# Judicial Council of California Criminal Jury Instructions

# CALCRIM

Supplement With New and Revised Instructions

As approved at the
April 29, 2011, Judicial Council Meeting

**Judicial Council of California**
**Advisory Committee on Criminal Jury Instructions**

Hon. Sandra Lynn Margulies, Chair

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# Table of New and Revised Judicial Council of California Criminal Jury Instructions (CALCRIM)

**April 2011**

*This April 2011 Supplement to the 2011 edition of CALCRIM includes all of the new and revised Judicial Council of California Criminal Jury Instructions approved by the Judicial Council of California at its meeting of April 29, 2011.*

**Table of Related Instructions for New CALCRIM (April 29, 2011)**

| CALCRIM No. | | CALJIC No. |
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| 3454A | . . . . . | 4.19 |

| CALJIC No. | | CALCRIM No. |
|---|---|---|
| 4.19 | . . . . . | 3454, 3454A |

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

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**Our system of justice requires that trials be conducted in open court with the parties presenting evidence and the judge deciding the law that applies to the case. It is unfair to the parties if you receive additional information from any other source because that information may be unreliable or irrelevant. Your verdict must be based only on the evidence presented during trial in this court and the law as I provide it to you.**

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

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

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

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

**[If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom and during jury deliberations. An electronic device includes any data storage device. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you without delay.]**

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

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

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

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

**You must reach your verdict without any consideration of punishment.**

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

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*New January 2006; Revised June 2007, April 2008, December 2008, April 2010, October 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

the proper introductory instruction for the penalty phase of a capital case.

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

## AUTHORITY

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

### *Secondary Sources*

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

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4] (Matthew Bender).

## RELATED ISSUES

### *Admonition Not to Discuss Case With Anyone*

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

> It is troubling that during deliberations not one but two jurors had

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

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

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

***Jury Misconduct***

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

## 225. Circumstantial Evidence: Intent or Mental State

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

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

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

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

*New January 2006; Revised August 2006, June 2007, April 2011*

### BENCH NOTES

***Instructional Duty***

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

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

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

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

## AUTHORITY

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

### *Secondary Sources*

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

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 652.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

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

## RELATED ISSUES

### *General or Specific Intent Explained*

A crime is a general-intent offense when the statutory definition of the crime consists of only the description of a particular act, without reference to intent

to do a further act or achieve a future consequence. A crime is a specific-intent offense when the statutory definition refers to the defendant's intent to do some further act or achieve some additional consequence. (*People v. McDaniel* (1979) 24 Cal.3d 661, 669 [156 Cal.Rptr. 865, 597 P.2d 124]; *People v. Hood* (1969) 1 Cal.3d 444, 456–457 [82 Cal.Rptr. 618, 462 P.2d 370]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768]; see, e.g., *People v. Whitfield* (1994) 7 Cal.4th 437, 449–450 [27 Cal.Rptr.2d 858, 868 P.2d 272] [second degree murder based on implied malice is a specific-intent crime].)

***Only One Possible Inference***

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

***Direct Evidence, Extrajudicial Admission, or No Substantial Reliance***

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

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

## 250. Union of Act and Intent: General Intent

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

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

*New January 2006; Revised June 2007, April 2008, April 2011*

### BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

***Defenses—Instructional Duty***

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

## AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].

### *Secondary Sources*

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

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

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

## RELATED ISSUES

***Sex Registration and Knowledge of Legal Duty***

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

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

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

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

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

*<Repeat next paragraph as needed>*

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

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*New January 2006; Revised June 2007, April 2010, April 2011*

### BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on the joint union of act and intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385,

926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) The court may give this instruction in cases involving both offenses requiring a specific intent or mental state and offenses that do not, rather than giving both CALCRIM No. 250 and CALCRIM No. 251.

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

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

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

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

***Defenses—Instructional Duty***

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

## AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Hill* (1967) 67 Cal.2d 105, 117

[60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].

- History of General-Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189–1190 [67 Cal.Rptr.3d 871].

### *Secondary Sources*

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

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

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

## RELATED ISSUES

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

## 334. Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice

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**Before you may consider the (statement/ [or] testimony) of** _____ *<insert name[s] of witness[es]>* **as evidence against (the defendant/** _____ *<insert names of defendants>***) [regarding the crime[s] of** _____ *<insert name[s] of crime[s] if corroboration only required for some crime[s]>***], you must decide whether** _____ *<insert name[s] of witness[es]>***) (was/were) [an] accomplice[s] [to (that/those) crime[s]]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if:**

1. **He or she personally committed the crime;**

**OR**

2. **He or she knew of the criminal purpose of the person who committed the crime;**

**AND**

3. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;]/ [or] participate in a criminal conspiracy to commit the crime).**

**The burden is on the defendant to prove that it is more likely than not that** _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s].**

**[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.]**

**[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice.]**

**[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]**

**[You may not conclude that a child under 14 years old was an**

**accomplice unless you also decide that when the child acted, (he/she) understood:**

1. **The nature and effect of the criminal conduct;**
2. **That the conduct was wrongful and forbidden;**

**AND**

3. **That (he/she) could be punished for participating in the conduct.]**

**If you decide that a (declarant/ [or] witness) was not an accomplice, then supporting evidence is not required and you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.**

**If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of _____ <*insert charged crime[s]*> based on his or her (statement/ [or] testimony) alone. You may use the (statement/ [or] testimony) of an accomplice 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[s], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice 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.**

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*New January 2006; Revised June 2007, April 2010, April 2011*

## 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]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].)

"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].) When 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, do not give this instruction. Give CALCRIM No. 335, *Accomplice Testimony: No 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 codefendants testify against each other and blame each other for the crime. (*Id.* at 218–219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, 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* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

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 below.)

In a multiple codefendant case, if the corroboration requirement does not apply to all defendants, insert the names of the defendants for whom corroboration is required where indicated in the first sentence.

If the witness was an accomplice to only one or some of the crimes he or she testified about, the corroboration requirement only applies to those crimes and not to other crimes he or she may have testified about. (*People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [331 P.2d 1040].) In such cases, the court may insert the specific crime or crimes requiring corroboration in the first sentence.

Give the bracketed paragraph that begins with "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness was an undercover police officer or an unwitting assistant.

Give the bracketed paragraph that begins with "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209 [55 P.2d 223].)

## 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* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defendant's Burden of Proof. *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Accomplice Includes Co-perpetrator. *People v. Felton* (2004) 122

Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].

- 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.Rtpr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

### *Secondary Sources*

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 98, 99, 105.

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).

## RELATED ISSUES

### *Out-of-Court Statements*

The out-of court statement of a witness *may* constitute "testimony" within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams* (1997) 16 Cal.4th 153, 245 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People v. Belton* (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485].) The Supreme Court has quoted with approval the following summary

of the corroboration requirement for out-of-court statements:

> '[T]estimony' within the meaning of . . . section 1111 includes . . . all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. [Citation.] On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as 'testimony' and hence need not be corroborated under . . . section 1111.

(*People v. Williams, supra*, 16 Cal.4th at p. 245 [quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218 [43 Cal.Rptr.2d 526] [quotation marks, citations, and italics removed]; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1230 [283 Cal.Rptr. 144, 812 P.2d 163] [out-of-court statement admitted as excited utterance did not require corroboration].) The court must determine whether the out-of-court statement requires corroboration and, accordingly, whether this instruction is appropriate. The court should also determine whether the statement is testimonial, as defined in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], and whether the *Crawford* holding effects the corroboration requirement of Penal Code section 1111.

***Incest With a Minor***

Accomplice instructions are not appropriate in a trial for incest with a minor. A minor is a victim, not an accomplice, to incest. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see CALCRIM No. 1180, *Incest*.)

***Liable to Prosecution When Crime Committed***

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469 [110 Cal.Rptr. 906, 516 P.2d 298].) However, the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [270 Cal.Rptr. 817, 793 P.2d 23].)

***Threats and Fear of Bodily Harm***

A person who is induced by threats and fear of bodily harm to participate in a crime, other than murder, is not an accomplice. (*People v. Brown* (1970) 6

Cal.App.3d 619, 624 [86 Cal.Rptr. 149]; *People v. Perez* (1973) 9 Cal.3d 651, 659–660 [108 Cal.Rptr. 474, 510 P.2d 1026].)

***Defense Witness***

"[A]lthough an accomplice witness instruction must be properly formulated . . . , there is no error in giving such an instruction when the accomplice's testimony favors the defendant." (*United States v. Tirouda* (9th Cir. 2005) 394 F.3d 683, 688.)

## 450. Liability of Corporate Officers and Agents: Single Theory of Liability

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**The defendant is charged [in Count _____] with _____** *<insert offense charged>* **while acting as an (officer/ [or] agent) of a corporation.**

**The People must prove that the defendant (personally committed/ was a direct participant in) the crime charged. The fact that the defendant is an (officer/ [or] agent) of the corporation is not sufficient by itself to support a finding of guilt.**

*<Alternative A—prosecution alleges only that defendant committed prohibited act personally>*

**[To prove that the defendant personally committed the crime charged, the People must prove that the defendant _____** *<insert description of conduct alleged in offense>***.]**

*<Alternative B—prosecution alleges only that defendant had authority to control conduct of others>*

**[To prove that the defendant was a direct participant in the crime charged, the People must prove that:**

1. **The defendant had the authority to control _____** *<insert description of conduct alleged in offense>***;**

**[AND]**

2. **The defendant (failed to/authorized/caused/permitted) _____** *<insert description of conduct alleged in offense>***(;/.)**

*<Alternative 3A: Give if offense alleged requires only knowledge or general criminal intent.>*

**[AND**

3. **The defendant knew _____** *<insert description of knowledge about conduct alleged in offense>***(;/.)]**

*<Alternative 3B: Give if offense alleged requires specific intent.>*

**[AND**

3. **When the defendant acted, (he/she) intended to**

_____ <*insert description of specific intent required*>**.]**

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*New January 2006*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction in any case where the defendant is charged as the officer or agent of a corporation. (See *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [30 Cal.Rptr.2d 681]; *Otis v. Superior Court* (1905) 148 Cal. 129, 131 [82 P. 853].) Repeat this instruction for each offense, inserting the specific requirements for that offense.

If the prosecution alleges that the defendant personally committed some or all of the acts alleged in the offense, give alternative A. If the prosecution's theory is solely that the defendant had control over the conduct alleged, give alternative B. If the prosecution is pursing both theories of liability, do not give this instruction. Give CALCRIM No. 451, *Liability of Corporate Officers and Agents: Two Theories of Liability*.

Give element 3A if the alleged offense requires knowledge or general criminal intent by the defendant. (See *Sea Horse Ranch, supra*, 24 Cal.App.4th at pp. 456–458; *People v. Epstein* (1931) 118 Cal.App. 7, 10 [4 P.2d 555].) Give element 3B if specific intent is required. If a strict-liability offense is alleged, give only elements 1 and 2. (See *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1062 [9 Cal.Rptr.2d 348].)

