the review of its proposal by the Yolo County District Attorney. See responses to specific comments below.

SP22-14

Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
California Alliance for Youth and Community Justice, by Israel Villa Deputy Director, and 31 co-signatories Community Agency for Resources, Advocacy and Services (C.A.R.A.S.) By Marty Estrada, Director of Community Development, Gilroy	*Both comments included the same comments and concerns verbatim* (2) In Proposed Rule 5.806(d) on "Range of Baseline Term," the lower range for Category C offenses should be 18 months. Overview: Within the offense based-matrix proposed in Rule 5.806(d), the court must select a baseline term within the range set for a category of offenses. Category C assigns a baseline confinement time range of two (2) to four (4) years and includes a number of offenses listed in Welf. Inst. Code 707(b), including Pen. Code 211 ("unarmed robbery") and Pen. Code 245(a)(4) ("assault by means likely to cause great bodily injury), two of the most common Welf. Inst. Code 707(b)offenses for which youth are adjudicated. Reason for Concern: The proposed rule's minimum baseline confinement time exceeds the current standard. Under existing regulations, most adjudications for PC 211 " unarmed robbery" (Pen. Code PC 211) and "assault by means likely to cause great bodily injury" (Pen. Code 245(a)(4)) have a minimum confinement of 18 months. The proposed rule would increase that by a third, potentially lengthening the incarceration time for the majority of cases seen by the court. This is an outcome contrary to the goals of DJJ realignment and the statutory mandate. Recommendation to address the concern: Modify the lower end for the range for Category C offenses from 2 years to 18 months. … In providing our comments, we must note some reservation around the overall concept assigning a minimum for lengthy terms of incarceration. No research supports the premise that	The committee appreciates the concern raised here that the two-year minimum baseline term appears to be an increase in the projected confinement time for unarmed robbery and some assaults, but believes that two years is the appropriate bottom of the range for SYTF commitments because these commitments are intended to be only for youth whose behavior cannot be addressed in a less restrictive setting. The committee notes that while two years is the initial minimum baseline term, all youth committed to this disposition will have their progress reviewed every six months and can earn a reduction of up to six months at each of those review hearings. As a result, a two year baseline term might be reduced to a one year term if the youth is accomplishing their rehabilitative goals. In addition, youth have the opportunity to move to a step-down program at each review hearing, if that is appropriate. For these reasons, the committee has concluded that the two year minimum is not likely to result in an increase in confinement time for these offenses, and will serve as a reminder that SYTF commitments are to be used sparingly, and only when less restrictive alternatives are not appropriate.

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	sending young people away from their home and community for lengthy periods of time is effective to promote community safety and youth well-being. In fact, overwhelming evidence shows that quality programming, connection to credible mentors, and minimal time in out-of-home placement are the factors that decrease the likelihood of reoffending, even for youth accused of more serious charges.	
California District Attorneys' Association By Tim Ward, Tulare County District Attorney, California District Attorneys' Association President	To those worthy ends and with those agreements, we request the following: 2. The amendment of terms for Category A crimes to 5–11 years. The adoption of these amendments serve numerous goals: decreasing the number of transfer hearings of Minors into adult court, providing the court with enough flexibility to tailor a resolution that fits the unique need of the particular Minor before the court and enough time to address the rehabilitative, treatment and care needs that best serve the interests of the justice-involved Minor. … To limit the time these Minors have to avail themselves of the guidance and positive youth development that this committee seeks to ensure is antithetical to the very goals of the juvenile court. Rather, the court should be allowed the flexibility to put the actions of the Minor into context with what else is known about his or her circumstances. Juvenile courts should have the flexibility to respond appropriately to the changing needs of the Minor as they age and mature; that flexibility should not be based solely on the seriousness of the charge but rather on the unique needs of a particular Minor.	The committee understands the concerns about the seriousness of Category A offenses and believes that the range for Category A is designed to provide substantial time and flexibility to achieve rehabilitation for the most serious juvenile offenses. Seven years was the discharge guideline for the Division of Juvenile Justice (DJJ) and the committee found no evidence that this term was insufficiently long to provide programming and treatment for these youth. The committee concurs that courts need flexibility and that is why a range of years is provided rather than one set term. Given the seriousness of the offenses in category A, the committee recognizes the need for greater judicial discretion and has conferred the longest range upon Category A to afford the court the greatest flexibility to address a youth's programmatic needs and to oversee their progress. The committee also considered the significant time that these adjudications can take and the information that the court has been able to gather about the youth's progress in treatment while in juvenile detention. The four to seven year term will provide the court with flexibility, while also ensuring that youth with the most serious needs can receive extended programming and intervention for up to seven years, with the opportunity to extend time in custody by an additional year if the youth still poses an imminent risk of substantial harm to the community (see

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
		875(e)(3). A term longer than 7 years seems punitive rather than rehabilitative, and therefore at odds with the objectives of the juvenile court.
Chris [Last name not provided] Individual from Oxnard	So this is suggesting that a human life is only worth 4-7 years? And even less than that if the killer is awarded time off their sentence every review period? We're talking about kids who kill and permanently take away a loved one from someone. I understand that the brain is still developing at their age but we're not talking about a beer run, or taking a car. This is a human life that was taken, and the consequence being proposed are just too lenient. At least the current rules call for incarceration up to 23 or 25 years of age. That was a hard pill to swallow, but it at least provided some accountability. This proposal is a slap in the face to victims, and their families. Once again, California is leading the way in making sure criminals are treated better than victims. The system continues to fail victims repeatedly and if this proposal is adopted, will serve as yet another example of how little California cares for the victims of crime.	The committee recognizes that human life is priceless. The committee was charged with developing a matrix of offense-based classifications to be applied by the juvenile courts in all counties in setting the baseline confinement terms for youth to further greater consistency. The matrix provides flexibility for the court and positive incentives for the youth to reduce the baseline term. This flexibility is intended to meet the statutory mandate "to represent the time in custody necessary to meet the developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community."[1] In developing the matrix, the Committee was advised by a working group of stakeholders, including representatives from prosecution, defense, probation, behavioral health, youth service providers, youth formerly incarcerated in the Division of Juvenile Justice, and youth advocacy and other stakeholders and organizations having relevant expertise or information on dispositions and sentencing of youth in the juvenile justice system. In the development process, the Committee also examined and took into account youth sentencing and length-of-stay guidelines and practices adopted by other states or recommended by organizations, academic institutions, or individuals having expertise or having conducted relevant research

[1] Welf. & Inst. Code, § 875(b).

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
		on dispositions and sentencing of youth in the juvenile justice system and determined the established ranges to fairly meet the gravity of the specified offense categories.
Thomas Harp Sacramento	Additionally the offenses still within Category B are incredibly serious, grave, and damaging towards victims. Due to this severity, and the length of time that may be needed to rehabilitate the youth (youth sex offender programs typically last several years), section B should range from 3 to 7 years. Offenders sentenced to the maximum 7 years should still have their sentencing reduced with successful compliance to their individualized rehabilitation plan.	The committee appreciates the intent of this suggestion, but has concluded that a term of three to five years will allow the court to provide an extended term for these offenses when needed. The committee notes that most of these offenses were subject to a four year term at DJJ and thus a three to five year term is consistent with current practice while offering more flexibility for the court to take into account the individual factors in each case. The committee is not persuaded that extended baseline terms as a rule would provide motivation for these youth and has concerns that it might be counter-productive in creating the appearance that release is too far away and thus it is not critical to actively engage in programming at the outset.
Orange County District Attorney Todd Spitzer Yolo County District Attorney Jeff Reisig	II. The baseline term of Category A should reflect the maximum allowable commitment under the law. *Both the Orange and Yolo County District attorney specifically request that the matrix* increase the baseline of SYTF Category A to 5-11 years. This will further the goals the SB 823 by decreasing the number of transfer hearings and providing the court both flexibility and sufficient time to address the rehabilitative needs of the youth. (Proposed changes typed in blue and highlighted in yellow – *See Appendix A which adds offenses to Category A discussed below and proposes a term of 5-11 years*) *These comments are verbatim from the Orange County District Attorney and were expressed in almost identical	The committee was mindful in building the matrix that it advance the goals of SB 823 and ensure that it did not result in additional transfer motions being filed as a result of the matrix. As a result, the committee set the ranges to be overlapping with the terms that would have applied at DJJ and to provide significant time for rehabilitation in juvenile programs. The committee notes that a youth must have been at least 16 years of age to be eligible for a transfer to criminal court jurisdiction and thus the maximum time that such youth can spend in an SYTF before hitting the age 25 jurisdictional limit would in practice be no more than eight years given the time needed to adjudicate the case. Rule 5.806 provides a maximum baseline term of seven years for category A offenses, and section 875 authorizes the court to add two

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	language by the Yolo County District Attorney* The commitment terms across all categories in the proposed matrix range from 1 year to 7 years. Per §875(a), youth as young as 14 may be committed to the SYTF and the maximum limit of jurisdiction for purposes of incarceration would be 11 years for those individuals. As such, the maximum baseline commitment term of Category A offenses should reflect the maximum period of incarceration-11 years. This judicial committee has the opportunity to depart from the former Division of Juvenile Justice (DJJ) matrix and set realistic baselines consistent with the range of rehabilitative needs of those individuals ---committed to the SYTF. The committee has shown incredible insight in proposing Rule 5.806(b)(1-4). By establishing criteria which the court must state on the record, referencing each and any factors deemed relevant, the courts have been given a wider range to operate in addressing the needs of committed youth. The existing ranges are both low in scale and narrow in application. A widening of the range not only for Category A, but across all categories, will create a greater amount of flexibility by which our courts can operate. The widening of the range should not be seen as contrary to the goals of juvenile legislation but consistent with existing law which is predicated on sound principle. FN1 FN1: A DJJ regulation in effect for decades establishes "[a] parole consideration date interval of seven years" when a minor is committed to DJJ for various offenses, including murder. (Cal. Code Regs., tit. 9, §30807). Thus, "as a general rule, a minor confined for committing first degree murder is eligible for parole consideration at least every seven years." (In re	additional six month periods of confinement to the baseline term for youth who pose a risk of imminent harm to the community. As a result, rule 5.806 offers the court the opportunity to commit a youth eligible for transfer for up to the maximum age of juvenile court jurisdiction, if necessary. Extending the top of the range from seven to eleven years would mostly impact youth whose offenses were committed at age 14 or 15 who are not eligible for transfer to criminal court. The committee appreciates the concern expressed by the commenters about having sufficient time for rehabilitation, but has concluded that seven years is a developmentally appropriate maximum term, consistent with the current guidelines at DJJ, and allowing for a period of supervision in the community post-release as provided in section 875. Given the seriousness of the offenses in category A, the committee recognizes the need for greater judicial discretion and has conferred the longest range upon Category A to afford the court the greatest flexibility to address a youth's programmatic needs and to oversee their progress. The committee also considered the significant time that these adjudications can take and the information that the court has been able to gather about the youth's progress in treatment while in juvenile detention. The four to seven year term will provide the court with flexibility, while also ensuring that youth with the most serious needs can receive extended programming and intervention for up to seven years, with the opportunity to extend by an additional year if the youth still poses an imminent risk of harm to the community.