***Example***

In *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446 [30 Cal.Rptr.2d 681], the defendant was charged as the president of a corporation with involuntary manslaughter based on a horse's escape from the ranch that caused a fatal vehicle accident. The instruction in such a case could read:

> To prove that the defendant was a direct participant in the crime charged, the People must prove that:
>
> 1. The defendant had the authority to control the maintenance of the fences.
> 2. The defendant failed to ensure that the fences were properly maintained.
>
> AND
>
> 3. The defendant knew that horses had repeatedly escaped from the

ranch due to poor maintenance of the fences.

## AUTHORITY

- Liability of Corporate Officer or Agent. *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [30 Cal.Rptr.2d 681]; see *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1062 [9 Cal.Rptr.2d 348]; *Otis v. Superior Court* (1905) 148 Cal. 129, 131 [82 P. 853].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 95–96.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.12 (Matthew Bender).

## 507. Justifiable Homicide: By Public Officer

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

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

**AND**

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

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

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

**The People have the burden of proving beyond a reasonable doubt**

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

It is unclear whether the officer must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the officer has probable cause to believe that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is, when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371–375 [132 Cal.Rptr. 348] [also stating the rule as "either" but quoting police regulations, which require that the officer always believe there is a risk of future harm.]) The committee has provided both options, but see *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241]. The court should review relevant case law before giving the bracketed language.

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

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

***Related Instructions***

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

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

## AUTHORITY

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

### *Secondary Sources*

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

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

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

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

## RELATED ISSUES

***Killing Committed in Obedience to Judgment***

A homicide is also justifiable when committed by a public officer "in obedience to any judgment of a competent court." (Pen. Code, § 196, subd.

1.) There are no reported cases construing this subdivision. This provision appears to apply exclusively to lawful executions.

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

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

1. **The defendant committed the [attempted] killing while lawfully trying to arrest or detain** _____ *<insert name of decedent>* **for committing (the crime of** _____ *<insert forcible and atrocious crime, i.e., felony* **that threatened death or serious bodily harm***>/*_____ *<insert crime decedent was suspected of committing, e.g.,* **burglary***>***, and that crime threatened the defendant or others with death or serious bodily harm);**

2. _____ *<insert name of decedent>* **actually committed (the crime of** _____ *<insert forcible and atrocious crime, i.e., felony that threatened death or serious bodily harm>/* _____ *<insert crime decedent was suspected of committing, e.g.,* **burglary***>***, and that crime threatened the defendant or others with death or serious bodily harm);**

3. **The defendant had reason to believe that** _____ *<insert name of decedent>* **had committed (the crime of** _____ *<insert forcible and atrocious crime, i.e., felony that threatened death or serious bodily harm>/* _____ *<insert crime decedent was suspected of committing, e.g.,* **burglary***>* **, and that crime threatened the defendant or others with death or serious bodily harm);**

**[4. The defendant had reason to believe that** _____ *<insert name of decedent>* **posed a threat of death or serious bodily harm, either to the defendant or to others];**

**AND**

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

**A person has *reason to believe* that someone [poses a threat of death or serious bodily harm or] committed (the crime of** _____ *<insert forcible and atrocious crime, i.e., felony that*

*threatened death or serious bodily harm*> / _____ <*insert crime decedent was suspected of committing, e.g., burglary*>**, and that crime threatened the defendant or others with death or serious bodily harm) when facts known to the person would persuade someone of reasonable caution to have (that/those) belief[s].**

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

provided both options. See *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241]. The court should review relevant case law before giving bracketed element 4.

***Related Instructions***

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

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

## AUTHORITY

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

### *Secondary Sources*

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

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

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

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

## RELATED ISSUES

***Felony Must Actually Be Committed***

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

***Felony Committed Must Threaten Death or Great Bodily Injury***

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

## 511. Excusable Homicide: Accident in the Heat of Passion

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

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

**AND**

7. **The defendant did not act with criminal negligence.**

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

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

**In order for the killing to be excused on this basis, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.**

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

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

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

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

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

**AND**

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

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

### *Instructional Duty*

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

### *Related Instructions*

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

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

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

## AUTHORITY

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

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 242; Crimes Against the Person, § 212.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.16 (Matthew Bender).

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

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

## RELATED ISSUES

### *Distinguished From Voluntary Manslaughter*

Under Penal Code section 195, subd. 2, a homicide is "excusable," "in the heat of passion" if done "by accident," or on "sudden . . . provocation . . . or . . . combat." (Pen. Code, § 195, subd. 2.) Thus, unlike voluntary manslaughter, the killing must have been committed without criminal intent, that is, accidentally. (See *People v. Cooley* (1962) 211 Cal.App.2d 173, 204

[27 Cal.Rptr. 543], disapproved on other grounds in *People v. Lew* (1968) 68 Cal.2d 774, 778, fn. 1 [69 Cal.Rptr. 102, 441 P.2d 942]; Pen. Code, § 195, subd. 1 [act must be without criminal intent]; Pen. Code, § 26, subd. 5 [accident requires absence of "evil design [or] intent"].) The killing must also be on "sudden" provocation, eliminating the possibility of provocation over time, which may be considered in cases of voluntary manslaughter. (See Bench Notes to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.)

***Distinguished From Involuntary Manslaughter***

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

## 522. Provocation: Effect on Degree of Murder

**Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.**

**If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]**

**[Provocation does not apply to a prosecution under a theory of felony murder.]**

*New January 2006; Revised April 2011*

### BENCH NOTES

***Instructional Duty***

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811] [court adequately instructed on relevance of provocation to whether defendant acted with intent to torture for torture murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) This is a pinpoint instruction, to be given on request.

This instruction may be given after CALCRIM No. 521, *First Degree Murder*.

If the court will be instructing on voluntary manslaughter, give both bracketed portions on manslaughter.

If the court will be instructing on felony murder, give the bracketed sentence stating that provocation does not apply to felony murder.

### AUTHORITY

- Provocation Reduces From First to Second Degree. *People v. Thomas*

(1945) 25 Cal.2d 880, 903 [156 P.2d 7]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811].

- Pinpoint Instruction. *People v. Rogers* (2006) 39 Cal.4th 826, 877–878].
- This Instruction Upheld. *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333–1335 [107 Cal.Rptr.3d 915].

### *Secondary Sources*

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.16 (Matthew Bender).

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01, 142.02 (Matthew Bender).

## 560. Homicide: Provocative Act by Defendant

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

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

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

**AND**

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

**A *provocative act* is an act:**

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

**[AND**

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

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

1. **A reasonable person in the defendant's position would have foreseen that there was a high probability that his or her**

**act could begin a chain of events resulting in someone's death;**

2. **The defendant's act was a direct and substantial factor in causing _____'s** *<insert name of decedent>* **death;**

**AND**

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

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

*<Multiple Provocative Acts>*

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

*<Independent Criminal Act>*

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

*<Degree of Murder>*

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

*<Give if multiple theories alleged.>*

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

**Each theory of first degree murder has different requirements, and**

**I will instruct you on (both/all _____ <*insert number*>.)**

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

*<A. Deliberation and Premeditation>*

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

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

*<Give the following paragraph if more than one defendant was involved in the provocative act>*

**For a defendant to be found guilty of first degree murder, (he/she) personally must have acted willfully, deliberately, and with premeditation when the (murder/attempted murder) was committed.**

*<B. Enumerated Felony>*

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

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

**AND**

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

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

*<C. If there is another theory, see Bench Note below and modify and use CALCRIM No. 521 in a manner consistent with the modifications in section A. Deliberation and Premeditation>*

**The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.**

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

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

## AUTHORITY

- Provocative Act Doctrine. *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461 [63 Cal.Rptr.2d 382].
- Felony-Murder Rule Invoked to Determine Degree. *People v. Gilbert* (1965) 63 Cal.2d 690, 705 [47 Cal.Rptr. 909, 408 P.2d 365]; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 139, fn. 4 [145 Cal.Rptr. 524, 577

P.2d 659]; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2 [203 Cal.Rptr. 433, 681 P.2d 274].

- Independent Intervening Act by Third Person. *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Natural and Probable Consequences Doctrine. *People v. Gardner* (1995) 37 Cal.App.4th 473, 479 [43 Cal.Rptr.2d 603].
- Response of Third Party Need Not Be Reasonable. *People v. Gardner* (1995) 37 Cal.App.4th 473, 482 [43 Cal.Rptr.2d 603].
- Unanimity on Which Act Constitutes Provocative Act is Not Required. *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401] [multiple provocative acts].

### *Secondary Sources*

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

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

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

## RELATED ISSUES

### *Act "Beyond What is Necessary"*

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

### *Death of a Fetus*

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

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

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

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

**The defendant committed involuntary manslaughter if:**

1. **The defendant committed (a crime/ [or] a lawful act in an unlawful manner);**
2. **The defendant committed the (crime/ [or] act) with criminal negligence;**

**AND**

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

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

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

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

***Criminal negligence* involves more than ordinary carelessness,**

**inattention, or mistake in judgment. A person acts with criminal negligence when:**

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

**AND**

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

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

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

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

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

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

**In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of**

**voluntary manslaughter.**

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary*

(1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

## AUTHORITY

- Involuntary Manslaughter Defined. Pen. Code, § 192(b).
- Due Caution and Circumspection. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Criminal Negligence Requirement; This Instruction Upheld. *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Not Amounting to a Felony. *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

### *Secondary Sources*

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

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

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

## LESSER INCLUDED OFFENSES

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

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

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

## RELATED ISSUES

***Imperfect Self-Defense and Involuntary Manslaughter***

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

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

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

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

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

1. **The defendant committed (a crime/ [or] a lawful act in an unlawful manner);**
2. **The defendant committed the (crime/ [or] act) with criminal negligence;**

**AND**

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

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

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

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

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

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

**AND**

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

**In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act**

**amounts to disregard for human life or indifference to the consequences of that act.**

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

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

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69

Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

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

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

## AUTHORITY

- Involuntary Manslaughter Defined. Pen. Code, § 192(b).
- Due Caution and Circumspection. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unlawful Act Not Amounting to a Felony. *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Criminal Negligence Requirement *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186

Cal.App.2d 433, 440 [8 Cal.Rptr. 863].

- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

### *Secondary Sources*

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

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

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

## LESSER INCLUDED OFFENSES

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

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

## RELATED ISSUES

### *Due Caution and Circumspection*

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

### *Felonies as Predicate "Unlawful Act"*

"[T]he only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (*People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675] [practicing medicine without a license cannot be predicate offense for second degree murder because not inherently

dangerous but can be for involuntary manslaughter even though Penal Code section 192 specifies an "unlawful act, not amounting to a felony"].)