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	R.O.(2009) 176 Cal.App.4th 1493, 1498) Although "parole consideration date represents, from its date of establishment, an interval of time in which a ward may reasonably and realistically be expected to achieve readiness for parole … it is not a fixed term or sentence, nor is it a fixed parole release date." (Cal. Code Regs., tit.9, §30815, subd. (a).)	
Pacific Juvenile Defender Center By, Brooke Harris Executive Director & Laurel Arroyo President, on Behalf of the PJDC Board of Directors	**First**, we urge the Committee to change the range for Category C offenses from the current proposed range of 2-4 years to a range of 18 months-4 years. In the current DJJ parole consideration structure, there are several Category Five offenses (presumptively 18 months to parole) which are now part of Category C. Two of these offenses, PC 211 (unarmed robbery) and PC 245(a)(4) (assault by means likely to cause great bodily injury) are two of the most common offenses charged in juvenile court. PJDC urges the Committee not to increase the current 18 month baseline to two years, and instead adopt an 18 month – 4 year range for Category C offenses.	The committee appreciates the concern raised here that the two-year minimum baseline term appears to be an increase in the projected confinement time for unarmed robbery and some assaults, but believes that two years is the appropriate bottom of the range for SYTF commitments because these commitments are intended to be only for youth whose behavior cannot be addressed in a less restrictive setting. The committee notes that while two years is the initial minimum baseline term, all youth committed to this disposition will have their progress reviewed every six months and can earn a reduction of up to six months at each of those review hearings. As a result, a two-year baseline term might be reduced to a one year term if the youth is accomplishing their rehabilitative goals. In addition, youth have the opportunity to move to a step-down program at each review hearing if that is appropriate. For these reasons, the committee has concluded that the two-year minimum is not likely to result in an increase in confinement time for these offenses, and will serve as a reminder that SYTF commitments are to be used sparingly, and only when less restrictive alternatives are not appropriate.
Jeff Rhoades Senior Deputy Probation Officer Sacramento County Probation	Like DJJ/CYA before, SYTFs are now the harshest consequence that the California Juvenile Justice system can provide. Commitments to SYTFs should be reserved for the most serious of criminal charges and/or highest risk offenders.	In its development of the matrix the committee was informed by the fundamental purpose of the juvenile court and the juvenile justice system which exists to rehabilitate youth, whose development is in progress, so

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	There are a substantial number of less restrictive dispositions available to youth with lesser offenses and lower risk—intervention programs, electronic monitoring, Ricardo M. time, RFAs, STRTPs, etc., to name a few. SYTFs are the final resort in the Juvenile Justice process. With the above said, if we take into account a youth's ability to reduce their base term by half (6 months off at each 6 month review hearing), the commitment ranges are too low. How comfortable are we explaining to California citizens, in a time when violent crime is on the rise and concern for community safety is high, that our State is willing to release a (juvenile) murderer after only 2 years of custody? How about only 3.5 years for the most severe of murders? District Attorneys will be pressured to fervently push for transfers to Criminal Court once it's understood that this is the sanction that the Juvenile Justice system provides. Furthermore, 875(e)(2) WIC, prohibits the extension of a youth's base term, or modified base term, as a discipline for misconduct. Let's, for a moment, explore this concept with our hypothetical murder case that received a 4 year base term. After 1.5 years at the SYTF, this youth has done relatively well and had their base term reduced by 1.5 years. At 20 months in, they get caught smuggling drugs into the facility and were selling to other youth. (This is rooted in a real-world example, by the way.) Because of 875(e)(2), the greatest institutional consequence the Court can provide is to deny a reduction of the modified base term. This juvenile offender, who now shows further disregard for the rule of law, will only serve a maximum of 2.5 years in custody. 875(e)(2)'s limitations necessitate longer base terms to account for the very real possibility that many SYTF youth will incur infractions and violations that	that they can reform their behavior and become productive adults. This function is different from the criminal justice system which includes more punitive sanctions to provide accountability for the harms committed by adults. The ranges for each of the categories in rule 5.806 are consistent with the prior guidelines for DJJ. The committee concurs that the SYTF should be used for the kinds of cases that previously resulted in a commitment to DJJ and was guided in its development by the DJJ guidelines, but concluded that the primary flaw with those guidelines was that they were insufficiently flexible to meet the needs of individual youth. The committee is aware that section 875 does not allow for the extension of a baseline term for misconduct in the facility, but notes that it does allow up to an additional year of confinement if the court determines that the youth poses a substantial risk of imminent harm to the community. This flexibility gives the court discretion to address serious risks posed by youth committed to an SYTF whose conduct is uneven and provides an incentive for youth to continue with their rehabilitation even as their initial baseline term is ending.

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	demonstrate their lack of readiness for return to the community. We have to remember, these are the highest risk, often antisocial, offenders who will struggle regardless of how supportive the SYTF programs are. This seeming lack of consequence will also encourage Probation Departments and DAs to more readily file criminal charges for in-custody violations, rather than treat them as institutional infractions. This will further perpetuate the "prison pipeline" that our efforts are working to avoid. It's wonderful that the system was designed to benefit youth with mitigating offense factors and positive institutional behavior. However, it does little to consider and address the youth who will struggle to adjust to SYTF rehabilitation efforts. And since consequences for negative behavior has been statutorily limited, we must rely on this Classification Matrix to account for this legislative oversight. The California Justice System, including Juvenile Justice, has a mandate to provide for community safety. Longer commitments provide this by limiting known, violent offenders access to the public. The streets are far more savvy then citizens and politicians give credit, and most offenders, even juveniles, are very much aware of the potential consequences of criminal actions. Longer commitments ultimately benefit the youth by keeping them away from negative environments, providing more time to take advantage of rehabilitative services, and giving them a safe space to navigate the turbulent transition into young adulthood.	The committee notes that section 875 is clear that additional time is not to be used to address institutional misconduct: "The ward's confinement time…shall not be extended beyond the baseline confinement term, or beyond a modified baseline term, for disciplinary infractions or other in-custody behaviors." Thus it does not appear that this was a legislative oversight, but rather a preference by the legislature that such behavior be addressed by alternative means: "Any infractions or behaviors shall be addressed by alternative means, which may include a system of graduated sanctions for disciplinary infractions adopted by the operator of a secure youth treatment facility and subject to any relevant state standards or regulations that apply to juvenile facilities generally." For this reason the committee has concluded that it would be contrary to the legislative mandate to consider this issue in the development of the matrix. Except for the two offenses in category D, which would be uncommon as an SYTF commitment offense, the minimum baseline term for rule 5.806 is two years and the maximum is seven years. Two years of confinement is a significant intervention for a minor and the court can select a higher term where it appears that the needs of the youth are more substantial.

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	Regarding that last point, research has shown that brain development continues into the early 20s. I can professionally attest that 21-23 year old youths have far greater maturity and responsibility over 17-19 year olds. I propose the following changes to the classification matrix: Category A: 6 – 10 years -->The availability of such a commitment would provide significant persuasion to keep a youth in Juvenile Court. The maximum term would provide a true "Juvenile Life" for cases that are severe enough to warrant it—i.e. a 15 year old would potentially not discharge until they turn 25. Even with a term of 10 years, a 15 year old could reasonably discharge by age 21-23. Any 16 or 17 year old with a severe enough murder case would likely be transferred to Criminal Court. Category B: 4 – 7 years -->Since this category includes most of the serious sex offenses, the minimum 2 years served would provide adequate	No response required. The matrix allows a term of seven years for category A, and section 875 allows for an additional year of confinement when the youth poses a substantial risk of imminent harm to the community. The result would be eight years of confinement for the most serious offenders which the committee believes is a very serious intervention for a juvenile. Given the seriousness of the offenses in category A, the committee recognizes the need for greater judicial discretion and has conferred the longest range upon Category A to afford the court the greatest flexibility to address a youth's programmatic needs and to oversee their progress. The committee also considered the significant time that these adjudications can take and the information that the court has been able to gather about the youth's progress in treatment while in juvenile detention. The four to seven year term will provide the court with flexibility, while also ensuring that youth with the most serious needs can receive extended programming and intervention for up to seven years, with the opportunity to extend by an additional year if the youth still poses an imminent risk of harm to the community. The committee agrees that the term for category B must allow time for sex offender treatment, and has set that term at a minimum of three and a maximum of five

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	custody time for completion of a sexual offense treatment program. Current treatment programs, including DJJ's own SBTP, typically take 1.5-2 years to complete. Completion of treatment in custody is ideal because it reduces obligations placed on the youth for post-SYTF probation. Category C: 2 – 6 years -->This is a very broad category and the specific facts of some of these offenses may be aggravating enough to extend the commitment term to a length that is nearly that of Category B or A. Factors in 5.806(b) can be applied to determine an appropriate base term. Category D: 1 – 2 years -->I have no issues with this category given the limited offenses that fall into it.	years. The committee believes that this range will allow for sex offender treatment to be completed prior to the end of the baseline term for these offenses, and notes that the term can be extended by a year where there is imminent risk to public safety. The committee notes that the range in rule 5.806 for category C of two to four years is an increase over what the guidelines were for some of these offenses in the DJJ guidelines, and has concluded that two to four years is an adequate range to address the range of circumstances in these cases. No response required.
San Diego County District Attorney Summer Stephan	The Judicial Council's recommended matrix of baseline ranges of commitment to a SYTF does not give the courts the ability to impose a term long enough for the most serious and violent offenses to meaningfully rehabilitate the youth which causes grave concern for the future of public safety in our community. In the past, the most serious crimes, such as murder and forcible sex crimes, were frequently transferred to adult court where they were subject to adult sentencing schemes and not to the matrix of baseline terms. Recent legislation has restricted the ability to transfer youth to adult court, and legislation due to take effect next year will further restrict the transfer of cases to adult court. Therefore, more cases will remain within the jurisdiction of the juvenile courts. The proposed matrix of baseline terms must address and adapt to this change. As proposed, the baseline terms will not be adequate to allow a judge to sentence youth for crimes such as murder, forcible	While the committee is aware that recent statutory changes have restricted the ability of the prosecuting attorney to seek a transfer of jurisdiction to criminal court, in developing rule 5.806, it has been guided by the text of section 875 which requires that the baseline term be "the time in custody necessary to meet the developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community." If the legislature wishes the courts to confine youth adjudicated for the most serious offenses to their jurisdictional maximum age, it can modify section 875 to make that clear. The committee does not believe that it would be within its purview to propose a matrix with terms substantially in excess of the terms at DJJ to respond to recent changes in the law on transfer of jurisdiction as that would be a

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
	rape, or a school shooting, in a way that protects the community. The baseline term for the most serious offenses, such as murder, torture and forcible sex crimes, should provide a wider range to allow the court the ability in appropriate cases to sentence a youth up until the time the juvenile justice system loses jurisdiction of the youth. Because WIC section 875(e)(1) requires the court review the youth's progress every six months and allows the court to reduce the sentence by up to six months at each review hearing, providing a range of 5-11 years for these offenses would allow the court to frequently and regularly reduce the sentence if safe to do so.	policy decision better left to the legislature. Given the seriousness of the offenses in category A, the committee recognizes the need for greater judicial discretion and has conferred the longest range upon Category A to afford the court the greatest flexibility to address a youth's programmatic needs and to oversee their progress. The committee also considered the significant time that these adjudications can take and the information that the court has been able to gather about the youth's progress in treatment while in juvenile detention. The four to seven year term will provide the court with flexibility, while also ensuring that youth with the most serious needs can receive extended programming and intervention for up to seven years, with the opportunity to extend by an additional year if the youth still poses an imminent risk of harm to the community.
	The Committee's stated goal of protecting the public and community by ensuring the term of commitment is of "sufficient length to assure the victim and the community that the harm committed can be addressed by the juvenile justice system in a developmentally appropriate manner and thus reduce the need for the youth to be transferred to criminal court" is not met by the proposed matrix. Expanding the range of the baseline term for the most serious and violent offenses to a maximum of 11 years, with the safeguards provided by WIC 875(e)(1), would fulfill this Committee's stated objectives by protecting victims and communities, providing a flexible and fair term of commitment that allows for rehabilitation and positive youth development.	The committee appreciates that victims may struggle to understand the differences between the juvenile and criminal justice systems and have concerns that juvenile terms are significantly shorter than the sentences meted out by the criminal courts, but the committee was tasked with looking at the evidence around length of stay in the juvenile justice system and found no evidence that extended periods of confinement were beneficial to reducing recidivism and protecting the public and some evidence that they can be counter-productive. For that reason, the committee is proposing a maximum term of 7 years, consistent with what was in place at DJJ for many years.
Ventura County District Attorney	I am writing on behalf of the Ventura County District	The committee was mindful in building the matrix that it

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
Erik Nasarenko	Attorney's Office to urge the Juvenile Law Advisory Committee to include in the SYTF offense-based classification category A not only the crime of murder, but also kidnapping with bodily harm, kidnapping during the commission of carjacking, and torture. Also, the matrix baseline term for these violent crimes should be 5 to 11 years. The Committee's proposed category A offenses only includes murder and sets the matrix at a 4 to 7-year range. One of the primary goals of SB 823 was to reduce juvenile transfers to criminal court. However, by narrowing the offense-based categories, and decreasing the baseline, the opposite may occur as prosecutors see transfer hearings as the more appropriate mechanism for addressing the most violent crimes. The Committee's proposed SYTF offense-based classification matrix will create the possibility that a youth who commits a murder could serve a minimum of 4 years. Additionally, pursuant to Welfare and Institutions Code section 875(e)(1), the court has the discretion to reduce this 4-year minimum by 6 months at every SYTF review hearing. The proposed category A baseline matrix is too low, does not provide sufficient time for rehabilitation, and does not ensure the public's safety. I urge the Committee to increase the baseline term to a 5 to 11-year range, and include not only the crime of murder, but also kidnapping with bodily harm, kidnapping during the commission of carjacking, and torture.	advance the goals of SB 823 and ensure that it did not result in additional transfer motions being filed as a result of the matrix. As a result, the committee set the ranges to be overlapping with the terms that would have applied at DJJ and to provide significant time for rehabilitation in juvenile programs. The committee notes that a youth must have been at least 16 years of age to be eligible for a transfer to criminal court jurisdiction and thus the maximum time that such youth can spend in an SYTF before hitting the age 25 jurisdictional limit would in practice be no more than eight years given the time needed to adjudicate the case. Rule 5.806 provides a maximum baseline term of seven years for category A offenses, and section 875 authorizes the court to add two additional six month periods of confinement to the baseline term for youth who pose a risk of imminent harm to the community. As a result, rule 5.806 offers the court the opportunity to commit a youth eligible for transfer for up to the maximum age of juvenile court jurisdiction if necessary. Extending the top of the range from seven to eleven years would mostly impact youth whose offenses were committed at age 14 or 15 who are not eligible for transfer to criminal court. The committee appreciates the concern expressed by the commenters about having sufficient time for rehabilitation but has concluded that 7 years is a developmentally appropriate maximum term, consistent with the current guidelines at DJJ, and allowing for a period of supervision in the community post-release as provided in section 875. Given the seriousness of the offenses in category A, the committee recognizes the need for greater judicial discretion and has conferred the longest range upon Category A to afford the court the greatest flexibility to

Rule 5.806(d) – Comments on Proposed Ranges		
Commenter	**Comment**	**Committee Response**
		address a youth's programmatic needs and to oversee their progress. The committee also considered the significant time that these adjudications can take and the information that the court has been able to gather about the youth's progress in treatment while in juvenile detention. The four to seven year term will provide the court with flexibility, while also ensuring that youth with the most serious needs can receive extended programming and intervention for up to seven years, with the opportunity to extend by an additional year if the youth still poses an imminent risk of harm to the community.