***No Inherently Dangerous Requirement for Predicate Misdemeanor/Infraction***

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

***Fetus***

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

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

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

*<Introductory Sentence: Alternative A—Charged Offense>*

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

*<Introductory Sentence: Alternative B—Lesser Included Offense>*

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

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

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

**AND**

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

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

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

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

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

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

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

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

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

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

*New January 2006; Revised December 2008, October 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

## AUTHORITY

- Vehicular Manslaughter Without Gross Negligence. Pen. Code, § 192(c)(2).
- Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence. Pen. Code, § 192.5(b).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence. Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].
- Criminal Negligence Requirement. *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].

### *Secondary Sources*

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

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140,

*Challenges to Crimes*, § 140.04, Ch. 142, *Crimes Against the Person*, § 142.02[1][a], [2][c], [4] (Matthew Bender).

## RELATED ISSUES

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

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

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

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

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

**AND**

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

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

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

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

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

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

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

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*New January 2006; Revised December 2008, August 2009, April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

Give the next-to-last bracketed paragraph when the defendant has been

charged only with attempt to commit murder, but the evidence at trial reveals that the murder was actually completed. (See Pen. Code, § 663.)

***Related Instructions***

CALCRIM Nos. 3470–3477, Defense Instructions.

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

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

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

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

## AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 663, 664.
- Murder Defined. Pen. Code, § 187.
- Specific Intent to Kill Required. *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Kill Zone Explained. *People v. Stone* (2009) 46 Cal.4th 131, 137–138 [92 Cal.Rptr.3d 362, 205 P.3d 272].
- Killer Need Not Be Aware of Other Victims in Kill Zone. *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 [86 Cal.Rptr.3d 915].
- This Instruction Correctly States the Law. *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556–557 [99 Cal.Rptr.3d 324]

***Secondary Sources***

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

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

## LESSER INCLUDED OFFENSES

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

*Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].)

## RELATED ISSUES

### *Specific Intent Required*

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

> In instructing upon the crime of attempt to commit murder, there should never be any reference whatsoever to implied malice. Nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do.

(*People v. Santascoy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709].)

### *Solicitation*

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

### *Single Bullet, Two Victims*

A shooter who fires a single bullet at two victims who are both in his line of fire can be found to have acted with express malice toward both victims. (*People v. Smith* (2005) 37 Cal.4th 733, 744 [37 Cal.Rptr.3d 163, 124 P.3d 730].) See also *People v. Perez* (2010) 50 Cal.4th 222, 225 [112 Cal.Rptr.3d 310, 234 P.3d 557].

### *No Attempted Involuntary Manslaughter*

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

### *Transferred and Concurrent Intent*

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

## 603. Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code, §§ 21a, 192, 664)

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**An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion.**

**The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if:**

1. **The defendant took at least one direct but ineffective step toward killing a person;**
2. **The defendant intended to kill that person;**
3. **The defendant attempted the killing because (he/she) was provoked;**
4. **The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment;**

**AND**

5. **The attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment.**

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

**In order for a sudden quarrel or heat of passion to reduce an attempted murder to attempted voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.**

**It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked**

**and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment.**

**[If enough time passed between the provocation and the attempted killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis.]**

**The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and was not acting as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted murder.**

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*New January 2006; Revised August 2009, April 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

***Related Instructions***

CALCRIM No. 511, *Excusable Homicide: Accident in the Heat of Passion*.

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

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

## AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 664.
- Manslaughter Defined. Pen. Code, § 192.
- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171

Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[2][a] (Matthew Bender).

## RELATED ISSUES

### *Specific Intent to Kill Required*

> An attempt to commit a crime requires an intention to commit the crime and an overt act towards its completion. Where a person intends to kill another person and makes an unsuccessful attempt to do so, his intention may be accompanied by any of the aggravating or mitigating circumstances which can accompany the completed crimes. In other words, the intent to kill may have been formed after premeditation or deliberation, it may have been formed upon a sudden explosion of violence, or it may have been brought about by a heat of passion or an unreasonable but good faith belief in the necessity of self-defense.

(*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824 [217 Cal.Rptr. 581] [citation omitted].)

### *No Attempted Involuntary Manslaughter*

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

See the Related Issues section to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

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

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

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*New April 2010; Revised April 2011*

### BENCH NOTES

***Instructional Duty***

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

### AUTHORITY

Instructional Requirements. Pen. Code, § 190.3; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204–207 [112 Cal.Rptr.3d 746, 235 P.3d 62].

***Secondary Sources***

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

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

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

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

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

*<Alternative 1A—force with weapon>*

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

*<Alternative 1B—force without weapon>*

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

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

**2. The defendant did that act willfully;**

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

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

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

**[AND]**

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

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

**[AND**

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

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

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

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

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

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

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

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

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

**[An *assault weapon* includes** _____ *<insert names of appropriate designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1>***.]**

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

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

**AND**

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

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

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

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

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

### *Instructional Duty*

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

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

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the

bracketed sentence stating that the term is defined elsewhere.

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

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

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

## AUTHORITY

- Elements. Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- Assault Weapon Defined. Pen. Code, §§ 12276, 12276.1.
- Firearm Defined. Pen. Code, § 12001(b).
- Machine Gun Defined. Pen. Code, § 12200.
- Semiautomatic Pistol Defined. Pen. Code, § 12126(e).
- .50 BMG Rifle Defined. Pen. Code, § 12278.
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Firefighter Defined. Pen. Code, § 245.1.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71

Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

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

## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

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

## 861. Assault on Firefighter or Peace Officer With Stun Gun or Less Lethal Weapon (Pen. Code, §§ 240, 244.5(c))

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**The defendant is charged [in Count _____] with assault with a (stun gun/ [or] less lethal weapon) on a (firefighter/peace officer) [in violation of Penal Code section 244.5(c)].**

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

1. **The defendant did an act with a (stun gun/[or] less lethal weapon) that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force with a (stun gun/[or] less lethal weapon) to a person;**
5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer);**

**[AND]**

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

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

**[AND**

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

**[A *stun gun* is anything, except a less lethal weapon, that is used or intended to be used as either an offensive or defensive weapon**

**and is capable of temporarily immobilizing someone by inflicting an electrical charge.]**

**[A _____ is a less lethal weapon.]**

**[_____ is less lethal ammunition.]**

**[A *less lethal weapon* is any device that is either designed to or that has been converted to expel or propel less lethal ammunition by any action, mechanism, or process for the purpose of incapacitating, immobilizing, or stunning a human being through the infliction of any less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort. It is not necessary that the weapon leave any lasting or permanent incapacitation, discomfort, pain, or other injury or disability in order to qualify as a *less lethal weapon*.]**

**[*Less lethal ammunition* is any ammunition that is designed to be used in any less lethal weapon or any other kind of weapon, including, but not limited to, firearms, pistols, revolvers, shotguns, rifles, and spring, compressed air, and compressed gas weapons. When used in a less lethal weapon or other weapon, *less lethal ammunition* is designed to immobilize or incapacitate or stun a human being by inflicting less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort.]**

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

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

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

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

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

**No one needs to actually have been injured by the defendant's act.**

**But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].**

**[Voluntary intoxication is not a defense to assault.]**

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

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

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

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

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*New January 2006; Revised August 2009, April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

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

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

## AUTHORITY

- Elements. Pen. Code, §§ 240, 244.5.
- Firefighter Defined. Pen. Code, § 245.1.
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Less Lethal Weapon and Less Lethal Ammunition Defined. Pen. Code,

§ 12601.

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

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

## LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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

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

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

*<Alternative 1A—force with weapon>*

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

*<Alternative 1B—force without weapon>*

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

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

**2. The defendant did that act willfully;**

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

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

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

**[AND]**

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

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

**[AND**

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

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

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

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

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

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

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

**A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [A (county jail/city jail/ _____ <*insert other detention facility*>) is a local**

**detention facility.] [A custodial officer is not a peace officer.]**

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

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

## AUTHORITY

- Elements. Pen. Code, §§ 240, 245, 245.3.
- Custodial Officer Defined. Pen. Code, § 831.
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 67.

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

## 900. Assault on Firefighter, Peace Officer or Other Specified Victim (Pen. Code, §§ 240, 241)

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**The defendant is charged [in Count _____] with assault on a (firefighter/peace officer/ _____ <*insert description of other person from Pen. Code, § 241(b/c)*>) [in violation of Penal Code section 241(b/c)].**

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

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act would directly, naturally, and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**
5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer/ _____ <*insert description of other person from Pen. Code, § 241(b) or (c)*>);**

**[AND]**

6. **When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a (firefighter/peace officer/ _____ <*insert description of other person from Pen. Code, § 241(b) or (c)*>) (who was performing (his/her) duties/ providing emergency medical care)(;/.)**

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

**[AND**

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

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

**or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.**

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

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

**[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 Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">***.]**

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

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

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*New January 2006; Revised April 2008, April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

Select the option in element six for "providing emergency medical care" if the victim is a physician or nurse engaged in rendering emergency medical care.

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." *(Ibid.)* The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must also instruct that the People have the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) Give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

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

The court may give the bracketed sentence that begins with "The duties of a _____ <*insert title of peace officer specified in Pen. Code, § 830 et*

*seq.*> include" on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1222.)

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

## AUTHORITY

- Elements. Pen. Code, §§ 240, 241.
- Firefighter Defined. Pen. Code, § 245.1.
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Willfully Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

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

## LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.

## RELATED ISSUES

### *Resisting Arrest*

"[A] person may not use force to resist any arrest, lawful or unlawful, except that he may use reasonable force to defend life and limb against excessive force . . . ." (*People v. Curtis* (1969) 70 Cal.2d 347, 357 [74 Cal.Rptr. 713, 450 P.2d 33].) "[I]f the arrest is ultimately determined factually to be unlawful [but the officer did not use excessive force], the defendant can be validly convicted only of simple assault or battery," not assault or battery of a peace officer. (*Id.* at pp. 355–356.) See CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*.

## 901. Assault on Custodial Officer (Pen. Code, §§ 240, 241.1)

**The defendant is charged [in Count _____] with assault on a custodial officer [in violation of Penal Code section 241.1].**

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

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

**[AND]**

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

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

**[AND**

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

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

**The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The**

**touching does not have to cause pain or injury of any kind.**

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

## AUTHORITY

- Elements. Pen. Code, §§ 240, 241.1.
- Custodial Officer Defined. Pen. Code, § 831.
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 67.

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

## 903. Assault on School District Peace Officer (Pen. Code, §§ 240, 241.4)

**The defendant is charged [in Count _____] with assault on a school district peace officer [in violation of Penal Code section 241.4].**

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

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

**[AND]**

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

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

**[AND**

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

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

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

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

**A *school district peace officer* is a peace officer who is a member of a police department of a school district under Education Code section 38000.**

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

## AUTHORITY

- Elements. Pen. Code, §§ 240, 241.4; Educ. Code, § 38000.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

## COMMENTARY

A school district peace officer is anyone so designated by the superintendent of the school district, but is not vested with general police powers. (See Educ. Code, § 38000(a).) The scope of authority for school district peace officers is set forth in Penal Code section 830.32. (See Educ. Code, § 38001.)

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

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

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

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

**[AND]**

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

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

**[AND**

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

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

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

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

**A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [A (county**

**jail/city jail/ _____ <*insert description*>) is a local detention facility.] [A custodial officer is not a peace officer.]**

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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

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

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

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

## AUTHORITY

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

- Custodial Officer Defined. Pen. Code, § 831.
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Statute Constitutional. *People v. Wilkinson* (2004) 33 Cal.4th 821, 840–841 [16 Cal.Rptr.3d 420, 94 P.3d 551].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery on Person Not Confined. Pen. Code, § 4131.5.

## RELATED ISSUES

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

## 981. Brandishing Firearm in Presence of Peace Officer (Pen. Code, § 417(c) & (e))

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**The defendant is charged [in Count _____] with brandishing a firearm in the presence of a peace officer [in violation of Penal Code section 417].**

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

1. **The defendant drew or exhibited a firearm in the immediate presence of a peace officer;**
2. **The defendant drew or exhibited the firearm in a rude, angry, or threatening manner;**
3. **When the defendant acted, the officer was lawfully performing (his/her) duties;**

**[AND]**

4. **When the defendant acted, (he/she) knew, or reasonably should have known, from the person's uniform or other identifying action[s] that the person was a peace officer who was performing (his/her) duties(;/.)**

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

**[AND**

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

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

**[The term *firearm* is defined in another instruction to which you should refer.]**

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

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

**[A person employed by _____** *<insert name of agency that*

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer

and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

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

***Related Instructions***

For misdemeanor brandishing instructions, see CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor*.

## AUTHORITY

- Elements. Pen. Code, § 417(c) & (e).
- Firearm Defined. Pen. Code, § 12001(b); see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [7 Cal.Rptr.2d 44] [pellet gun not a "firearm" within meaning of Pen. Code, § 417(a)].
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Victim's Awareness of Firearm Not a Required Element. *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891] [in context of misdemeanor brandishing under Pen. Code, § 417(a)].
- Weapon Need Not Be Pointed Directly at Victim. *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420] [in context of Pen. Code, § 417(a)].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 6, 7.

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

## LESSER INCLUDED OFFENSES

- Brandishing a Firearm. Pen. Code, § 417(a)(2).

## RELATED ISSUES

### *Infliction of Serious Bodily Injury*

It is a separate offense to intentionally inflict serious bodily injury while drawing or exhibiting a firearm in the presence of a peace officer. (See Pen. Code, § 417.6(a); see also Pen. Code, § 417.6(b) [defining "serious bodily injury"].)

### *Multiple Peace Officers*

A "single act of exhibiting a firearm in the presence of a peace officer . . . cannot be punished as many times as there are peace officers observing the act. . . . [T]he multiple-victim exception [under *Neal v. State of California* (1960) 55 Cal.2d 11, 20–21 [9 Cal.Rptr. 607, 357 P.2d 839] for acts of violence against multiple victims] is just that, a multiple-victim exception, not a multiple-observer exception." (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1095–1096 [100 Cal.Rptr.2d 279].)

### *Reasonable Person Standard for Physically Disabled Defendant*

A defendant with a physical disability is entitled to an instruction that the reasonable person standard as used in this instruction means a person with the same physical disability. (*People v. Mathews* (1994) 25 Cal.App.4th 89, 99 [30 Cal.Rptr.2d 330]; see CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person.*)

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

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

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

*<Alternative 1A—defendant touched child>*

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

**[OR]**

*<Alternative 1B—child touched defendant>*

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

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

**AND**

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

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

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

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

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

**[Under the law, a person becomes one year older as soon as the**

**first minute of his or her birthday has begun.]**

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (*People v. Soto* (2011) 51 Cal.4th 229, 232 [119 Cal.Rptr.3d 775, 245 P.3d 410] ["the victim's consent is not a defense to the crime of lewd acts on a child under age 14 under any circumstances"]

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

## AUTHORITY

- Elements. Pen. Code, § 288(a).
- Actual Arousal Not Required. *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its

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

- Child's Consent Not a Defense. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].
- Child Touching Own Body Parts at Defendant's Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Lewd Defined. *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

### *Secondary Sources*

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

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

## LESSER INCLUDED OFFENSES

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

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

## RELATED ISSUES

### *Any Act That Constitutes Sexual Assault*

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

Code, § 654(a); *People v. Nicholson* (1979) 98 Cal.App.3d 617, 625 [159 Cal.Rptr. 766].)

***Calculating Age***

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

***Minor Perpetrator***

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

***Solicitation to Violate Section 288***

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

***Mistaken Belief About Victim's Age***

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

***Multiple Lewd Acts***

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

requirement that the two be separated by a hiatus or period of reflection. (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456 [121 Cal.Rptr.2d 426].)

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

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

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

*<Alternative 1A—defendant touched child>*

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

**[OR]**

*<Alternative 1B—child touched defendant>*

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

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

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

**AND**

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

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

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

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

**[*Duress* means the use of a direct or implied threat of force,**

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

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

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

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

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code,

§ 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

***Defenses—Instructional Duty***

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

## AUTHORITY

- Elements. Pen. Code, § 288(b)(1).
- Duress Defined. *People v. Soto* (2011) 51 Cal.4th 229, 232 [119 Cal.Rptr.3d 775, 245 P.3d 410]; *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Menace Defined. Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Child Touching Own Body Parts at Defendant's Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].

- Lewd Defined. *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

### *Secondary Sources*

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

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

## COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The definition of "force" as used in Penal Code section 288(b)(1) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra,* 33 Cal.4th at pp. 1026–1028.)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126

Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra*, 33 Cal.4th at p. 1007, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

***Evidence of Duress***

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

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

## 1150. Pimping (Pen. Code, § 266h)

**The defendant is charged [in Count _____] with pimping [in violation of Penal Code section 266h].**

**To prove that the defendant is guilty of pimping, the People must prove that:**

1. **The defendant knew that _____ <*insert name*> was a prostitute;**

**[AND]**

*<Alternative 2A—money earned by prostitute supported defendant>*

**[2. The (money/proceeds) that _____ <*insert name*> earned as a prostitute supported defendant, in whole or in part(;/.)]**

*<Alternative 2B—money loaned by house manager supported defendant>*

**[2. Money that was (loaned to/advanced to/charged against) _____ <*insert name*> by a person who (kept/managed/was a prostitute at) the house or other place where the prostitution occurred, supported the defendant in whole or in part(;/.)]**

*<Alternative 2C—defendant asked for payment>*

**[2. The defendant asked for payment or received payment for soliciting prostitution customers for _____ <*insert name*>(;/.)]**

*<Give element 3 when defendant charged with pimping a minor.>*

**[AND**

3. **_____ <*insert name*> was a minor (over the age of 16 years/under the age of 16 years) when (he/she) engaged in the prostitution.]**

**A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other compensation]. A *lewd act* means physical contact of 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.**

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

In element 2, use the appropriate alternative A–C depending on the evidence in the case.

Give element 3 if it is alleged that the prostitute was a minor. Punishment is enhanced if the minor is under the age of 16 years. (Pen. Code, § 266h(b).)

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

***Defenses—Instructional Duty***

If necessary for the jury's understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

## AUTHORITY

- Elements. Pen. Code, § 266h.
- Prostitution Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195] [lewd act requires touching between prostitute and customer].
- General Intent Crime. *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22].
- Proof Person Is a Prostitute. *People v. James* (1969) 274 Cal.App.2d 608, 613 [79 Cal.Rptr. 182].
- Solicitation Defined. *People v. Smith* (1955) 44 Cal.2d 77, 78–80 [279 P.2d 33].
- Good Faith Belief That Minor Is 18 No Defense to Pimping and

Pandering. *People v. Branch* (2010) 184 Cal.App.4th 516, 521–522 [109 Cal.Rptr.3d 412].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 67–69.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[2] (Matthew Bender).

## COMMENTARY

### *Solicitation*

In deciding there was sufficient evidence of solicitation, the court in *People v. Phillips* (1945) 70 Cal.App.2d 449, 453 [160 P.2d 872], quoted the following definitions:

> "[S]olicit" is defined as: "To tempt . . .; to lure on, esp. into evil, . . . to bring about . . .; to seek to induce or elicit . . . ." (Webster's New International Dictionary (2d ed.)). ". . . to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; . . . to try to obtain. . . . While it does imply a serious request, it requires no particular degree of importunity, entreaty, imploration or supplication." (58 C.J. 804–805.)

### *General Intent*

The three ways of violating Penal Code section 266h are all general intent crimes, as held in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22]:

> [D]eriving support with knowledge that the other person is a prostitute is all that is required for violating the section in this manner. No specific intent is required. . . . Receiving compensation for soliciting with knowledge that the other person is a prostitute is the only requirement under the first alternative of violating section 266h by solicitation. Under the second alternative to pimping by soliciting (soliciting compensation), . . . if the accused has solicited for the prostitute and has solicited compensation even though he had not intended to receive compensation, he would nevertheless be guilty of pimping. Pimping in all its forms is not a specific intent crime.

## LESSER INCLUDED OFFENSES

- Attempted Pimping. Pen. Code, §§ 664, 266h; see *People v. Osuna* (1967) 251 Cal.App.2d 528, 531 [59 Cal.Rptr. 559].
- There is no crime of aiding and abetting prostitution. *People v. Gibson*

(2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].

## RELATED ISSUES

***House of Prostitution***

One room of a building or other place is sufficient to constitute a house of prostitution, and one person may keep such a place to which others resort for purposes of prostitution. (*People v. Frey* (1964) 228 Cal.App.2d 33, 53 [39 Cal.Rptr. 49]; see *Aguilera v. Superior Court* (1969) 273 Cal.App.2d 848, 852 [78 Cal.Rptr. 736].)

***Receiving Support***

A conviction for living or deriving support from a prostitute's earnings does not require evidence that the defendant received money directly from the prostitute, or that the defendant used money received from the prostitution solely to pay his or her own living expenses. (*People v. Navarro* (1922) 60 Cal.App. 180, 182 [212 P. 403].)

***Unanimity Instruction Not Required***

Pimping is a crime "of a continuous ongoing nature and [is] therefore not subject to the requirement that the jury must agree on the specific act or acts constituting the offense." (*People v. Dell* (1991) 232 Cal.App.3d 248, 265–266 [283 Cal.Rptr. 361]; *People v. Lewis* (1978) 77 Cal.App.3d 455, 460–462 [143 Cal.Rptr. 587] [living or deriving support from prostitute's earnings is an ongoing continuing offense].) Proof of an ongoing relationship between the defendant and the prostitute is not required. (*People v. Jackson* (1980) 114 Cal.App.3d 207, 209–210 [170 Cal.Rptr. 476].)