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
California District Attorneys' Association By Tim Ward, Tulare County District Attorney, California District Attorneys' Association President	To those worthy ends and with those agreements, we request the following: 1. The inclusion of Kidnapping with Bodily Harm, Kidnapping as punishable by Penal Code section 209.5 and Torture as described in Penal Code sections 206 and 206.1 into Category A Offenses. To be plain, a Minor who has committed the crimes of Murder, Kidnapping with the Death of the Victim, Kidnapping with Substantial Injury or Torture is a Minor in very significant crisis. Of course, whatever drove the Minor to the commitment of these offenses is a concern, but so is the trauma experience by the Minor after their commitment. This Minor is in need of a system that has as many tools as possible at their disposal to fashion a way out of this crisis and into wholeness.	The committee has adopted most of this suggestion and moved Torture as described in Penal Code sections 206 and 206.1 and Kidnapping with Bodily Harm which results in death or substantial injury into category A. This change will make category A consistent with DJJ category I and therefore reduce any incentive to seek transfer motions for these offenses as an unintended consequence of the adoption of the matrix. The committee has left all other Kidnapping with Bodily Harm offenses in category B, also consistent with the DJJ categorization, and in recognition that category A has a very high maximum term that should be reserved for the most serious offenses.
Thomas Harp Sacramento	Categorization - The following Category B offenses should be included in Category A as they are severe offenses that carry significant weight: (12) Attempted murder, (23) Torture, as described in Penal Code sections 206 and 206.1, (24) Aggravated mayhem, as described in Penal Code section 205.	The committee is persuaded that (23) Torture, as described in Penal Code sections 206 and 206.1 should be included in category A, as it was in the DJJ guidelines. While attempted murder and aggravated mayhem are serious crimes, the former was in DJJ category II and the latter in DJJ category III, while both are in category B of rule 5.806. The committee believes that a baseline term of three to five years is appropriate for these offenses.
Los Angeles County District Attorney's Office By Frank C. Santoro, II Assistant Head Deputy Juvenile Division	After reviewing the new baseline terms promulgated by the Judicial Council, it appears that almost all of the revised baseline terms are reasonable in light of the rehabilitative needs of the youth who will be committed to an SYTF facility. However, the offense of PC 288(b), lewd or lascivious act with a minor under 14 years of age, (hereafter "288"), was bumped down a category in the new matrix. Generally speaking, there are five sex offenses listed 707(b) that can lead to an SYTF	In its work to assign each of the 707(b) offenses to a category the committee was significantly guided by the DJJ categories, and the resulting matrix is mostly consistent in its assignment of offenses. As the commenter notes, one exception was for Penal Code section 288(b), which the committee assigned to category C, when it had been assigned to DJJ category II. As the commenter suggests, there is a qualitative

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	sentence. They consist of what are commonly called "the big four" sex offense (rape/PC 261, sodomy/PC 286, digital penetration/PC 289, and oral copulation/PC 287) and the fifth sex offense, 288. Force, menace, duress, or threat of injury, etc., is required in any of the five sex offenses to qualify it as a 707(b) offense, and to thereby make a youth eligible for an SYTF commitment. Under the old matrix, all of the five sex offenses were listed as category two offense which had a four year parole eligibility date. Under the new matrix the big four sex crimes have a baseline term of three to five years as compared to 288 which has a baseline term of two to four years. First, we understand the downward matrix may be because there can be "less offensive" 288s. In other words, because the crime of 288 is based on the age of the victim (unlike the big four sex offenses) the crime can be committed with "less offensive" behavior. For example, a 288 can be committed by a 15-year-old rubbing the breasts of a 13-year-old female over the 13-year-old's clothing. This sounds less offensive than rape, sodomy, etc., which generally requires the direct touching of the victim's genitals under the clothing. Second, in the more serious 288 cases, usually one of the big four sex crimes is also committed. However, that is not always the case. In some of the most serious 288s that is the only sex crime committed. In addition, in order for a 288 to qualify as a section 707(b) offense and to make the youth eligible for SYTF, force, duress, etc., must be used. This means that the less serious heavy petting cases, even if not consensual, don't rise to the level of force and don't qualify as a 707b/SYTF offense. Moreover, if there is a 288 that by definition may qualify as a 707(b)/SYTF offense but the crime is not as serious and the youth does not need a long SYTF commitment to rehabilitate, then the charge	difference between most of these offenses and the forcible sex offenses listed in section 707(b) and for that reason, the committee concluded that this offense more appropriately belonged in category C. The committee notes that because the matrix in rule 5.806 has ranges, rather than set terms, the court can set a baseline term for this offense at up to 4 years, which is the same as the DJJ category II guideline. With this flexibility, the committee believes that the range for category C will allow for the court to address these cases appropriately, providing longer baseline terms when needed and shorter terms in those cases that require less extensive interventions.

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	can be a simple 288(a) with no force which precludes a 707(b)/SYTF offense. This change in sentencing for 288s by the JC addresses the needs of the youth who commits the less serious 288 but it does not, necessarily, address the needs of the youth who commits the more serious 288. While charging a 288 can avoid a SYTF sentence by filing the appropriate charges and precluding an SYTF commitment, the opposite is not true, for a youth who need [sic] a longer, more rehabilitate [sic] commitment to an SYTF facility. For these reasons, the position of the Juvenile Division of the Los Angeles County District Attorney's Office's is that the charge of PC 288(b), as listed in section 707(b), should have a matrix baseline term of three to five years like the four other sex crimes listed in section 707(b), not two to four years as indicated in the new matrix.	
Orange County District Attorney Todd Spitzer Yolo County District Attorney Jeff Reisig	*These are the verbatim comments of the Orange County District Attorney, and nearly identical comments were submitted by the Yolo County District Attorney* Adopt the DJJ Category 1 Matrix for SYTF Category A [to include (11) Kidnapping with bodily harm (27) Kidnapping, as punishable in Penal Code section 209.5. (23) Torture, as described in Penal Code sections 206 and 206.1.] ... This will further the goals the SB 823 by decreasing the number of transfer hearings and providing the court both flexibility and sufficient time to address the rehabilitative needs of the youth. (Proposed changes typed in blue and highlighted in yellow – *See Appendix A which includes those three offenses in Category A*) I. There will be increased transfer hearings and a promotion of	The committee has adopted most of this suggestion and moved Torture as described in Penal Code sections 206 and 206.1 and Kidnapping with Bodily Harm which results in death or substantial injury into category A. This change will make category A consistent with DJJ category I and therefore reduce any incentive to seek transfer motions for these offenses as an unintended consequence of the adoption of the matrix. The committee has left all other kidnapping offenses in category B, also consistent with the DJJ categorization and in recognition that category A has a very high maximum term that should be reserved for the most serious offenses.

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	"net widening" due to the elimination of specific offenses from Category A. The primary goals of SB 823 and the Office of Youth and Community Restoration are the reduction of juvenile transfers and the prevention of "net widening". By narrowing the offense-based categories and eliminating what are arguably the most serious offenses a minor can commit, the committee is tying the hands of prosecutors, probation officers, and judicial officers when evaluating juvenile alternatives to transfer. For the purpose of this discussion we will be comparing the glaring differences between the existing expiring DJJ Matrix and the proposed SYTF matrix. A glaring change between SYTF Category A and DJJ expiring Category 1 are Kidnapping with Death of Victim, Kidnapping with Substantial Injury, and Torture, which have been eliminated from the category A - which details the most serious charges - in the proposed SYTF matrix and transferred to a lesser category in SYTF Category B. a. 3 to 5-year baseline period of incarceration at a SYTF for Category B offense may not meet the rehabilitative needs for a youth who has committed torture, kidnapping with death, or kidnapping with substantial injury. SYTF Category B Offenses carry a 3 to 5-year commitment where a Category A carries a 4-7-year commitment. The exclusion of these most serious and violent offenses from SYTF Category A limits the terms of commitment necessary for rehabilitation. When evaluating a case for potential transfer to a court of criminal jurisdiction prosecutors must determine whether the	

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. Welf. Inst. §707(a)(3)(B)(i). There is a high likelihood that a low 3 to 5-year baseline period of incarceration at a SYTF will not meet the rehabilitative needs for a youth who has committed torture, kidnapping with death, or kidnapping with substantial injury. As a result, our prosecutors may make a decision to transfer the youth to adult court if the prosecutor believes, based on the evidence, that the youth cannot be rehabilitated prior to the expiration of the juvenile court's jurisdiction in SYTF Category B baseline period. This will increase transfer hearings and "net widening" due to the elimination of specific offenses from SYTF Category A. Additionally, the discussion would be more fruitful if you can provide the empirical data relied upon by your Judicial Committee in the decision to re-categorize torture, kidnapping with death, or kidnapping to show why these youth do not need a higher baseline for rehabilitation and re-entry. Finally, the recategorization of these offenses seem inconsistent with the three articulated primary objectives laid out by the advisory committee: (1) positive youth development, (2) public and community safety, and (3) flexible and fair terms of commitment. ▫ Positive Youth Development The advisory council articulates "Positive Youth Development" as being rooted in promoting long-term prosocial behavior with targeted treatment needs to ensure healing and rehabilitation. With this in mind, it is fundamental to recognize that even the minor who perpetrates such violent offenses will likely be traumatized and grossly impacted by the nature of their conduct. This likely necessitates a lengthier baseline	

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	commitment only afforded by Category A. ▫ Public Safety Additionally, as "Public Safety" is the second of three objectives outlined by the committee, it is our firm belief the re-categorization of Category A to include the eliminated offenses is fundamental to this stated objective. The committee affirms that, "protecting the public and the community is a central objective of the matrix" and further adds that the matrix is structured so that a commitment "is of sufficient length to assure the victim and the community that the harm committed can be redressed by the juvenile justice system ... and thus reduce the need for the youth to be transferred to criminal court." Consequently, including the eliminated offenses is consistent with the committee's stated objective and failing to do so may actually result in an increasing number of transfers of juveniles to adult court. ▫ Flexible and Fair Terms of Commitment Keeping in mind the principles of "flexible and fair terms of commitment" we are encouraged the criterion set forth in proposed Rule 5.806(b)(1-4). However, given the wide latitude for judicial discretion in setting a youth's baseline term of commitment, we again would implore this committee to include kidnapping with death of victim, kidnapping with substantial injury, and torture in Category A. This would increase the time available to meet the rehabilitative needs of these youth. (Please see attached "Proposed Matrix" – *See Appendix A)	
Jeff Rhoades Senior Deputy Probation Officer Sacramento County Probation	I'd also move Attempted Murder (664/187 PC) into *Category A*. An act severe enough to warrant this charge should be held with similar regard to a completed murder. 5.806(b)(1)	The committee determined that Attempted Murder should remain in category B consistent with its DJJ categorization in category II. This characterization will

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	could be applied to prevent an Attempted Murder case from receiving the maximum term. Additionally, the Court can seek to sustain a lesser, reasonably related charge (say 245 PC), when circumstances might be less severe. Category B 288(b) PC should be moved to this category. This category will then contain all 707(b) sexual offenses. See my above comment regarding adequate commitment for completion of treatment. Additionally, in my experience 288(b) charges encompass a broad range of circumstances that would be on equal footing to any other 707(b) sexual offense. Any 288(b) charges that are not serious in nature could be argued down to 288(a) PC. Category D: 1 – 2 years -->I have no issues with this category given the limited offenses that fall into it.	allow for an extended baseline term of up to 5 years for this offense and prevent incentives to overcharge lesser offenses to obtain a category A baseline term. The committee agrees that Penal Code section 288(b) charges can encompass a broad range of circumstances and that the range for category C adequately addresses that range. The committee notes that because the matrix in rule 5.806 has ranges, rather than set terms, the court can set a baseline term for this offense at up to 4 years, which is the same as the DJJ category II guideline. With this flexibility, the committee believes that the term for category C will allow for the court to address these cases appropriately, providing longer terms when needed and shorter terms in those cases that require less extensive interventions. No response required.
Summer Stephan San Diego County District Attorney	In the past, the most serious crimes, such as murder and forcible sex crimes, were frequently transferred to adult court where they were subject to adult sentencing schemes and not to the matrix of baseline terms. Recent legislation has restricted the ability to transfer youth to adult court, and legislation due to take effect next year will further restrict the transfer of cases to adult court. Therefore, more cases will remain within the jurisdiction of the juvenile courts. The proposed matrix of baseline terms must address and adapt to this change. As proposed, the baseline terms will not be adequate to allow a	The committee agrees that the 707(b) torture offense should be included in category A and has moved it there. The committee has also recategorized Kidnapping with bodily harm involving death or substantial injury as a category A offense consistent with the offense categorization for DJJ. The committee appreciates that forcible sex offenses are serious crimes and has included all of them in category B, which has a range of three to five years. The DJJ guidelines for these offenses provided a term of 4 years, so the committee has