## 1151. Pandering (Pen. Code, § 266i)

**The defendant is charged [in Count _____] with pandering [in violation of Penal Code section 266i].**

**To prove that the defendant is guilty of pandering, the People must prove that:**

*<Alternative 1A—persuaded/procured>*

**[1. The defendant (persuaded/procured) _____ <*insert name*> to be a prostitute(;/.)]**

*<Alternative 1B—promises/threats/violence used to cause person to become prostitute>*

**[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ <*insert name*> to become a prostitute(;/.)]**

*<Alternative 1C—arranged/procured a position>*

**[1. The defendant (arranged/procured a position) for _____ <*insert name*> to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]**

*<Alternative 1D—promises/threats/violence used to cause person to remain>*

**[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ <*insert name*> to remain as a prostitute in a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]**

*<Alternative 1E—used fraud>*

**[1. The defendant used fraud, trickery, or duress [or abused a position of confidence or authority] to (persuade/procure) _____ <*insert name*> to (be a prostitute/enter any place where prostitution is encouraged or allowed/enter or leave California for the purpose of prostitution)(;/.)]**

*<Alternative 1F—received money>*

**[1. The defendant (received/gave/agreed to receive/agreed to**

**give) money or something of value in exchange for (persuading/attempting to persuade/procuring/attempting to procure) _____ <*insert name*> to (be a prostitute/ enter or leave California for the purpose of prostitution)(;/ .)]**

*<Give element 2 when instructing on specific intent; see Bench Notes.>*

**[AND]**

**[2. The defendant intended to influence _____ <*insert name*> to be a prostitute(;/.)]**

*<Give element 3 when defendant charged with pandering a minor.>*

**[AND**

**3. _____ <*insert name*> was (over the age of 16 years old/under the age of 16) at the time the defendant acted.]**

**A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other compensation]. A *lewd act* means physical contact of 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.**

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

In element 1, give the appropriate alternative A-F depending on the evidence

in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [117 P.2d 437] [statutory alternatives are not mutually exclusive], disapproved on other grounds in *People v. Dillon* (19830 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (19750 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].)

There is a conflict in the case law about the intent required to prove pandering. (See *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1256 [219 Cal.Rptr. 693] [pandering under former § 266i(b) (now § 266i(a)(2)) requires a specific intent to influence a person to become a prostitute]; but see *People v. Montgomery, supra,* 47 Cal.App.2d at p. 16 [pandering does not necessarily involve specific intent].) The trial court must decide whether to give bracketed element 2 on specific intent.

The committee included "persuade" and "arrange" as options in element one because the statutory language, "procure," may be difficult for jurors to understand.

Give bracketed element 3 if it is alleged that the person procured, or otherwise caused to act, by the defendant was a minor "over" or "under" the age of 16 years. (Pen. Code, § 266i(b).)

Give the bracketed paragraph defining duress on request if there is sufficient evidence that duress was used to procure a person for prostitution. (Pen. Code, § 266i(a)(5); see *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] [definition of "duress"].)

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

***Defenses—Instructional Duty***

If necessary for the jury's understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

## AUTHORITY

- Elements. Pen. Code, § 266i.
- Prostitution Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court*

(2001) 93 Cal.App.4th 422, 431–433] [lewd act requires touching between prostitute and customer].

- Procurement Defined. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].
- Proof of Actual Prostitution Not Required. *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532 [59 Cal.Rptr. 559].
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Good Faith Belief That Minor Is 18 No Defense to Pimping and Pandering. *People v. Branch* (2010) 184 Cal.App.4th 516, 521–522 [109 Cal.Rptr.3d 412].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 70–78.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Attempted Pandering. Pen. Code, §§ 664, 266i; *People v. Charles* (1963) 218 Cal.App.2d 812, 819 [32 Cal.Rptr. 653]; *People v. Benenato* (1946) 77 Cal.App.2d 350, 366–367 [175 P.2d 296], disapproved on other grounds in *In re Wright* (1967) 65 Cal.2d 650, 654–655, fn. 3 [56 Cal.Rptr. 110, 422 P.2d 998].

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].)

## RELATED ISSUES

See Related Issues section to CALCRIM No. 1150, *Pimping*.

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

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

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

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

*<Alternative 2A—held or detained>*

**[2. The defendant held or detained the other person;]**

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

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

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

**[AND]**

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

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

**[AND**

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

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

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

*<Defense: Good Faith Belief in Consent>*

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

*<Defense: Consent Given>*

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

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

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

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

*<Sentencing Factor>*

**[If you find the defendant guilty of kidnapping for (ransom [,]/ [or] reward[,]/ [or] extortion), you must then decide whether the**

**People have proved the additional allegation that the defendant (caused the kidnapped person to (die/suffer bodily harm)/ [or] intentionally confined the kidnapped person in a way that created a substantial risk of death).**

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

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

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

**AND**

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

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

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

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

If the prosecution alleges that the kidnapping resulted in death or bodily

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

Give the bracketed definition of "consent" on request.

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

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

***Defenses—Instructional Duty***

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

*People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

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

***Related Instructions***

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

## AUTHORITY

- Elements. Pen. Code, § 209(a).
- Requirement of Lack of Consent. *People v. Eid* (2010) 187 Cal.App.4th 859, 878 [114 Cal.Rptr.3d 520].
- Extortion. Pen. Code, § 518; *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382].
- Amount of Physical Force Required. *People v. Chacon* (1995) 37 Cal.App.4th 52, 59 [43 Cal.Rptr.2d 434]; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762].
- Bodily Injury Defined. *People v. Chacon* (1995) 37 Cal.App.4th 52, 59; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686; see *People v. Reed* (1969) 270 Cal.App.2d 37, 48–50 [75 Cal.Rptr. 430] [injury reasonably foreseeable from defendant's act].
- Control Over Victim When Intent Formed. *People v. Martinez* (1984) 150 Cal.App.3d 579, 600–602 [198 Cal.Rptr. 565] [disapproved on other ground in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376].]
- No Asportation Required. *People v. Macinnes* (1973) 30 Cal.App.3d 838, 844 [106 Cal.Rptr. 589]; see *People v. Rayford* (1994) 9 Cal.4th 1, 11–12, fn. 8 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227 [277 Cal.Rptr. 382].
- Official Act Defined. *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against

the Person, §§ 266–273.

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

## COMMENTARY

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

## LESSER INCLUDED OFFENSES

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

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

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

## RELATED ISSUES

***Extortion Target***

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

***No Good-Faith Exception***

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

## 1350. Hate Crime: Misdemeanor Interference With Civil Rights by Force (Pen. Code, § 422.6(a))

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**The defendant is charged [in Count _____] with interfering with another person's civil rights by the use of force [in violation of Penal Code section 422.6(a)].**

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

1. **The defendant used force to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____ <*describe the right allegedly infringed, e.g., "be free from violence or bodily harm"*>, established by the law or Constitution of California or the United States;**
2. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

3. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

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

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

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

**AND**

2. **The bias motivation caused the defendant to commit the alleged acts.**

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

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

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

**[*Nationality* includes citizenship, country of origin, and national origin.]**

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

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

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

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

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*New January 2006*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

If the prosecution is based on the defendant's speech alone, do not give this instruction. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698,

711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].) Give CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

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

## AUTHORITY

- Elements. Pen. Code, § 422.6(a).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).
- Association With Defined. Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required. *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Not Limited to "Significant Constitutional Rights." *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional. *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

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

## RELATED ISSUES

***Defendant Need Not Know He or She Is Violating the Law***

" '[S]pecific intent' under the statute does not require an actual awareness on the part of the defendant that he is violating another's constitutional rights. It is enough that he engages in activity that interferes with rights clearly and specifically protected by the laws of the United States." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 948 [2 Cal.Rptr.2d 629].) "It is sufficient if the right is clearly defined and that the defendant intended to invade interests protected by constitutional or statutory authority." (*Id.* at p. 949.)

***Penal Code Section 654***

In *In re M.S.* (1995) 10 Cal.4th 698, 727 [42 Cal.Rptr.2d 355, 896 P.2d 1365], the court rejected the argument that Penal Code section 654 does not apply to convictions under Penal Code section 422.6. In 2004, the Legislature amended the statute to add subdivision (d), which specifically states that Penal Code section 654 applies to convictions under Penal Code section 422.6.

## 1351. Hate Crime: Misdemeanor Interference With Civil Rights by Threat (Pen. Code, § 422.6(a) & (c))

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**The defendant is charged [in Count _____] with interfering with another person's civil rights by threatening violence [in violation of Penal Code section 422.6].**

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

1. **The defendant threatened physical violence against a specific person [or a specific group of people];**
2. **The threat would have caused a reasonable person to be afraid because the defendant appeared able to carry out the threat;**
3. **The defendant used the threat to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____ <*describe the right allegedly infringed, e.g., "be free from violence or bodily harm"*>, established by the law or Constitution of California or the United States;**
4. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

5. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

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

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

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or]**

**religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

**2. The bias motivation caused the defendant to commit the alleged acts.**

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

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

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

**[*Nationality* includes citizenship, country of origin, and national origin.]**

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

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

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

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

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

Give this instruction if the prosecution is based on the defendant's speech alone. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

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

## AUTHORITY

- Elements. Pen. Code, § 422.6(a) & (c).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).
- Association With Defined. Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required. *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].

- Requirements for Threat of Violence. Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Not Limited to "Significant Constitutional Rights." *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional. *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

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

## RELATED ISSUES

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force.*

## 1600. Robbery (Pen. Code, § 211)

**The defendant is charged [in Count _____] with robbery [in violation of Penal Code section 211].**

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

1. **The defendant took property that was not (his/her) own;**
2. **The property was taken from another person's possession and immediate presence;**
3. **The property was taken against that person's will;**
4. **The defendant used force or fear to take the property or to prevent the person from resisting;**

**AND**

5. **When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

**The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.**

*<Give the following bracketed paragraph if the second degree is the only possible degree of the charged crime for which the jury may return a verdict.>*

**[If you find the defendant guilty of robbery, it is robbery of the second degree.]**

**[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]**

**[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]**

**[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the**

**right to control it), either personally or through another person.]**

**[A (store/ [or] business) (employee/ _____ <*insert description*>) who is on duty has possession of the (store/ [or] business) owner's property.]**

**[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]**

**[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]**

**[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]**

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*New January 2006; Revised August 2009, October 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees*.

Give the bracketed definition of "against a person's will" on request.

If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See

*People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*.