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	judge to sentence youth for crimes such as murder, forcible rape, or a school shooting, in a way that protects the community. The baseline term for the most serious offenses, such as murder, torture and forcible sex crimes, should provide a wider range to allow the court the ability in appropriate cases to sentence a youth up until the time the juvenile justice system loses jurisdiction of the youth. Because WIC section 875(e)(1) requires the court review the youth's progress every six months and allows the court to reduce the sentence by up to six months at each review hearing, providing a range of 5-11 years for these offenses would allow the court to frequently and regularly reduce the sentence if safe to do so.	concluded that the range for category B is sufficiently long to address the needs of these youth without creating an incentive to transfer them to criminal court. The committee does not consider it within the council's purview to increase the terms for these offenses as a means to counteract the consequences of recent statutory changes on transfer of jurisdiction to criminal court as that is a policy decision outside the scope of the authority delegated to the council to develop and adopt the matrix.
Ventura County District Attorney Erik Nasarenko	I am writing on behalf of the Ventura County District Attorney's Office to urge the Juvenile Law Advisory Committee to include in the SYTF offense-based classification category A not only the crime of murder, but also kidnapping with bodily harm, kidnapping during the commission of carjacking, and torture. Also, the matrix baseline term for these violent crimes should be 5 to 11 years. The Committee's proposed category A offenses only includes murder and sets the matrix at a 4 to 7-year range. One of the primary goals of SB 823 was to reduce juvenile transfers to criminal court. However, by narrowing the offense-based categories, and decreasing the baseline, the opposite may occur as prosecutors see transfer hearings as the more appropriate mechanism for addressing the most violent crimes. The Committee's proposed SYTF offense-based classification matrix will create the possibility that a youth who commits a murder could serve a minimum of 4 years. Additionally, pursuant to Welfare and Institutions Code section 875(e)(1), the court has the discretion to reduce this 4-year minimum by 6 months at every SYTF review hearing. The proposed category	The committee has adopted most of this suggestion and moved Torture as described in Penal Code sections 206 and 206.1 and Kidnapping with Bodily Harm which results in death or substantial injury into category A. This change will make category A consistent with DJJ category I and therefore reduce any incentive to seek transfer motions for these offenses as an unintended consequence of the adoption of the matrix. The committee has left all other kidnapping offenses in category B, also consistent with the DJJ categorization and in recognition that category A has a very high maximum term that should be reserved for the most serious offenses.

SP22-14

Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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

Rule 5.806(d) – Comments on Categorization of Offenses		
Commenter	**Comment**	**Committee Response**
	A baseline matrix is too low, does not provide sufficient time for rehabilitation, and does not ensure the public's safety. I urge the Committee to increase the baseline term to a 5 to 11-year range, and include not only the crime of murder, but also kidnapping with bodily harm, kidnapping during the commission of carjacking, and torture.	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Rule 5.806(b) – Using Factors to Set the Baseline term		
Commenter	**Comment**	**Committee Response**
California Alliance for Youth and Community Justice, by Israel Villa Deputy Director and 31 co-signatories Community Agency for Resources, Advocacy and Services (C.A.R.A.S.) By Marty Estrada, Director of Community Development, Gilroy	**(3) A Court's Determination of the Baseline Time should not be dependent on a SYTF's capacity to provide suitable treatment and education for a youth.** *Overview:* Existing law already requires that a court's determination to commit a young person to a SYTF considers whether the SYTF has appropriate programming, education, and treatment. Welf. Inst. Code 875(a)(3)(C) states the court should consider "whether the programming, treatment, and education offered and provided in a secure youth treatment facility is appropriate to meet the treatment and security needs" of the youth. Proposed Rule 5.806(b)(3)(B) would allow the court to consider the capacity of the SYTF to provide suitable treatment or education in setting the initial baseline confinement time. However, the rule does not address situations in which the SYTF have inadequate capacity that would delay provision of treatment. The Advisory Committee Comment states that "enumerated factors that are outside the youth's control should not result in a longer baseline term". *Reason for Concern:* The proposed rule would allow the court to consider the capacity of the SYTF to provide suitable education or treatment in setting the initial baseline confinement time, a factor clearly outside the control of the young person. In cases where the SYTFs have inadequate capacity, the court may be inclined to set a minimum time that is at the upper side of the range. The existence of programming is a factor beyond the youth's control, and we ask that this Committee make clear that inadequacy or delay of programming should not encourage a higher range imposed as the baseline term. *Recommendation to address the concern:* Remove Proposed	The committee agrees that no youth should receive a longer baseline term because of a factor outside the youth's control and has expressly added that to the rule in subdivision (b), thus inadequate capacity should not result in a longer baseline term. The committee believes that with this change this factor can be taken into account when appropriate without it extending the term of the person being committed to the SYTF.

Rule 5.806(b) – Using Factors to Set the Baseline term		
Commenter	**Comment**	**Committee Response**
	Rule 5.806(b)(3)(B) and provide greater clarification to ensure that factors that are outside the youth's control should not result in a longer baseline term. **(4) Proposed Rule 5.806(b)(4) should clarify that the youth's development history should only serve as mitigating factors and should not result in a longer baseline time.** *Overview:* Proposed Rule 5.806(b)(4) includes factors related to youth's developmental history. *Reason for Concern:* Courts could deem factors around a youths' needs related to their developmental history and any harmful childhood experiences to weigh in favor of a longer baseline confinement time. These factors should mitigate a baseline time, not add to it. *Recommendation to address the concern:* Proposed rules should clarify that youths' developmental history (and as stated above, other factors outside the youths' control) should be mitigating factors that do not result in a longer baseline term.	The committee concurs that this issue should be addressed in the rule of court and has moved the substance of the language included in the Advisory Committee Comment into the text of the rule in subdivision (b) to read: "The court must select a baseline term that is no longer than necessary to meet the developmental needs of the youth and to prepare the youth for discharge to a period of probation supervision in the community. Enumerated factors listed below that are outside the youth's control must not result in a longer baseline term than otherwise needed to meet this objective."
Chief Probation Officers of California By Rosemary Lamb McCool, Deputy Director	**2. Section (b)(3): Selecting the baseline term with the range for the offense category** We support the inclusion of language in (b)(1) that acknowledges the extent of harm to victims occurring as a result of the offense. As stated in the background information guiding the development of the matrix, a central element is assuring the victim and the community that the harm committed can be redressed by the juvenile justice system in a developmentally appropriate manner. In furtherance of this goal, we would ask that the Judicial Council consider an additional criteria in (b)(3), regarding the period of	The committee agrees that the harm to the victim is a critical factor in evaluating the baseline term for a youth committed to an SYTF, and that is why is it listed in 5.806(b)(1) as a factor to be considered when evaluating the circumstances and gravity of the offense. The committee believes that this is the appropriate criterion for this factor to be evaluated under and that it would be redundant and potentially confusing to list it again in subdivision (b)(3).

Rule 5.806(b) – Using Factors to Set the Baseline term		
Commenter	**Comment**	**Committee Response**
	confinement, to include criteria regarding the consideration of the harm to victims occurring as a result of the offense.	
Thomas Harp Sacramento	5.806(b)(4)(C)-(E): While harmful experiences such as domestic/community violence, poverty, or discrimination in childhood may affect a youth, it should not be a factor into sentencing. Many youth have experienced great degrees of harm from said experiences and do not turn to crime as a result. By including this language you are giving victims of abuse a green light to victimize and abuse others. Instead developmental history should be based on mental capacity of the offender, their maturity level, and their *brain* developmental and not the challenges in life they face.	The discretionary factors in rule 5.806(b) are included to assist the court in making a holistic assessment of the time needed to meet the developmental needs of the youth and believes that adverse childhood experiences of various kinds are relevant to that assessment. As noted above the committee has clarified the intent of these factors to ensure that they do not arbitrarily increase a youth's baseline term.
Pacific Juvenile Defender Center By, Brooke Harris Executive Director & Laurel Arroyo President, on Behalf of the PJDC Board of Directors	Second, we ask the Committee to make more explicit that the presence of factors in proposed rule 5.806(b)(4)(B)-(b)(4)(D) are intended as mitigating factors supporting the lower end of the range. We acknowledge the final sentence of the Advisory Committee Comment, which states that "[e]numerated factors that are outside the youth's control should not result in a longer baseline term." However, we urge the Committee to clarify this sentence and place it directly in rule 5.806(b)(4). We otherwise commend the Committee for the strong language and clarity in this portion of the proposal.	The committee concurs that this issue should be addressed in the rule of court and has moved the substance of the language included in the Advisory Committee Comment into the text of the rule in subdivision (b) to read: "The court must select a baseline term that is no longer than necessary to meet the developmental needs of the youth and to prepare the youth for discharge to a period of probation supervision in the community. Enumerated factors listed below that are outside the youth's control must not result in a longer baseline term than otherwise needed to meet this objective."
Superior Court of Orange By Vivian Tran Operations Analyst	▪ Are the enumerated criteria and factors for the court to consider when setting the baseline term appropriate and relevant, and will they assist the court in making an informed decision? ▫ Yes, the criteria and factors for the court to consider when setting the baseline term are appropriate and relevant for the court to make an informed decision.	The committee appreciates the support for the proposed criteria and factors.

SP22-14

Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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

Rule 5.806(b) – Using Factors to Set the Baseline term		
Commenter	**Comment**	**Committee Response**

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Rule 5.806(d) – Limits on plea bargaining		
Commenter	**Comment**	**Committee Response**
California Alliance for Youth and Community Justice, by Israel Villa Deputy Director and 31 co-signatories. Community Agency for Resources, Advocacy and Services (C.A.R.A.S.) By Marty Estrada, Director of Community Development, Gilroy	**(1) Proposed Rule 5.806(d) on "Range of Baseline Term" should clarify that the determination of the baseline confinement time is a judicial function and not subject to a plea agreement.** *Overview:* Proposed Rule 5.806(d) creates the Secure Youth Treatment Facility (SYTF) offense-based classification matrix. It requires a court select a baseline term within the range set for the category that has been assigned to the Welf. Inst. Code 707(b) commitment offense. The selection of the baseline term is determined by the court's consideration of four criteria and analysis of how to effectively accomplish the statutory mandate that the term represents the custody time necessary to meet the developmental and treatment needs of the youth and prepare them for release on supervision. *Reason for Concern:* Plea bargaining would undermine the role of the court. No standard data exists on the number of cases in which a stipulated plea agreement is executed for cases that previously resulted in a commitment to the Division of Juvenile Justice (DJJ). However, there is anecdotal evidence from defense counsel throughout the state and research conducted by advocates that prosecutors routinely offer stipulations that remove strikes or withdraw motions to transfer a young person to adult court for an agreement to commit a youth to DJJ. Thus, there is reason to believe that without guidance clarifying that it is the court's role to determine the initial baseline time, plea bargains will include stipulations to a baseline term. The determination of the baseline term is a judicial function, requiring a trier of fact to weigh the evidence and make a decision about how to best achieve the central mandate of the statute. If left to plea bargaining, the goal of ensuring that length of custody time is related to the developmental and	The committee appreciates that setting a baseline term is plainly a judicial function under section 875 but notes that the statute makes no reference to plea bargaining or any limitations on plea bargaining with regard to baseline terms. Existing case law allows plea bargains in juvenile matters, and thus the committee does not believe that it has the authority to prohibit them by rule of court in this context absent express statutory direction to do so. The committee notes that the court is never required to accept a plea bargain and that a youth and his counsel are under no obligation to agree to a plea bargain if they would prefer to seek a judicial resolution. The committee understands that transfer motions may be used as leverage by some prosecuting attorneys in order to secure an agreement to a longer baseline term but notes that these motions can only be brought for older youth and now require the prosecution to show by clear and convincing evidence that the youth cannot be rehabilitated under juvenile court jurisdiction and that determination must be made by the court. Thus, even youth subject to transfer have options other than a stipulation if they wish to have the juvenile court make these determinations. The committee also notes that if it is the intent of the legislature that plea bargains be restricted in this context, it can amend the statute to include that limitation.