## AUTHORITY

- Elements. Pen. Code, § 211.
- Fear Defined. Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined. *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined. *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee. *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].
- Constructive Possession by Subcontractor/Janitor. *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].
- Constructive Possession by Person With Special Relationship. *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369–1370 [109 Cal.Rptr.3d 479].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes—Property, § 86.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

## COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that

are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] ["force is a factual question to be determined by the jury using its own common sense"].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

## LESSER INCLUDED OFFENSES

- Attempted Robbery. Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft. Pen. Code, §§ 484, 487g; *People v. Webster, supra,* at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile. Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft. Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior. Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the

application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

## RELATED ISSUES

### *Asportation—Felonious Taking*

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

### *Claim of Right*

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

### *Fear*

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

### *Force—Amount*

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th

1242, 1246 [53 Cal.Rptr.2d 256] [noting that force employed by pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

***Force—When Applied***

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

***Immediate Presence***

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

***Multiple Victims***

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a

single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

***Value***

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

## 1700. Burglary (Pen. Code, § 459)

**The defendant is charged [in Count _____] with burglary [in violation of Penal Code section 459].**

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

1. **The defendant entered (a/an) (building/room within a building/locked vehicle/** _____ *<insert other statutory target>***);**

**AND**

2. **When (he/she) entered (a/an) (building/room within the building/locked vehicle/** _____ *<insert other statutory target>***), (he/she) intended to commit (theft/ [or]** _____ *<insert one or more felonies>***).**

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

*<Give the following bracketed paragraph if the second degree is the only possible degree of the charged crime for which the jury may return a verdict.>*

**[If you find the defendant guilty of burglary, it is burglary of the second degree.]**

**A burglary was committed if the defendant entered with the intent to commit (theft/ [or]** _____ *<insert one or more felonies>***). The defendant does not need to have actually committed (theft/ [or]** _____ *<insert one or more felonies>***) as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/ [or]** _____ *<insert one or more felonies>***).]**

**[Under the law of burglary, a person *enters a building* if some part of his or her body [or some object under his or her control] penetrates the area inside the building's outer boundary.]**

**[A building's *outer boundary* includes the area inside a window screen.]**

**[The People allege that the defendant intended to commit (theft/ [or] _____ <*insert one or more felonies*>). You may not find the defendant guilty of burglary unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes (he/she) intended.]**

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*New January 2006; Revised October 2010*

## BENCH NOTES

***Instructional Duty***

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

If second degree burglary is the only possible degree of burglary that the jury may return as their verdict, do not give CALCRIM No. 1701, *Burglary: Degrees*.

Although actual commission of the underlying theft or felony is not an element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903]), the court has a **sua sponte** duty to instruct that the defendant must have intended to commit a felony and has a **sua sponte** duty to define the elements of the underlying felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706 [144 Cal.Rptr. 330]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432].) Give all appropriate instructions on theft or the felony alleged.

If the area alleged to have been entered is something other than a building or locked vehicle, insert the appropriate statutory target in the blanks in elements 1 and 2. Penal Code section 459 specifies the structures and places that may be the targets of burglary. The list includes a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home as defined in Health and Safety Code section 18075.55(d), railroad car, locked or sealed cargo container whether or not mounted on a vehicle, trailer coach as defined in Vehicle Code section 635, house car as defined in Vehicle Code section 362, inhabited camper as defined in Vehicle Code section 243, locked vehicle as defined by the Vehicle Code, aircraft as defined in Public Utilities Code section 21012, or mine or any underground portion thereof. (See Pen. Code, § 459.)

On request, give the bracketed paragraph that begins with "Under the law of burglary," if there is evidence that only a portion of the defendant's body, or

an instrument, tool, or other object under his or control, entered the building. (See *People v. Valencia* (2002) 28 Cal.4th 1, 7❒8 [120 Cal.Rptr.2d 131, 46 P.3d 920]; *People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083].)

On request, give the bracketed sentence defining "outer boundary" if there is evidence that the outer boundary of a building for purposes of burglary was a window screen. (See *People v. Valencia* (2002) 28 Cal.4th 1, 12❒13 [120 Cal.Rptr.2d 131, 46 P.3d 920].)

If multiple underlying felonies are charged, give the bracketed paragraph that begins with "The People allege that the defendant intended to commit either." (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

If the defendant is charged with first degree burglary, give CALCRIM No. 1701, *Burglary: Degrees*.

## AUTHORITY

- Elements. Pen. Code, § 459.
- Instructional Requirements. *People v. Failla* (1966) 64 Cal.2d 560, 564, 568–569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Smith* (1978) 78 Cal.App.3d 698, 706–711 [144 Cal.Rptr. 330]; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 113, 115.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.10 (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Attempted Burglary. Pen. Code, §§ 663, 459.
- Tampering With a Vehicle. Veh. Code, § 10852; *People v. Mooney* (1983) 145 Cal.App.3d 502, 504–507 [193 Cal.Rptr. 381] [if burglary of automobile charged].

## RELATED ISSUES

### *Auto Burglary–Entry of Locked Vehicle*

Under Penal Code section 459, forced entry of a locked vehicle constitutes burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 863 [57 Cal.Rptr.2d 12].) However, there must be evidence of forced entry. (See

*People v. Woods* (1980) 112 Cal.App.3d 226, 228–231 [169 Cal.Rptr. 179] [if entry occurs through window deliberately left open, some evidence of forced entry must exist for burglary conviction]; *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [pushing open broken wing lock on window, reaching one's arm inside vehicle, and unlocking car door evidence of forced entry].) Opening an unlocked passenger door and lifting a trunk latch to gain access to the trunk is not an auto burglary. (*People v. Allen* (2001) 86 Cal.App.4th 909, 917–918 [103 Cal.Rptr.2d 626].)

***Auto Burglary–Definition of Locked***

To lock, for purposes of auto burglary, is "to make fast by interlinking or interlacing of parts . . . [such that] some force [is] required to break the seal to permit entry . . . ." (*In re Lamont R.* (1988) 200 Cal.App.3d 244, 247 [245 Cal.Rptr. 870], quoting *People v. Massie* (1966) 241 Cal.App.2d 812, 817 [51 Cal.Rptr. 18] [vehicle was not locked where chains were wrapped around the doors and hooked together]; compare *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [vehicle with locked doors but broken wing lock that prevented window from being locked, was for all intents and purposes a locked vehicle].)

***Auto Burglary–Intent to Steal***

Breaking into a locked car with the intent to steal the vehicle constitutes auto burglary. (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461 [25 Cal.Rptr.2d 296]; see also *People v. Blalock* (1971) 20 Cal.App.3d 1078, 1082 [98 Cal.Rptr. 231] [auto burglary includes entry into locked trunk of vehicle].) However, breaking into the headlamp housings of an automobile with the intent to steal the headlamps is not auto burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 864 [57 Cal.Rptr.2d 12] [stealing headlamps, windshield wipers, or hubcaps are thefts, or attempted thefts, auto tampering, or acts of vandalism, not burglaries].)

***Building***

A building has been defined for purposes of burglary as "any structure which has walls on all sides and is covered by a roof." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672].) Courts have construed "building" broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133 Cal.App.3d 200, 204–205 [183 Cal.Rptr. 773].) However, the definition of building is not without limits and courts have focused on "whether the nature of a structure's composition is such that a reasonable person would expect some

protection from unauthorized intrusions." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672] [open pole barn is not a building]; see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–1424 [252 Cal.Rptr. 17] [electric company's "gang box," a container large enough to hold people, is not a building; such property is protected by Penal Code sections governing theft].)

***Outer Boundary***

A building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. Under this test, a window screen is part of the outer boundary of a building for purposes of burglary. (*People v. Valencia* (2002) 28 Cal.4th 1, 12❒13 [120 Cal.Rptr.2d 131, 46 P.3d 920].) Whether penetration into an area behind a window screen amounts to an entry of a building within the meaning of the burglary statute is a question of law. The instructions must resolve such a legal issue for the jury. (*Id.* at p. 16.)

***Theft***

Any one of the different theories of theft will satisfy the larcenous intent required for burglary. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 29–30 [219 Cal.Rptr. 707] [entry into building to use person's telephone fraudulently]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30–31 [46 Cal.Rptr.2d 840].)

***Burglarizing One's Own Home—Possessory Interest***

A person cannot burglarize his or her own home as long as he or she has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [125 Cal.Rptr. 773, 542 P.2d 1365].) However, a family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she has no claim of a right to enter that residence. (*In re Richard M.* (1988) 205 Cal.App.3d 7, 15–16 [252 Cal.Rptr. 36] [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent's home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–893 [268 Cal.Rptr. 501] [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People v. Sears* (1965) 62 Cal.2d 737, 746 [44 Cal.Rptr. 330, 401 P.2d 938], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 510 [20 Cal.Rptr.2d 582, 853 P.2d 1037] [burglary conviction proper where husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704,

712–714 [170 Cal.Rptr. 292] [husband had unconditional possessory interest in jointly owned home; his access to the house was not limited and strictly permissive, as in *Sears*].)

***Consent***

While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [253 Cal.Rptr. 316] [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be buyers, no burglary occurred].) The consent must be express and clear; the owner/occupant must both expressly permit the person to enter and know of the felonious or larcenous intent of the invitee. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860].) A person who enters for a felonious purpose, however, may be found guilty of burglary even if he or she enters with the owner's or occupant's consent. (*People v. Frye* (1998) 18 Cal.4th 894, 954 [77 Cal.Rptr.2d 25, 959 P.2d 183] [no evidence of unconditional possessory right to enter].) A joint property owner/occupant cannot give consent to a third party to enter and commit a felony on the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 420–423 [76 Cal.Rptr.2d 536] [husband's consent did not preclude a burglary conviction based upon defendant's entry of premises with the intent to murder wife].)

***Entry by Instrument***

When an entry is made by an instrument, a burglary occurs if the instrument passes the boundary of the building and if the entry is the type that the burglary statute intended to prohibit. (*People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083] [placing forged check in chute of walk-up window of check-cashing facility was not entry for purposes of burglary] disapproving of *People v. Ravenscroft* (1988) 198 Cal.App.3d 639, 643–644 [243 Cal.Rptr. 827] [insertion of ATM card into machine was burglary].)

***Multiple Convictions***

Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–318 [256 Cal.Rptr. 64], the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099 [236 Cal.Rptr. 822] [multiple penetration case]: " '[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the

[action by the defendant] is nevertheless renewed, a new and separate crime is committed.' " (*In re William S., supra*, 208 Cal.App.3d at p. 317.) The court in *In re William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce "absurd results." The court gave this example: where "a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts." (*Ibid.*) The *In re William S.* test has been called into serious doubt by *People v. Harrison* (1989) 48 Cal.3d 321, 332–334 [256 Cal.Rptr. 401, 768 P.2d 1078], which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison*, *supra*, 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568 [57 Cal.Rptr.2d 774], a burglary case, agreed with *In re William S.* to the extent that burglary is analogous to crimes of sexual penetration. Following *Harrison*, the court held that each separate entry into a building or structure with the requisite intent is a burglary even if multiple entries are made into the same building or as part of the same plan. (*People v. Washington, supra*, 50 Cal.App.4th at pp. 574–579; see also 2 Witkin and Epstein, Cal. Criminal Law (2d. ed. 1999 Supp.) "Multiple Entries," § 662A, p. 38.) The court further stated that any "concern about absurd results are [sic] better resolved under [Penal Code] section 654, which limits the punishment for separate offenses committed during a single transaction, than by [adopting] a rule that, in effect, creates the new crime of continuous burglary." (*People v. Washington, supra*, 50 Cal.App.4th at p. 578.)

***Room***

Penal Code section 459 includes "room" as one of the areas that may be entered for purposes of burglary. (Pen. Code, § 459.) An area within a building or structure is considered a room if there is some designated boundary, such as a partition or counter, separating it from the rest of the building. It is not necessary for the walls or partition to touch the ceiling of the building. (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257–1258 [263 Cal.Rptr. 183] [office area set off by counters was a room for purposes of burglary].) Each unit within a structure may constitute a separate "room" for which a defendant can be convicted on separate counts of burglary. (*People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521 [271 Cal.Rptr. 769] [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [264 Cal.Rptr. 49] [separate business offices in same building].)

Entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after entry

into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289] ["the unadorned word 'room' in section 459 reasonably must be given its ordinary meaning"]; see *People v. McCormack* (1991) 234 Cal.App.3d 253, 255–257 [285 Cal.Rptr. 504]; *People v. Young* (1884) 65 Cal. 225, 226 [3 P. 813].) However, entry into multiple rooms within one apartment or house cannot support multiple burglary convictions unless it is established that each room is a separate dwelling space, whose occupant has a separate, reasonable expectation of privacy. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575 [11 Cal.Rptr.3d 802]; see also *People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2 [1 Cal.Rptr.2d 434].)

***Temporal or Physical Proximity—Intent to Commit the Felony***

According to some cases, a burglary occurs "if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction." (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [23 Cal.Rptr. 734] [defendant entered office with intent to steal tires from attached open-air shed].) This test was followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932 [102 Cal.Rptr. 266] [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–232 [214 Cal.Rptr. 82] [defendant entered lobby of apartment building, intending to burglarize one of the units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696 [14 Cal.Rptr.2d 246] [defendant entered a home to facilitate the crime of extortion].

However, in *People v. Kwok* (1998) 63 Cal.App.4th 1236 [75 Cal.Rptr.2d 40], the court applied a less restrictive test, focusing on just the facilitation factor. A burglary is committed if the defendant enters a building in order to facilitate commission of theft or a felony. The defendant need not intend to commit the target crime in the same building or on the same occasion as the entry. (*People v. Kwok, supra,* 63 Cal.App.4th at pp. 1246–1248 [defendant entered building to copy a key in order to facilitate later assault on victim].) The court commented that "the 'continuous transaction test' and the 'immediate vicinity test' . . . are artifacts of the particular factual contexts of *Wright*, *Nance*, and *Nunley*." (*Id.* at p. 1247.) With regards to the *Ortega* case, the *Kwok* court noted that even though the *Ortega* court "purported to rely on the 'continuous transaction' factor of Wright, [the decision] rested principally on the 'facilitation' factor." (*Id.* at pp. 1247–1248.) While *Kwok* and *Ortega* dispensed with the elemental requirements of spatial and

temporal proximity, they did so only where the subject entry is "closely connected" with, and is made in order to facilitate, the intended crime. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749 [109 Cal.Rptr.2d 273].)

## 1806. Theft by Embezzlement (Pen. Code, §§ 484, 503)

**The defendant is charged [in Count _____] with [grand/petty] theft by embezzlement [in violation of Penal Code section 503].**

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

1. **An owner [or the owner's agent] entrusted (his/her) property to the defendant;**
2. **The owner [or owner's agent] did so because (he/she) trusted the defendant;**
3. **The defendant fraudulently (converted/used) that property for (his/her) own benefit;**

**AND**

4. **When the defendant (converted/used) the property, (he/she) intended to deprive the owner of (it/its use).**

**A person acts *fraudulently* when he or she takes undue advantage of another person or causes a loss to that person by breaching a duty, trust or confidence.**

**[A good faith belief in acting with authorization to use the property is a defense.]**

**[In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.]**

**[An intent to deprive the owner of property, even temporarily, is enough.]**

**[Intent to restore the property to its owner is not a defense.]**

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

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

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*New January 2006; Revised June 2007, April 2008, October 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

If the evidence supports it, the court has a **sua sponte** duty to instruct that a good faith belief in acting with authorization to use the property is a defense. *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].

Intent to return the property at the time of the taking is not a defense to embezzlement under Pen. Code, § 512 unless the property was returned before the person was charged. *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 812 [104 Cal.Rptr.3d 654].

***Related Instructions***

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

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

## AUTHORITY

- Elements. Pen. Code, §§ 484, 503–515; *In re Basinger* (1988) 45 Cal.3d 1348, 1362–1363 [249 Cal.Rptr. 110, 756 P.2d 833]; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1845 [52 Cal. Rptr.2d 765]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 361 [234 Cal.Rptr. 442].
- Fraud Defined. *People v. Talbot* (1934) 220 Cal. 3, 15 [28 P.2d 1057]; *People v. Stein* (1979) 94 Cal.App.3d 235, 241 [156 Cal.Rptr. 299].
- Intent to Temporarily Deprive Owner of Property Sufficient. *People v. Casas* (2010) 184 Cal.App.4th 1242, 1246–1247 [109 Cal.Rptr.3d 811] [acknowledging general rule for larceny requires intent to permanently deprive owner of property, citing *People v. Davis* (1998) 19 Cal.4th 301, 305 [79 Cal.Rptr.2d 295, 965 P.2d 1165]].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 26.

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

## LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.

## RELATED ISSUES

### *Alter Ego Defense*

A partner can be guilty of embezzling from his own partnership. "[T]hough [the Penal Code] requir[es] that the property be 'of another' for larceny, [it] does not require that the property be 'of another' for embezzlement. . . . It is both illogical and unreasonable to hold that a partner cannot steal from his partners merely because he has an undivided interest in the partnership property. Fundamentally, stealing that portion of the partners' shares which does not belong to the thief is no different from stealing the property of any other person." (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 464, 468 [106 Cal.Rptr. 519]; see Pen. Code, § 484.)

### *Fiduciary Relationships*

Courts have held that creditor/debtor and employer/employee relationships are not presumed to be fiduciary relationships in the absence of other evidence of trust or confidence. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1846 [52 Cal.Rptr.2d 765] [creditor/debtor]; *People v. Threestar* (1985) 167 Cal.App.3d 747, 759 [213 Cal.Rptr. 510] [employer/employee].)

## 1935. Making, Passing, etc., Fictitious Check or Bill (Pen. Code, § 476)

**The defendant is charged [in Count _____] with (possessing[,]/ [or] making[,]/ [or] passing[,]/ [or] using[,]/ [or] attempting to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property) [in violation of Penal Code section 476].**

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

1. **The defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property);**
2. **The defendant knew that the document was (false/ [or] altered);**

**[AND]**

3. **When the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) the document, (he/she) intended to defraud(;/.)**

*<Give element 4 only when possession charged.>*

**[AND**

4. **When the defendant possessed the document, (he/she) intended to pass or use the document as genuine.]**

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

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

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

**[A person *alters* a document if he or she adds to, erases, or**

**changes a part of the document that affects a legal, financial, or property right.]**

**A person *(passes[,]/* [or] *uses[,]/* [or] *attempts to pass or use)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.**

**[The People allege that the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) the following documents: _____** <*insert description of each document when multiple items alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) at least one document that was (fictitious/ [or] altered) and you all agree on which document (he/she) (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use).]**

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

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

If the prosecution alleges under a single count that the defendant passed or possessed multiple forged documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

*People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

If the prosecution alleges that the defendant possessed the document, give element 4. Do not give element 4 if the prosecution alleges that the defendant made, passed, used, or attempted to pass or use the document.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or

association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

## AUTHORITY

- Elements. Pen. Code, § 476.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Pass or Attempt to Use Defined. *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Explanation of "Fictitious." *People v. Mathers* (2010) 183 Cal.App.4th 1464, 1467–1468 [108 Cal.Rptr.3d 720].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 150, 169, 173.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Attempted Making, etc., of Fictitious Check. Pen. Code, §§ 664, 476.

## RELATED ISSUES

### *Check Fraud*

A defendant who forges the name of another on a check may be charged under either Penal Code section 470 or section 476. (*People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66]; *People v. Pearson* (1957)

151 Cal.App.2d 583, 586 [311 P.2d 927].) However, the defendant may not be convicted of and sentenced on both charges for the same conduct. (Pen. Code, § 654; *People v. Hawkins, supra,* 196 Cal.App.2d at pp. 839–840; see also CALCRIM No. 3516, *Multiple Counts—Alternative Charges for One Event—Dual Conviction Prohibited*.)

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

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

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

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

**AND**

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

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

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

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

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

*<Defense: Compassionate Use>*

**[Possession or transportation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.**

**[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]**

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*New January 2006; Revised April 2010, October 2010, April 2011*

## BENCH NOTES

### *Instructional Duty*

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

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

### *Defenses—Instructional Duty*

The medical marijuana defense is available in some cases when the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a

reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense when defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

***Related Instructions***

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

## AUTHORITY

- Elements. Health & Saf. Code, § 11360(a).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

- Primary Caregiver. *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense. *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- This Instruction Upheld. *People v. Busch* (2010) 187 Cal.App.4th 150, 155–156 [113 Cal.Rptr.3d 683].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

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

## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

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

## 2375. Simple Possession of Marijuana: Misdemeanor (Health & Saf. Code, § 11357(c))

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**The defendant is charged [in Count _____] with possessing more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11357(c)].**

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

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

**AND**

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

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

**[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]**

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

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

**[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]**

*<Defense: Compassionate Use>*

**[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.**

**[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]**

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*New January 2006; Revised June 2007, April 2010, October 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

***Defenses—Instructional Duty***

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude

defense when defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

## AUTHORITY

- Elements. Health & Saf. Code, § 11357(c); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- "Marijuana" Defined. Health & Saf. Code, § 11018.
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver. *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense. *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- This Instruction Upheld. *People v. Busch* (2010) 187 Cal.App.4th 150, 160 [113 Cal.Rptr.3d 683].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

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

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

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

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

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

**AND**

3. **The defendant knew it to be an object used for unlawfully injecting or smoking a controlled substance.**

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

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

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

*<Defense: Authorized Possession for Personal Use>*

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

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

**[AND]**

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

**[AND**

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

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

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*New January 2006; Revised October 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

***Defenses—Instructional Duty***

In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 121285.) The purpose of this project is to evaluate "the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C." (Health & Saf. Code, § 121285(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) Similarly, in a city or county that has authorized participation in the project, Health and Safety Code section 11364(a) "shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source." (Health & Saf. Code, § 11364(c).) The defendant need only raise a reasonable doubt about whether his or her possession of these items was lawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on this defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession of hypodermic is an affirmative defense]); *People v. Mower*, *ibid.* at pp. 478–481 [discussing affirmative defenses generally and

the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

## AUTHORITY

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

### *Secondary Sources*

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

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

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

## RELATED ISSUES

### *Marijuana Paraphernalia Excluded*

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

## 3161. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed (Pen. Code, § 12022.7(b))

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**If you find the defendant guilty of the crime[s] charged in Count[s] _____[,] [or of attempting to commit (that/those) crime[s]][ or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury that caused _____ <*insert name of injured person*> to become (comatose/ [or] permanently paralyzed). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation, the People must prove that:**

1. **The defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of the crime;**

**[AND]**

2. **The defendant's acts caused _____ <*insert name of injured person*> to (become comatose due to brain injury/ [or] suffer permanent paralysis)(./;)**

*<Give element 3 when instructing on whether injured person was an accomplice.>*

**[AND**

3. **_____ <*insert name of injured person*> was not an accomplice to the crime.]**

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

**[*Paralysis* is a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.]**

*<Group Assault>*

**[If you conclude that more than one person assaulted _____ <*insert name of injured person*> and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____ <*insert***

*name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted** _____ *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on** _____ *<insert name of injured person>* **during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on** _____ *<insert name of injured person>* **was enough that it alone could have caused** _____ *<insert name of injured person>* **to suffer great bodily injury(;/.)]**

**[OR]**

**[3B. The physical force that the defendant used on** _____ *<insert name of injured person>* **was sufficient in combination with the force used by the others to cause** _____ *<insert name of injured person>* **to suffer great bodily injury.]**

**The defendant must have applied substantial force to** _____ *<insert name of injured person>***. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

**[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:**

1. **He or she knew of the criminal purpose of the person who committed the crime;**

**AND**

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

*<If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, see Bench Notes.>*

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

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*New January 2006; Revised June 2007, December 2008*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

## AUTHORITY

- Enhancement. Pen. Code, § 12022.7(b).
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v.*

*Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].

- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

### *Secondary Sources*

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

## RELATED ISSUES

### *Coma Need Not Be Permanent*

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378 [94 Cal.Rptr. 2d 814], the court held that an enhancement under Penal Code section 12022.7(b) was proper where the victim was maintained in a medically induced coma for two months following brain surgery necessitated by the assault.

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

## 3163. Great Bodily Injury: Domestic Violence (Pen. Code, § 12022.7(e))

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**If you find the defendant guilty of the crime[s] charged in Count[s] _____[,] [or of attempting to commit (that/those) crime[s]][ or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of that crime, under circumstances involving domestic violence. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**[The People must also prove that _____ <*insert name of injured person*> was not an accomplice to the crime.]**

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

***Domestic violence*** **means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person with whom the defendant is having or has had a dating relationship[,]/ [or] person who was or is engaged to the defendant).**

***Abuse*** **means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.**

**[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]**

**[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4)**

**the parties' holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]**

**[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]**

**[Committing the crime of _____** *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

*<Group Assault>*

**[If you conclude that more than one person assaulted _____** *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on _____** *<insert name of injured person>* **was enough that it alone could have caused _____** *<insert name of injured person>* **to suffer great bodily injury(;/.)]**

**[OR]**

**[3B. The physical force that the defendant used on _____** *<insert name of injured person>* **was sufficient in combination with the force used by the others to cause _____** *<insert name of injured person>* **to suffer great bodily injury.]**

**The defendant must have applied substantial force to _____** *<insert name of injured person>***. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

**[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:**

**1. He or she knew of the criminal purpose of the person who committed the crime;**

**AND**

**2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

*<If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, see Bench Notes.>*

**[The person who was injured does not have to be a person with whom the defendant had a relationship.]**

**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.**

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*New January 2006; Revised June 2007, December 2008*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See P*eople v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

## AUTHORITY

- Enhancement Pen. Code, § 12022.7(e).
- Great Bodily Injury Defined Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Dating Relationship Defined Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- "In Commission of" Felony *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

### *Secondary Sources*

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

## RELATED ISSUES

### *Person Who Suffers Injury Need Not Be "Victim" of Domestic Abuse*

Penal Code section 12022.7(e) does not require that the injury be inflicted on the "victim" of the domestic violence. (*People v. Truong* (2001) 90

Cal.App.4th 887, 899 [108 Cal.Rptr.2d 904].) Thus, the enhancement may be applied where "an angry husband physically abuses his wife and, as part of the same incident, inflicts great bodily injury upon the man with whom she is having an affair." (*Id.* at p. 900.)

See also the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

## 3222. Characteristics of Victim (Pen. Code, §§ 667.9(a) & (b), 667.10(a))

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**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 committed that crime against a person who was (65 years of age or older/under the age of 14 years/blind/deaf/developmentally disabled/paraplegic/ [or] quadriplegic). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation, the People must prove that:**

1. **At the time of the crime, _____ <*insert name of alleged victim*> was (65 years of age or older/under the age of 14 years/blind/deaf/developmentally disabled/paraplegic/ [or] quadriplegic);**

**AND**

2. **At that time, the defendant knew or reasonably should have known that _____ <*insert name of alleged victim*> was (65 years of age or older/under the age of 14 years/ blind/deaf/developmentally disabled/paraplegic/ [or] quadriplegic).**

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

**[*Developmentally disabled* means a severe, chronic disability of a person that:**

1. **Is attributable to a mental or physical impairment or a combination of mental and physical impairments;**
2. **Is likely to continue indefinitely;**

**AND**

3. **Results in substantial functional limitation in three or more of the following abilities:**
   a. **To care for one's self;**

**b. To understand and express language;**

**c. To learn;**

**d. To be independently mobile;**

**e. To engage in self-direction;**

**f. To live independently;**

**OR**

**g. To be economically self-sufficient.]**

**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.**

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*New January 2006; Revised April 2011*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged with a prior conviction under Penal Code section 667.9(b) or 667.10, the court must also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial,* unless the defendant has stipulated to the prior or the court has granted a bifurcated trial on the prior conviction.

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

Give the bracketed definition of developmental disability if that enhancement is charged.

## AUTHORITY

- Enhancements. Pen. Code, §§ 667.9(a) & (b), 667.10(a).
- Developmental Disability Defined. Pen. Code, § 667.9(d).
- Reasonably Should Have Known Not Unconstitutionally Vague. *People v. Smith* (1993) 13 Cal.App.4th 1182, 1188–1190 [16 Cal.Rptr.2d 820].
- Prior Conviction Not Required for Enhancement Under Penal Code Section 667.9(a). *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1213 [38 Cal.Rptr.2d 592].

- Proof of Knowledge Requirement. *People v. Morris* (2010) 185 Cal.App.4th 1147, 1153–1154 [111 Cal.Rptr.3d 204].

### *Secondary Sources*

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 306, 352.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.52 (Matthew Bender).

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

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

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

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

**[AND]**

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

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

**[AND**

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

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

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

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

**Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a**

**relationship has been established or promoted for the primary purpose of victimization.**

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

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

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

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

*<A. Conviction With Fixed Sentence>*

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

*<B. Conviction With Indeterminate Sentence>*

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

*<C. Conviction in Another Jurisdiction>*

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

*<D. Conviction Under Previous Statute>*

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

*<E. Conviction With Probation>*

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

*<F. Acquittal Based on Insanity Defense>*

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

*<G. Conviction as Mentally Disordered Sex Offender>*

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

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

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

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

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

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*New January 2006; Revised August 2006, June 2007, August 2009, April 2011*

## BENCH NOTES

***Instructional Duty***

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

Do not use this instruction for extension or status proceedings. Use instead CALCRIM No. 3454A, *Hearing to Determine Current Status Under Sexually Violent Predator Act*.

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (*People v. Grassini*

(2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

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

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

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

## AUTHORITY

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

128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].

- Amenability to Voluntary Treatment. *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same. *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].

### *Secondary Sources*

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

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

## RELATED ISSUES

### *Different Proof Requirements at Different Stages of the Proceedings*

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

### *Masturbation Does Not Require Skin-to-Skin Contact*

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

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

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

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

1. **(He/She) has a diagnosed mental disorder;**

**[AND]**

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

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

**[AND**

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

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

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

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

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

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

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

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

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

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

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*New April 2011*

## BENCH NOTES

***Instructional Duty***

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

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

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation*

*Instructions*; and any other relevant post-trial instructions. These instructions may need to be modified.

## AUTHORITY

- Elements and Definitions. Welf. & Inst. Code, §§ 6600, 6605.
- Unanimous Verdict, Burden of Proof. *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined. *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined. *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility. *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Impairment of Control. *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment. *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same. *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].
- State-Operated Conditional Release Program. *People v. Superior Court (George)* (2008) 164 Cal.App.4th 183, 196–197 [78 Cal.Rptr.3d 711].
- Impairment of Control. *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].

### *Secondary Sources*

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 1993.

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

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

**A person who engages in mutual combat or who starts a fight has a right to self-defense only if:**

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

**[AND]**

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

*<Give element 3 in cases of mutual combat.>*

**[AND**

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

**If the defendant meets these requirements, (he/she) then had a right to self-defense if the opponent continued to fight.**

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

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

*New January 2006; Revised April 2008, December 2008, April 2011*

### BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

## AUTHORITY

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

### *Secondary Sources*

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

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

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

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

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

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

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

*New January 2006; Revised June 2007, October 2010, April 2011*

### BENCH NOTES

***Instructional Duty***

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

If the evidence raises the issue whether the same act or single event underlies

both a theft conviction and a receiving stolen property conviction, this may be a question for the jury and the instruction should be modified accordingly.

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

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

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

## AUTHORITY

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

### *Secondary Sources*

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

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

## RELATED ISSUES

***Dual Conviction May Not Be Based on Necessarily Included Offenses***

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

***Dual Conviction—Examples of Offense Where Prohibited or Permitted***

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

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

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

- Burglary and theft. *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [27 Cal.Rptr.2d 839].
- Burglary and receiving stolen property. *People v. Allen* (1999) 21 Cal.4th 846, 866 [89 Cal.Rptr.2d 279, 984 P.2d 486].
- Carjacking and grand theft. *People v. Ortega* (1998) 19 Cal.4th 686,

693 [80 Cal.Rptr.2d 489, 968 P.2d 48].

- Carjacking and robbery. *People v. Ortega* (1998) 19 Cal.4th 686, 700 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and unlawful taking of a vehicle. *People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].
- Murder and gross vehicular manslaughter while intoxicated. *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118].
- Murder and child abuse resulting in death. *People v. Malfavon* (2002) 102 Cal.App.4th 727, 743 [125 Cal.Rptr.2d 618].

***Joy Riding and Receiving Stolen Property***

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

***Accessory and Principal***

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

## 3550. Pre-Deliberation Instructions

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

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

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

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

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

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

**If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one**

**or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.**

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

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

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

**You must reach your verdict without any consideration of punishment.**

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

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*New January 2006; Revised April 2008, October 2010, April 2011*

## BENCH NOTES

***Instructional Duty***

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

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with "These exhibits will be sent into the jury

room." If not, give the bracketed phrase that begins with "You may examine whatever exhibits you think."

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

## AUTHORITY

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

### *Secondary Sources*

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

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

## RELATED ISSUES

### *Admonition Not to Discuss Case with Anyone*

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court's admonition not to

discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

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

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

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