Rule 5.806(d) – Limits on plea bargaining		
Commenter	**Comment**	**Committee Response**
	treatment needs of the youth will likely be lost.	
Pacific Juvenile Defender Center By, Brooke Harris Executive Director & Laurel Arroyo President, on Behalf of the PJDC Board of Directors	**Third**, the vast majority of juvenile cases are resolved by plea bargain. We are concerned that offers from the prosecution will be made contingent on the youth waiving certain rights granted by Welfare and Institutions Code section 875, or will be contingent on youth entering into certain stipulations. For example, a prosecution offer could be made contingent on the youth stipulating to a specified baseline term duration within the range, or it could require a waiver by the youth of the right to advocate for a step-down, or a reduction of the baseline term, at a six-month progress review hearing. PJDC's membership of approximately 1600 juvenile defenders across California has substantial expertise with the juvenile court practices around the state. Although disposition plea-bargaining is disfavored by juvenile statutes and rules of court, and is arguably impermissible, it occurs routinely in multiple jurisdictions around the state. For example, in Los Angeles County, plea bargains *routinely* involve an agreed-upon disposition and are part of an "offer" from the prosecution. While a Court may reject an agreed-upon disposition by the parties, this method of case resolution is utilized in nearly all juvenile cases in Los Angeles County. We have heard from our membership that the SYTF bargaining techniques described above are already being used in some counties. But if plea bargains may be conditioned on stipulations to specified base terms or on forfeiture of the right to advocate for clients at review hearings, it will strip the ability of juvenile court judges to follow and benefit from the language that the Matrix Classification Working Group has worked so hard to create.	The committee appreciates that setting a baseline term is plainly a judicial function under section 875 but notes that the statute makes no reference to plea bargaining or any limitations on plea bargaining with regard to baseline terms. Existing case law allows plea bargains in juvenile matters, and thus the committee does not believe that it has the authority to prohibit them by rule of court in this context absent express statutory direction to do so. The committee notes that the court is never required to accept a plea bargain and that a youth and his counsel are under no obligation to agree to a plea bargain if they would prefer to seek a judicial resolution. The committee understands that transfer motions may be used as leverage by some prosecuting attorneys in order to secure an agreement to a longer baseline term but notes that these motions can only be brought for older youth and now require the prosecution to show by clear and convincing evidence that the youth cannot be rehabilitated under juvenile court jurisdiction and that determination must be made by the court. Thus, even youth subject to transfer have options other than a stipulation if they wish to have the juvenile court make these determinations. The committee also notes that if it is the intent of the legislature that plea bargains be restricted in this context, it can amend the statute to include that limitation.

Rule 5.806(d) – Limits on plea bargaining		
Commenter	**Comment**	**Committee Response**
	We ask the Committee to add language specifying that selecting the baseline term, adjusting the baseline term at review hearings, and deciding whether to "step" youth down to less restrictive placements are exclusively *judicial* functions and not subject to plea bargaining by the parties.	

Rule 5.806(c) – Review hearings		
Commenter	**Comment**	**Committee Response**
California Alliance for Youth and Community Justice, by Israel Villa Deputy Director and 31 co-signatories Community Agency for Resources, Advocacy and Services (C.A.R.A.S.) By Marty Estrada, Director of Community Development, Gilroy	**(5) Proposed Rule 5.806(c) should not constrain the operation of an SYTF to Probation Departments** *Overview:* Proposed Rule 5.806(c) provides for adjusting the baseline term at review hearings. The rule provides that "each probation department operating a secure youth treatment facility must implement a system to track the positive behavior of youth…" *Reason for Concern:* This proposed rule conflicts with existing law. Welf. Inst. Code 875(f)(1) describes an SYTF as a "secure facility that is operated, utilized or accessed by the county of commitment…" The law does not limit the operation of an SYTF to probation departments. Instead, existing law gives counties the authority to choose what agency or entity operates an SYTF. The proposed rule refers only to probation departments. *Recommendation to address the concern:* Amend Proposed Rule 5.806(c) to acknowledge that agencies or entities other than probation departments may operate an SYTF.	The committee concurs that the statute does not restrict the operation of SYTF facilities to probation departments but does not agree that the rule as proposed would constrain the operation of SYTF facilities to probation departments. The provision of the rule cited here directs probation departments operating SYTF facilities to track the positive behavior of the youth in those facilities and report to the court at each review hearing. Because probation departments are tasked with making recommendations to the court in juvenile matters, the council has the authority to make this directive to the probation department via rule of court. If a county were to select another agency or entity to operate the SYTF, the provision of the rule requiring collection of this information would not apply, and the court would need to make specific orders to ensure that it obtains needed information about positive behavior for youth committed to those facilities, or, alternatively, the statute would need to be amended to provide clear authority for requiring any operator of such a facility to track behavior systematically and provide that information to probation and/or the court.
Chief Probation Officers of California By Rosemary Lamb McCool, Deputy Director	**Section (c): Adjusting the baseline term at review hearings**. Upon reviewing the draft rule of court 5.806, it does not appear the draft matrix will afford the court the option to reduce and/or increase the baseline term for a youth. Welfare and Institutions Code Section 875 (h)(1) provides that: *"The classification matrix may provide for upward or downward deviations from the baseline term and may also provide for a system of positive incentives or credits for time served."*	The committee has considered this comment but does not agree that the statute provides authority for upward adjustments to the baseline term at review hearings. The provisions in the statute that reference upward adjustments are all focused on setting the baseline term at the time of commitment. The committee did not include such adjustments in the matrix rule because the matrix itself contains wide ranges for the baseline term and thus any additional room for adjustment would be redundant and confusing. The review hearing provision of the rule is constrained by the statute, which expressly

Rule 5.806(c) – Review hearings		
Commenter	**Comment**	**Committee Response**
	Current Welfare and Institutions Code Section 875(b) grants courts the ability to modify the baseline term with a deviation of plus or minus six months pending the adoption of the Judicial Council guidelines: *"The court may, pending the adoption of Judicial Council guidelines, modify the initial baseline term with a deviation of plus or minus six months. The baseline term shall also be subject to modification in progress review hearings as described in subdivision (e)."* We ask that the Judicial Council consider establishing a process for review hearings to determine if a baseline term is in need of modification either downward or upward dependent upon a youth's progress towards their Individual Rehabilitation Plan (IRP). Currently, the draft Rule of Court only allows for the baseline term to be modified down. Further, the Judicial Council could establish factors within Section (c) for the court to consider when determining modifications to the baseline term just as factors have been defined for consideration when setting the baseline term in Section (b). We have concerns that if youth are not able to complete their rehabilitative programming and/or are not actively engaging in their programming pursuant to their IRP, it will have adverse impacts to their success upon transition into a less restrictive program and/or their transition into the community. The ability to only shorten the baseline term may result in the unintended consequence of increased filings for transfer to adult court. It is also important to note the importance of Welfare and Institutions Code Section (e)(2) which states: *"The ward's confinement time, including time spent in a less restrictive program described in subdivision (f), shall not be extended beyond the baseline confinement term, or beyond a*	provides: "At the conclusion of each review hearing, upon making a finding on the record, the court may order that the ward remain in custody for the remainder of the baseline term or may order that the ward's baseline term or previously modified baseline term be modified downward by a reduction of confinement time not to exceed six months for each review hearing." (Welf. & Inst. Code § 875(e)(1)). Moreover, the statute goes on to state: "The ward's confinement time, including time spent in a less restrictive program described in subdivision (f), *shall not be extended beyond the baseline confinement term, or beyond a modified baseline term, for disciplinary infractions or other in-custody behaviors*." (Welf. & Inst. Code (e)(2)(emphasis added)). Thus, while the committee appreciates the concern that the limits on the court's ability to extend the baseline term when a youth is failing to make progress may pose a challenge for operators of SYTF facilities, the statute plainly does not authorize extension of the baseline term after it has been set.

Rule 5.806(c) – Review hearings		
Commenter	**Comment**	**Committee Response**
	modified baseline term, for disciplinary infractions or other in-custody behaviors. Any infractions or behaviors shall be addressed by alternative means...apply to juvenile facilities generally." The statute referenced above is important to note as we believe that it is important that upward deviations apply to one's progress, or lack thereof, on their Individual Rehabilitation Plan and not specific to behaviors. **3. Section (c): Adjusting the baseline term at review hearings** Section (c) of the rule of court as currently drafted does not reference Welfare and Institutions Code Section 875(e)(3) whereby the court may retain a youth in custody in a SYTF for up to an additional year of confinement if the court finds that the youth constitutes a substantial risk of imminent harm to others. We request that the Judicial Council consider defining substantial risk of imminent harm within the framework of Rule of Court 5.806 to provide courts and probation departments more guidance in this area.	The committee recognizes that the court will have a challenge at the discharge hearing to determine whether additional confinement time is warranted, but does not agree that the statute is insufficiently specific. A substantial risk of imminent harm is a clear standard that courts should be able to apply in each case based on the evidence of the youth's progress and behavior while in the SYTF and any potential danger to the community that it suggests.
Thomas Harp Sacramento	Offenders can have and should be required to have their baseline adjusted as they participate in their rehabilitation. This would in turn further advance the goal of Positive Youth Development as well as providing additional incentive for the sentenced individual to participate in counseling/rehabilitative services.	The statute and the rule of court do allow for a reduction of the baseline term if warranted for youth who are progressing in their rehabilitation, but there is no authority for the court to increase the baseline term after it has been set and thus the rule cannot include upward adjustments.

Require Data Collection		
Commenter	**Comment**	**Committee Response**
California Alliance for Youth and Community Justice, by Israel Villa Deputy Director and 31 co-signatories Community Agency for Resources, Advocacy and Services (C.A.R.A.S.) By Marty Estrada, Director of Community Development, Gilroy	**(6) There are no proposed rules requiring any data collection. In order to effectively monitor racial and ethnic disparities in confinement terms, data collection is essential.** *Overview:* There is no proposed requirement that data be collected on baseline confinement terms. *Reason for Concern:* Significant racial and ethnic disparities persist in California's criminal legal system. Historically, youth of color bear the brunt of the state's most punitive justice system decisions, including commitments to DJJ. As SYTF serves as a local replacement for DJJ, careful monitoring of whether there are racial and ethnic disparities in the use of SYTFs, including data around the baseline confinement terms, is critical. *Recommendation to address the concern:* Include language requiring data collection on baseline confinement terms that are disaggregated by commitment offense and race and ethnicity, age and gender.	The committee appreciates the vital role that data collection and analysis can play in ensuring that baseline terms are applied fairly across California, but the statute does not require any data collection and reporting and placing such a requirement on the courts, who are not part of a statewide data collection system, would be a significant workload burden beyond the statutory delegation, and for which the council would need to seek public comment from the courts. The committee is hopeful that existing efforts at the state level led by the Department of Justice will result in an effective and efficient means of collecting such data in a manner that can be used to assess the application of the matrix. In the meantime, the committee has tried to address this issue within its statutory purview by adding a sentence to the Advisory Committee Comment encouraging courts and probation to monitor implementation of this rule to ensure that it is fairly and consistently applied.

Appendix A: Attachment to the Comments of the Orange County and Yolo County District Attorneys

SP22-14

Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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

Proposed SYTF Matrix for Category A:

Category	Offense (Listed with reference to paragraph within section 707(b))	Term
A	(1) Murder	4 to 7 years

DJJ expiring Matrix Category 1:

DIVISION OF JUVENILE JUSTICE
CASE SERVICES SECTION
SUMMARY OF OFFENSES AND CATEGORIES AS LISTED IN TITLE 15

Baseline for Offenses Occurring on or After 11/14/96

CATEGORY / SECTION #'S	Offense	Penal Code	Baseline PCD
	Murder, First Degree	187, 189, 190	7 years
	Murder, Second Degree	187, 189, 190	
	Kidnapping with Death of Victim	207, 209	
	Kidnapping (with Substantial Injury)	207, 208, 209	
	Torture	206, 206.1	
	Conspiracy to Commit Any Category 1 Offense	182	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

SP22-14

Juvenile Law: Secure Youth Treatment Facility Offense Based Classification Matrix (Adopt Cal. Rules of Court, rule 5.806)

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

Category	Offense (Listed with reference to paragraph within section 707(b))	Term
A	(1) Murder (11) Kidnapping with bodily harm. (27) Kidnapping, as punishable in Penal Code section 209.5 (23) Torture, as described in Penal Code sections 206 and 206.1.	5 to 11 years
B	(4) Rape with force, violence, or threat of great bodily harm. (5) Sodomy by force, violence, duress, menace, or threat of great bodily harm. (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. (8) An offense specified in Penal Code section 289(a). (9) Kidnapping for ransom. (10) Kidnapping for purposes of robbery. (12) Attempted murder. (24) Aggravated mayhem, as described in Penal Code section 205. (26) Kidnapping for purposes of sexual assault, as punishable in Penal Code section 209(b). (29) The offense described in Penal Code section (30) Voluntary manslaughter, as described in Penal Code section 192(a). 18745.	3 to 5 years

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

B	(4) Rape with force, violence, or threat of great bodily harm. (5) Sodomy by force, violence, duress, menace, or threat of great bodily harm. (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. (8) An offense specified in Penal Code section 289(a). (9) Kidnapping for ransom. (10) Kidnapping for purposes of robbery. (11) Kidnapping with bodily harm. (12) Attempted murder. (23) Torture, as described in Penal Code sections 206 and 206.1. (24) Aggravated mayhem, as described in Penal Code section 205. (26) Kidnapping for purposes of sexual assault, as punishable in Penal Code section 209(b). (27) Kidnapping, as punishable in Penal Code section 209.5. (29) The offense described in Penal Code section (30) Voluntary manslaughter, as described in Penal Code section 192(a). 18745.	3 to 5 years

Secure Youth Treatment Facility Offense-Based Classification Matrix Working Group

Hon. Stephanie E. Hulsey, Chair
Judge of the Superior Court of California,
County of Monterey

Hon. Melissa N. Widdifield, Vice-Chair
Judge of the Superior Court of California,
County of Los Angeles

Hon. John P. Bianco
Judge of the Superior Court of California,
County of Tulare

Hon. Katherine Lucero (Ret.)
Director
Office of Youth and Community Restoration

Hon. Tilisha Martin
Judge of the Superior Court of California,
County of San Diego

Hon. Rubén A. Villalobos
Judge of the Superior Court of California,
County of Stanislaus

Hon. Pamela Villanueva
Judge of the Superior Court of California,
County of Los Angeles

Dr. Baljit Atwal
Psychologist
PARC, Inc.

Ms. Nisreen Baroudi
Supervising Attorney
Santa Clara County Public Defender's Office

Ms. Elizabeth S. Braunstein
Deputy Public Defender
Los Angeles County Public Defender

Mr. Dieudonné Brou
Juvenile Justice Programs & Initiatives Coordinator
Urban Peace Movement

Mr. Miguel A. Garcia
Specialist, County Coordinating Unit
Office of Youth and Community Restoration

Mr. Matthew R. Golde
Assistant District Attorney
Alameda County District Attorney's Office

Mr. David M. Koch
Chief Probation Officer
Sonoma County Probation Department

Mr. Abraham Medina
Senior Program Officer
Sierra Health Foundation

Mr. Brian Richart
Chief Probation Officer
El Dorado County Probation

Ms. Christienne Sanders
Associate Director
Division of Juvenile Justice

Ms. Nancy E. Smith
Supervising Deputy District Attorney
Sacramento County District Attorney's Office

Secure Youth Treatment Facility Offense-Based Classification Matrix Working Group

Mr. David J. Steinhart
Director
Commonweal Juvenile Justice Program

JUDICIAL COUNCIL STAFF

Ms. Tracy Kenny
Attorney
Center for Families, Children & the Courts
Judicial Council of California

Ms. Charina Zalzos
Administrative Coordinator
Center for Families, Children & the Courts
Judicial Council of California

Item number: 05

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: February 16, 2023

Title of proposal: Rules and Forms: Miscellaneous Technical Changes

Proposed rules, forms, or standards *(include amend/revise/adopt/approve):*
Amend rules 8.137, 8.406, 8.416, 8.730, 8.805, and 8.837; and revise forms AT-138/EJ-125, CR-290, CR-292, and JV-469

Committee or other entity submitting the proposal:
Judicial Council Staff

Staff contact (name, phone and e-mail): Anne M. 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:
This proposal was not circulated for public comment because it is 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).)

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

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-077
For business meeting on: March 23–24, 2023

Title
Rules and Forms: Miscellaneous Technical Changes

Rules, Forms, Standards, or Statutes Affected
Amend rules 8.137, 8.406, 8.416, 8.730, 8.805, and 8.837; revise forms AT-138/EJ-125, CR-290, CR-292, and JV-469

Recommended by
Judicial Council staff
Anne M. Ronan, Supervising Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
April 1 and May 1, 2023

Date of Report
February 14, 2023

Contact
Anne M. Ronan, 415-865-8933
anne.ronan@jud.ca.gov

Executive Summary

Various members of the judicial branch, members of the public, and Judicial Council staff have identified errors in the California Rules of Court and Judicial Council forms resulting from typographical errors, and minor changes needed to conform to recent legislation or previous council actions. Judicial Council staff recommend making the necessary corrections to ensure the rules and forms conform to law and to avoid causing confusion for court users, clerks, and judicial officers.

Recommendation

Judicial Council staff recommend that the council take the following actions:

Effective April 1, 2023:

1. Amend rule 8.137(g)(3) to clarify a cross-reference to subdivision (f)(2) and delete an extraneous word.

2. Amend rule 8.406(a) to update cross-references that changed when the rule was recently amended.

3. Amend rule 8.416 to correct a cross-reference to other rules.

4. Amend rule 8.730(c)(1) and (d) of the California Rules of Court to correct cross-references to rules that were recently renumbered as rules 8.720, 8.724, and 8.728, respectively.

5. Amend rule 8.805(a) to change the cross-reference to the Supreme Court rules in division 5 of title 8, to division 7 of title 8, where the referenced rules are now located.

6. Amend 8.837 to clarify a cross-reference to subdivision (d)(4).

7. Revise *Application and Order for Appearance and Examination* (form AT-138/EJ-125) to add the numeral denoting item 2, which was inadvertently omitted from the form in a recent revision.

8. Revise *Petition and Order to Exit and Reenter Jurisdiction—Nonminor Dependent* (form JV-469) to correct a sentence in item 2 of the form that directs the person filing the petition to indicate how consent was obtained from the subject of the petition, but refers to the "consent of the minor" and should instead read "consent of the nonminor" because the petition can only be filed after the subject has reached the age of 18.

Effective May 1, 2023:

9. Revise *Felony Abstract of Judgment—Determinate* (form CR-290) to replace an incorrect reference in item 9e to "Court Operations Assessment" with "Conviction Assessment," add back boxes to items 6 and 8 to indicate years and months for sentencing purposes, and indicate statutory references to the Penal Code.

10. Revise *Abstract of Judgment—Prison Commitment—Indeterminate* (form CR-292) to replace check boxes indicating whether the commitment is to state prison or county jail with "Commitment to State Prison—Abstract of Judgment" and correct item 6b by replacing a sentence of "15 years to Life" (already listed in item 6a) with "25 years to Life."

The text of the amended rule and the revised forms are attached at pages 4–14.

Relevant Previous Council Action

The Judicial Council has acted on these rules and forms previously. This proposal addresses minor corrections of items that were either inadvertently omitted in the prior action or unrelated to any prior action.

Analysis/Rationale

The changes to these rules and forms are technical in nature and necessary to correct inadvertent omissions or incorrect references. They are needed to ensure that the rules and forms are correct and conform to the law.

Policy implications

There are no policy implications to this proposal.

Comments

This proposal was not circulated for public comment because the changes 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 forms and rules need to be corrected, so the alternative of taking no action was not considered. An earlier effective date was considered for the CR form corrections, but court administrators requested additional time to allow for input of the corrected forms into electronic case management systems.

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 technical corrections, case management systems are unlikely to need updating to implement any other than the CR forms.

Attachments and Links

1. Cal. Rules of Court, rules 8.137, 8.406, 8.416, 8.730, 8.805, and 8.837, at pages 4–6
2. Forms AT-138/EJ-125, CR-290, CR-292, and JV-469, at pages 7–14

Rules 8.137, 8.406, 8.416, 8.730, 8.805, and 8.837 of the California Rules of Court are amended, effective April 1, 2023, to read:

Rule 8.137. Settled statement

(a)–(f) * * *

(g) Review of the corrected statement

(1)–(2) * * *

(3) Within 10 days after the time for filing proposed modifications or objections under (2) has expired, the trial court judge must review the corrected or modified statement and any proposed modifications or objections to the statement filed by the parties. The procedures in (f)(2) or ~~in~~ (f)(3) apply if the trial court judge determines that further corrections or modifications are necessary to ensure that the statement is an accurate summary of the evidence and the testimony of each witness relevant to the points that the appellant states under (d)(1) are being raised on appeal.

(h) * * *

Rule 8.406. Time to appeal

(a) Normal time

(1) Except as provided in ~~(2) and (3),~~ (A), (B), and (2), a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.

(A)–(B) * * *

(2) * * *

(b)–(d) * * *

Rule 8.416. Appeals from all terminations of parental rights; dependency appeals in Orange, Imperial, and San Diego Counties and in other counties by local rule

(a) * * *

(b) Form of record

(1) The clerk's and reporter's transcripts must comply with rules 8.45–8.~~46~~7, relating to sealed and confidential records, and, except as provided in (2) and (3), with rule 8.144.

(2)–(3) * * *

(c)–(h) * * *

Rule 8.730. Filing, modification, and finality of decision; remittitur

(a)–(b) * * *

(c) Finality of decision

(1) A court's denial of a petition for a writ under rule ~~8.495~~ 8.720, ~~8.496~~ 8.724, or ~~8.498~~ 8.728 without issuance of a writ of review is final in that court when filed.

(2)–(5) * * *

(d) Remittitur

A Court of Appeal must issue a remittitur in a writ proceeding under this chapter except when the court denies the petition under rule ~~8.495~~ 8.720, ~~8.496~~ 8.724, or ~~8.498~~ 8.728 without issuing a writ of review. Rule 8.272(b)–(d) governs issuance of a remittitur in writ proceedings under this chapter.

Rule 8.805. Amendments to rules and statutes

(a) Amendments to rules

Only the Judicial Council may amend these rules, except the rules in division ~~5~~ 7, which may be amended only by the Supreme Court. An amendment by the Judicial Council must be published in the advance pamphlets of the Official Reports and takes effect on the date ordered by the Judicial Council.

(b) * * *

Rule 8.837. Statement on appeal

(a)–(d) * * *

(e) Review of the corrected statement

(1)–(2) * * *

(3) Within 10 days after the time for filing proposed modifications or objections under (2) has expired, the judge must review the corrected or modified statement and any proposed modifications or objections to the statement filed by the parties. The procedures in (d)(3) or (d)(4) apply if the judge determines that further corrections or modifications are necessary to ensure that the statement is an accurate summary of the evidence and the testimony of each witness relevant to the points which the appellant states under (c)(1) are being raised on appeal.

(f) * * *

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **2/10/2023** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
APPLICATION AND ORDER FOR APPEARANCE AND EXAMINATION ☐ **ENFORCEMENT OF JUDGMENT** ☐ **ATTACHMENT (Third Person)** ☐ **Judgment Debtor** *or* ☐ **Third Person**	CASE NUMBER:

ORDER TO APPEAR FOR EXAMINATION

1. TO *(name):*
2. YOU ARE ORDERED TO APPEAR personally before this court, or before a referee appointed by the court, to
   a. ☐ furnish information to aid in enforcement of a money judgment against you.
   b. ☐ answer concerning property of the judgment debtor in your possession or control or concerning a debt you owe the judgment debtor.
   c. ☐ answer concerning property of the defendant in your possession or control or concerning a debt you owe the defendant that is subject to attachment.

Date:	Time:	Dept. or Div.:	Rm.:
Address of court ☐ is shown above ☐ is:			

3. This order may be served by a sheriff, marshal, registered process server, **or** the following specially appointed person *(name)*:

Date:

JUDGE

This order must be served not less than 10 days before the date set for the examination.

IMPORTANT NOTICES ON PAGES 2 AND 3

APPLICATION FOR ORDER TO APPEAR FOR EXAMINATION

4. ☐ Original judgment creditor ☐ Assignee of record ☐ Plaintiff who has a right to attach order applies for an order requiring *(name):*
   to appear and furnish information to aid in enforcement of the money judgment or to answer concerning property or debt.
5. The person to be examined is
   a. ☐ the judgment debtor.
   b. ☐ a third person (1) who has possession or control of property belonging to the judgment debtor or the defendant or (2) who owes the judgment debtor or the defendant more than $250. An affidavit supporting this application under Code of Civil Procedure section 491.110 or 708.120 is attached.
6. The person to be examined resides or has a place of business in this county or within 150 miles of the place of examination.
7. ☐ This court is **not** the court in which the money judgment is entered or *(attachment only)* the court that issued the writ of attachment. An affidavit supporting an application under Code of Civil Procedure section 491.150 or 708.160 is attached.
8. ☐ The judgment debtor has been examined within the past 120 days. An affidavit showing good cause for another examination is attached.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

(Continued on pages 2 and 3)

Information for Judgment Creditor Regarding Service

If you want to be able to ask the court to enforce the order on the judgment debtor or any third party, you must have a copy of the order personally served on the judgment debtor by a sheriff, marshal, registered process server, or the person appointed in item 3 of the order at least 10 calendar days before the date of the hearing, and have a proof of service filed with the court.

IMPORTANT NOTICES ABOUT THE ORDER

APPEARANCE OF JUDGMENT DEBTOR (ENFORCEMENT OF JUDGMENT)

NOTICE TO JUDGMENT DEBTOR If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.

APPEARANCE OF A THIRD PERSON (ENFORCEMENT OF JUDGMENT)

NOTICE TO PERSON SERVED If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.

NOTICE TO JUDGMENT DEBTOR The person in whose favor the judgment was entered in this action claims that the person to be examined under this order has possession or control of property that is yours or owes you a debt. This property or debt is as follows *(describe the property or debt)*:

If you claim that all or any portion of this property or debt is exempt from enforcement of the money judgment, you must file your exemption claim in writing with the court and have a copy personally served on the judgment creditor not later than three days before the date set for the examination. You must appear at the time and place set for the examination to establish your claim of exemption or your exemption may be waived.

APPEARANCE OF A THIRD PERSON (ATTACHMENT)

NOTICE TO PERSON SERVED If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the plaintiff in this proceeding.

APPEARANCE OF A CORPORATION, PARTNERSHIP, ASSOCIATION, TRUST, LIMITED LIABILITY COMPANY, OR OTHER ORGANIZATION

If the order to appear for the examination on page 1 does not require the appearance of a specified individual:

- **The organization has a duty to designate one or more of the following to appear and be examined: officers, directors, managing agents, or other persons who are familiar with the organization's property and debts.**
- **Failure to designate such a person familiar with the organization's property and debts to appear for examination will result in the order to appear for the examination to be deemed to have been made to, and require the appearance of, the following:**
  - **If the organization is a corporation registered with the Secretary of State, a natural person named as the chief financial officer in the corporation's most recent filing with the Secretary of State. If no one is so named, a natural person named as the chief executive officer in the corporation's most recent filing with the Secretary of State. If no one is so named, a natural person named as the secretary in the corporation's most recent filing with the Secretary of State.**
  - **If the organization is a limited liability company registered with the Secretary of State, the first natural person named as a manager or member in the limited liability company's most recent filing with the Secretary of State.**
  - **If the organization is a limited partnership registered with the Secretary of State, the first natural person named as a general partner in the limited partnership's most recent filing with the Secretary of State.**
  - **If the organization is not registered with the Secretary of State or the organization's filings with the Secretary of State do not identify a natural person as described above, a natural person identified by the judgment creditor as being familiar with the property and debts of the organization, together with an affidavit or declaration signed by the judgment creditor that sets forth the factual basis for the identification of the individual. The affidavit or declaration shall be served on the organization together with the order.**
- **Service of an order to appear for an examination upon an organization by any method permitted under the Code of Civil Procedure or the Corporations Code, including service on the agent of the organization for service of process, shall be deemed effective service of the order to appear upon the individuals identified above.**

Request for Accommodations. Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before your hearing. Contact the clerk's office for *Disability Accommodation Request* (form MC-410). (Civil Code, § 54.8.)

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

FELONY ABSTRACT OF JUDGMENT—DETERMINATE

CR-290

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF:		*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: AKA: CII NO: BOOKING NO: ☐ NOT PRESENT	DOB:	-A -B -C -D
FELONY ABSTRACT OF JUDGMENT ☐ AMENDED ABSTRACT ☐ PRISON COMMITMENT ☐ COUNTY JAIL COMMITMENT		
DATE OF HEARING	DEPT. NO.	JUDGE
CLERK	REPORTER	PROBATION NO. OR PROBATION OFFICER ☐ IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE		COUNSEL FOR DEFENDANT ☐ APPOINTED

1. Defendant was convicted of the commission of the following felonies:

☐ Additional counts are listed on attachment

_____ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YR.)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	TERM (L, M, U)	CONCURRENT	1/3 CONSECUTIVE	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (REFER TO Item 5)	654 STAY	SERIOUS FELONY	VIOLENT FELONY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YRS.	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: MOS.
					/ /													
					/ /													
					/ /													
					/ /													
					/ /													
					/ /													

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

COUNT	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

3. ENHANCEMENTS charged and found to be true for PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

4. Defendant sentenced ☐ to county jail per PC 1170(h)(1) or (2)

☐ to prison per PC 1170(a), 1170.1(a) or 1170(h)(3) due to ☐ current or prior serious or violent felony ☐ PC 290 or ☐ PC 186.11 enhancement

☐ per PC 667(b)-(i) or PC 1170.12 (strike prior)

☐ per PC 1170(a)(3). Preconfinement credits equal or exceed time imposed. ☐ Defendant ordered to report to local parole or probation office.

5. INCOMPLETE SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES: _____ _____

7. ☐ Additional indeterminate term (see CR-292).

8. TOTAL TIME: _____ _____

Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-290 [Rev. May 1, 2023]

FELONY ABSTRACT OF JUDGMENT—DETERMINATE

Penal Code, §§ 1213, 1213.5

PEOPLE OF THE STATE OF CALIFORNIA v.
DEFENDANT:

-A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. **Restitution Fines:**

Case A: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.
Case B: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.
Case C: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.
Case D: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

b. **Restitution per PC 1202.4(f):**

Case A: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case B: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ *Victim name(s), if known, and amount breakdown in item 13, below. ☐ *Victim name(s) in probation officer's report.

c. **Fines:**

Case A: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense
Case B: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense
Case C: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense
Case D: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. **Court Operations Assessment:** $ _____ per PC 1465.8. e. **Conviction Assessment:** $ _____ per GC 70373. f. **Other:** $ _____ per (specify): _____

10. TESTING: ☐ Compliance with PC 296 verified ☐ AIDS per PC 1202.1 ☐ Other *(specify):*

11. REGISTRATION REQUIREMENT: ☐ per *(specify code section):*

12. ☐ MANDATORY SUPERVISION: Execution of a portion of the defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170(h)(5)(B) as follows *(specify total sentence, portion suspended, and amount to be served forthwith):*
Total: Suspended: Served forthwith:

13. ☐ Other orders *(specify):*

14. IMMEDIATE SENTENCING: ☐ Probation to prepare and submit a post-sentence report to CDCR per PC 1203c.
Defendant's race/national origin: _____

15. EXECUTION OF SENTENCING IMPOSED
a. ☐ at initial sentencing hearing
b. ☐ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1172.1)
e. ☐ Other *(specify):*

16. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT	
A				2933 2933.1 4019
B				2933 2933.1 4019
C				2933 2933.1 4019
D				2933 2933.1 4019
Date Sentence Pronounced			Time Served in State Institution DMH CDC CRC	

17. The defendant is remanded to the custody of the sheriff ☐ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to the ☐ reception center designated by the director of the California Department of Corrections and Rehabilitation
☐ county jail ☐ Other *(specify):*

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	Date:

ABSTRACT OF JUDGMENT—PRISON COMMITMENT—INDETERMINATE

CR-292

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF:		***FOR COURT USE ONLY***
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: AKA: CII NO: BOOKING NO: ☐ NOT PRESENT	DOB:	-A -B -C
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT ☐ AMENDED ABSTRACT		-D

DATE OF HEARING	DEPT. NO.	JUDGE
CLERK	REPORTER	PROBATION NO. OR PROBATION OFFICER ☐ IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE		COUNSEL FOR DEFENDANT ☐ APPTD.

1. Defendant was convicted of the commission of the following felonies:
   ☐ Additional counts are listed on attachment
   _____ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YR.)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	CONCURRENT	CONSECUTIVE	654 STAY
					/ /						
					/ /						
					/ /						
					/ /						
					/ /						
					/ /						

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☐ LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts _____
5. ☐ LIFE WITH THE POSSIBILITY OF PAROLE on counts _____
6. a. ☐ 15 years to Life on counts _____ c. ☐ _____ years to Life on counts _____
   b. ☐ 25 years to Life on counts _____ d. ☐ _____ years to Life on counts _____

   PLUS enhancement time shown above
7. ☐ Additional determinate term (see CR-290).
8. ☐ Defendant was sentenced pursuant to ☐ PC 667(b)-(i) or PC 1170.12 ☐ PC 667.61 ☐ PC 667.7 ☐ Other *(specify):*

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

PEOPLE OF THE STATE OF CALIFORNIA v.
DEFENDANT:

-A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. **Restitution Fines:**

Case A: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case B: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case C: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case D: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

b. **Restitution per PC 1202.4(f):**

Case A: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case B: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ *Victim name(s), if known, and amount breakdown in item 12, below. ☐ *Victim name(s) in probation officer's report.

c. **Fines:**

Case A: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. **Court Security Fee:** $ _____ per PC 1465.8. e. **Criminal Conviction Assessment:** $ _____ per GC 70373.

10. TESTING: a. ☐ Compliance with PC 296 verified b. ☐ AIDS per PC 1202.1 c. ☐ Other *(specify):*

11. REGISTRATION REQUIREMENT: ☐ per *(specify code section):*

12. Other orders *(specify):*

13. IMMEDIATE SENTENCING:

☐ Probation to prepare and submit post-sentence report to CDCR per PC 1203c.

Defendant's race/national origin: _____

14. EXECUTION OF SENTENCING IMPOSED

a. ☐ at initial sentencing hearing
b. ☐ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1172.1)
e. ☐ Other *(specify):*

15. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT	
A				2933 2933.1 4019
B				2933 2933.1 4019
C				2933 2933.1 4019
D				2933 2933.1 4019
Date Sentence Pronounced			Time Served in State Institution DMH CDC CRC	

16. The defendant is remanded to the custody of the sheriff ☐ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to the ☐ reception center designated by the director of the California Department of Corrections and Rehabilitation
☐ county jail ☐ Other *(specify):*

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	Date:

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR *(name):*		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
NONMINOR'S NAME:		
PETITION AND ORDER TO EXIT AND REENTER JURISDICTION—NONMINOR DEPENDENT		CASE NUMBER:

DRAFT
Not approved by the Judicial Council

1. **Petitioner *(name):***
   a. ☐ Social worker
   b. ☐ Probation officer
   c. ☐ Tribal placing agency

   requests on behalf of and with the consent of the nonminor named above that the court dismiss its jurisdiction under Welfare and Institutions Code section 300 or 450 and assume general jurisdiction under section 303, and then immediately resume its jurisdiction under section 300 or 450 to establish the nonminor's eligibility for federal financial participation. Petitioner certifies that the nonminor is not categorically ineligible for federal foster care benefits and is not a member of a tribe whose services would be disrupted by seeking to establish federal eligibility. Petitioner certifies that the petition is in the nonminor's best interest, and that reasonable efforts were made to meet the nonminor's needs prior to a foster care placement.

2. Petitioner obtained the consent of the nonminor on *(date):* _____ via the following method *(specify how consent was obtained):*

3. Notice of this request has been provided to the nonminor and the attorney for the nonminor via first class mail, personal service, or electronic service as provided in Welfare and Institutions Code section 212.5, and a proof of service is attached.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE)

(*The court will complete the section below only if a hearing is set.*)

ORDER

4. The court orders the following:
   ☐ The matter is set for hearing on *(date):* _____ *(time):* in department:

At the court address listed above.

Date: _____

_____
(JUDICIAL OFFICER)

Form Adopted for Mandatory Use
Judicial Council of California
JV-469 [Rev. April 1, 2023]

Welfare and Institutions Code, § 388(f);
Cal. Rules of Court, rules
5.555, 5.570, and 5.906
www.courts.ca.gov

Item number: 06

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 2/16/2023

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

Title of proposal: Jury Instructions: Public Access and Publication

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Cal. Rules of Court, rule 2.1050

Committee or other entity submitting the proposal:
Rules Committee

*Staff contact (*name, phone and e-mail*): Eric Long, 415-865-7691 eric.long@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): N/A
Project description from annual agenda: N/A

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
This proposal is based on a change in law already in effect, which will not directly impact courts but may impact litigants. For that reason, the recommendation is to send the proposal to the Judicial Council meeting in March 2023, for an April 1, 2023, effective date.

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

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-068
For business meeting on March 23–24, 2023

Title
Jury Instructions: Public Access and Publication

Rules, Forms, Standards, or Statutes Affected
Revise Cal. Rules of Court, rule 2.1050

Recommended by
Rules Committee
Hon. Carin T. Fujisaki, Chair

Agenda Item Type
Action Required

Effective Date
April 1, 2023

Date of Report
February 1, 2023

Contact
Eric Long, 415-865-7691
eric.long@jud.ca.gov

Executive Summary

The Rules Committee recommends revising California Rules of Court, rule 2.1050, to remove any implicit references to copyright and to express the council's continued interest in both free public access to its civil and criminal jury instructions and having publishers accurately publish the instructions, properly attribute the council as the source of the instructions, and not claim copyright in them. This proposal originated with a suggestion from a nonprofit organization after a change in copyright law that impacts government bodies.

Recommendation

The Rules Committee recommends that the council, effective April 1, 2023, amend rule 2.1050 to remove references to "permission to publish" and "royalties," which may imply copyright in the *Judicial Council of California Civil Jury Instructions* and *Judicial Council of California Criminal Jury Instructions*, and to express the council's continued interest in both free public access to its civil and criminal jury instructions and having publishers accurately publish the instructions, properly attribute the council as the source of the instructions, and not claim copyright in them.

The proposed amended rule is attached at pages 5–6.

Relevant Previous Council Action

Rule 2.1050, Judicial Council jury instructions, was adopted in 2003 as rule 855 in conjunction with the Judicial Council's approval of the civil jury instructions that comprised the first edition of *Judicial Council of California Civil Jury Instructions (CACI)*. The council amended former rule 855, effective August 26, 2005, on the recommendation of the Task Force on Jury Instructions, adding a provision to subdivision (c), to ensure that publication of the instructions by commercial publishers does not occur without permission, including ensuring that commercial publishers publish the instructions accurately, credit the council as the source of the instructions, and do not claim copyright of the instructions.[1] From that point on, the council asserted copyright over the jury instructions.

After former rule 855 was renumbered, the only amendments were minor amendments in 2016 to effectuate an organizational name change.

Analysis/Rationale

Background

Beginning with jury instructions that became effective in January 2006, the council expressly asserted copyright over and regularly registered with the United States Copyright Office the amended editions and annual supplements of *CACI* and *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. That action was consistent with copyright law at the time. The publications, including the versions published on the court's website, contained copyright registration notices—for example, "© 2006." Similarly, public-facing draft instructions in reports to the council and in invitations to comment contained a footer that read, "Copyright Judicial Council of California" or some variation of that statement.

Following the United States Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* (*Georgia*),[2] Public.Resource.Org, Inc. (Public.Resource) asked the council to amend rule 2.1050, and to make corresponding changes to its jury instructions publications and associated California Courts web pages to clarify that the jury instructions are in the public domain and that the council does not assert copyright in those materials. Public.Resource requested these changes because it concluded that the jury instructions are not eligible for copyright protection under

[1] Judicial Council of Cal., Staff Rep., *Judicial Council Jury Instructions (amend Cal. Rules of Court, rules 229 and 855, repeal Cal. Stds. Jud. Admin., § 5* (Aug. 26, 2005), pp. 1–5, *www.courts.ca.gov/documents/min082605.pdf*. The council at the same time reaffirmed that it intended its jury instructions be freely available for use and reproduction by parties, attorneys, and the public, except as otherwise limited by the rules, and expanded subdivision (e) to include criminal jury instructions.

[2] (2020) __ U.S. __ [140 S.Ct. 1498, 206 L.Ed.2d 732].

Georgia.[3] In June 2021, relying on the *Georgia* decision, the Copyright Office declined to register the May 2019 Supplement to *CACI*.

During the period the council expressly had claimed copyright in the jury instructions, the council simultaneously made the instructions freely available for use and reproduction by parties, attorneys, and the public by providing a broad public license for such use and reproduction. Under the rule, commercial publishers were treated differently from parties, attorneys, the public, and non-commercial publishers. Because the council has ceased registering a copyright in *CACI* and *CALCRIM*, the committee recommends that the rule now treat all publishers similarly. The committee believes it is appropriate to expand the provision in the rule that allows the council to contract with an official publisher to include contracting with other publishers, and to state a policy declaring the council's interest in maintaining the integrity of the jury instructions.

In subdivision (c), Public access, the proposal removes the entirety of the language concerning commercial publishers, and any implicit references to copyright, including "permission to publish" and "royalties." The rule maintains the commitment to free public access for the jury instructions, including the council's continued provision of copies and updates of the approved jury instructions on the court's public website. The substance concerning publication of the instructions would be relocated to a new subdivision.

In new subdivision (d), Publication, the proposal expresses the council's intent to enter into agreements to publish with an official publisher and other publishers. Subdivision (d) maintains much of the substance of the current rule as it relates to protecting the integrity of the council's jury instructions. The council has an ongoing interest in publishers accurately publishing the instructions, accurately crediting the Judicial Council as the source of the instructions, and publishers not falsely claiming copyright in *CACI* and *CALCRIM*.

Subdivision (e), Updating and revisions, would also be clarified to reflect existing practice relating to consideration of suggestions for changes to the jury instructions. Law students, self-represented litigants, appellate justices, business entities, and nonprofits—to name just a few—submit proposals on jury instructions, and any proposal submitted is considered by the appropriate advisory committee on jury instructions. The current provision provides that trial judges and attorneys may submit proposals to the Legal Services office of the Judicial Council. The advisory committees, however, consider submissions on jury instruction content from anyone with a comment relevant to the jury instructions, not just trial judges and attorneys.

Policy implications

Any policy implications are the result of an expansion of the government edicts doctrine under federal copyright law. This proposal does not alter the council's commitment to creating accurate

[3] The Court in *Georgia* held that, under the government edicts doctrine, annotations beneath the statutory provisions in the *Official Code of Georgia Annotated* are ineligible for copyright protection. (*Georgia, supra,* 140 S.Ct. at pp. 1503–1504.) Under the government edicts doctrine, "copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties." (*Id.* at p. 1508.)

and clear jury instructions stated in plain English in an attempt to clarify the legal principles jurors must consider in reaching their decisions.

Comments

The proposal was circulated for public comment in the winter 2023 invitation-to-comment period—from December 14, 2022, to January 20, 2023. One commenter, Public.Resource, responded. Public.Resource agreed with the proposal and suggested no modifications.

A chart setting forth the comment and committee's response is included at pages 7–9.

Alternatives considered

The Rules Committee considered the changes to rule 2.1050 suggested by the nonprofit organization Public.Resource to declare the jury instructions "in the public domain" and that the council does not claim copyright in them. The committee decided it was not necessary to make those declarations. Rule 2.1050(c) already states that the Judicial Council intends that the instructions be freely available for use and reproduction. In addition, the committee concluded that it is preferable to retain the language relating to accuracy and attribution. Even without copyright protections, the council has a significant interest in protecting the integrity of its jury instructions.

Fiscal and Operational Impacts

Operational impacts to the council from this rule amendment are expected to be minimal. Any fiscal impacts would not be from the proposed amendment but from no longer asserting copyright in the instructions, and even those effects are uncertain. Publishers who contract with the Judicial Council to publish jury instructions pay fees to the council. By statute, monies received from jury instruction publishers must be used "for the improvement of the jury system."[4] The committee believes the council's jury instructions have significant value, even without copyright protections. It is possible, however, that revenues will decrease over time as more copies of the jury instructions become available.

Attachments and Links

1. Cal. Rules of Court, rule 2.1050, at pages 5–6
2. Chart of comments, at pages 7–9

[4] Gov. Code, § 77209(h).

Rule 2.1050 of the California Rules of Court is amended, effective April 1, 2023, to read:

Rule 2.1050. Judicial Council jury instructions

(a)–(b) * * *

(c) Public access

The Judicial Council must provide copies and updates of the approved jury instructions to the public on the California Courts website. ~~The Judicial Council may contract with an official publisher to publish the instructions in both paper and electronic formats.~~ The Judicial Council intends that the instructions be freely available for use and reproduction ~~by parties, attorneys, and the public, except as limited by this subdivision~~. ~~The Judicial Council may take steps necessary to ensure that publication of the instructions by commercial publishers does not occur without its permission, including, without limitation, ensuring that commercial publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright of the instructions. The Judicial Council may require commercial publishers to pay fees or royalties in exchange for permission to publish the instructions. As used in this rule, "commercial publishers" means entities that publish works for sale, whether for profit or otherwise.~~

(d) Publication

The Judicial Council may contract with an official publisher and other publishers to publish the instructions in both paper and electronic formats. The Judicial Council may take appropriate actions to maintain the integrity of the jury instructions, including, without limitation, ensuring that publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright in the instructions.

~~(d)~~(e) Updating and ~~amendments~~ revisions

The Judicial Council instructions will be regularly updated and maintained through its advisory committees on jury instructions. ~~Amendments~~ Revisions to these instructions will be circulated for public comment before publication. ~~Trial judges and attorneys may submit for the advisory committees' consideration suggestions for improving or modifying these instructions or creating new instructions.~~ Suggestions for revising an instruction or creating new instructions may be submitted in writing, with an explanation of why the change is proposed~~.~~, ~~Suggestions should be sent~~ to the Judicial Council of California, Legal Services.

~~(e)~~(f) Use of instructions

Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless ~~he or she~~ the judge finds that a different instruction would more accurately state the law and be understood by jurors. Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument.

Jury Instructions: Public Access and Publication (Revise Cal. Rules of Court, rule 2.1050)

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

	Commenter	Position	Comment	Committee Response
1.	Public.Resource.Org, Inc. by Jennifer M. Urban Clinical Professor Samuelson Law, Technology & Public Policy Clinic University of California, Berkeley School of Law	A	Public.Resource.Org ("**Public Resource**") writes to convey its strong support of the Rules Committee's proposed revisions to California Rules of Court, rule 2.1050, set forth in Invitation to Comment W23-11 ("**Invitation to Comment**"). In November of 2020, Public Resource respectfully requested that the Judicial Council of California ("**JCC**") revise rule 2.1050, consistent with federal copyright law, to clarify that the California Civil Jury Instructions ("**CACI**") and the California Criminal Jury Instructions ("**CALCRIM**") (collectively, the "**Jury Instructions**") are in the public domain. Public Resource also respectfully requested that the JCC make the corresponding change of removing all copyright claims and notices from CACI, from CALCRIM, and from related web pages on the Judicial Branch web site. Public Resource submitted its proposal together with letters and statements of support from: • 11 public interest organizations that seek to improve public access to the law: Electronic Frontier Foundation, Fix the Court, Public Citizen, First Amendment Coalition, Public Knowledge, Free Law Project, Creative Commons, American Civil Liberties Union Found. of Northern California, American Civil Liberties Union Found. of San Diego & Imperial Counties, American Civil Liberties Union Found. of Southern California, and the Wikimedia Foundation; • The Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project; • 338 law professors, law librarians, and legal practitioners, the East Bay Community Law Center, and the San Francisco Public Defender's Office; • 120 law students, and 12 California law student organizations: Berkeley Law Wage Justice Clinic, Berkeley Journal of Gender, Law & Justice, Berkeley Technology Law Journal, Hastings Law Journal, Intellectual Property and Technology Law Journal, King Hall Intellectual Property Law Association, Law and Political	The committee thanks the commenter for its input.

	Commenter	Position	Comment	Committee Response
			Economy Society, Law Students of African Descent, Middle Eastern & North African Law Students Association, Post-Conviction Advocacy Project, Pilipinx American Law Society, Public Interest Law & Technology; and • Edward H. Schulman, a former Chief Assistant State Public Defender and member of the CALJIC Committee in Los Angeles from 1985-89. Public Resource applauds the Rules Committee's proposed changes to rule 2.1050 and its continued commitment to making the Jury Instructions freely [available] to the public. As noted in the Invitation to Comment, the proposed changes eliminate portions of rule 2.1050, subdivision (c) that implicitly referred to copyright protection, and "recommit[] to free public access for the jury instructions, including the council's continued provision of copies and updates of the approved jury instructions on the court's public website." The proposed changes to rule 2.1050 would more fully realize California's longstanding and ongoing efforts to increase Californians' access to the law. California has set an impressive and important precedent by rendering its Jury Instructions in "plain English." (Judicial Council of Cal., Criminal Jury Instructions (2020) p. ix.) The JCC took this approach explicitly to increase access to the law for jurors. (See Judicial Council of Cal., Civil Jury Instructions (2020) p. xxiii.) The JCC additionally worked to increase public access to the law by posting the Jury Instructions on the Judicial Branch web site. (Cal. Rules of Court, rule 2.1050, subd. (c).) The proposed changes to rule 2.1050 would further these efforts by bringing California's Jury Instructions in line with federal copyright law, and specifically with the United States Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* that, under the government edicts doctrine, government officials cannot author, and therefore cannot copyright, works they create in carrying out their official duties. ((2020) 140 S.Ct. 1498, 1504.)	

	Commenter	Position	Comment	Committee Response
			Public Resource thanks the Rules Committee and the JCC for its careful work to correct this oversight. The government edicts doctrine, at heart, ensures access to the law. And access to the law is fundamental to California's administration of justice. "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." (Cal. Const. art. I, § 7, subd. (a).) Accordingly, " 'All are entitled to be informed as to what the State commands or forbids.' " (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115, quoting *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) Because " '[e]very citizen is presumed to know the law,' " " 'it needs no argument to show . . . that all should have free access' " to its contents. (*Georgia*, *supra*, 140 S.Ct. at p. 1507, quoting *Nash v. Lathrop* (1886) 142 Mass. 29, 35.) Jury instructions in particular "are important because together they state the law that [jurors] will use." (CACI No. 5000.) Providing the law and legal materials for viewing alone is inadequate. (See *Building Officials & Code Adm. v. Code Technology, Inc.* (1st Cir. 1980) 628 F.2d 730, 736 [stating that the right to freely access the law includes "a necessary right freely to copy and circulate all or part of a given law for various purposes"].) The proposed changes are thus essential to complying with federal copyright law, to serving the goals of the JCC, and to protecting public access to the law. Public Resource supports them fully.	