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INVITATION TO COMMENT CALCRIM-2022-01

Title

Criminal Jury Instructions: Revisions and Additions

Proposed Rules, Forms, Standards, or Statutes

New and Revised Jury Instructions

Proposed by

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

Action Requested

Review and submit comments by July 1, 2022.

Proposed Effective Date

September 20, 2022

Contact

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

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207. Proof Need Not Show Actual Date

It is alleged that the crime[s] occurred on [or about] _____ <insert alleged date(s) or date ranges by count>. The People are not required to prove that the crime[s] took place exactly on (that/those) day[s] but only that it happened reasonably close to (that/those) day[s].

New January 2006; Revised February 2014, February 2016, September 2022

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. This instruction should not be given: (1) when the evidence demonstrates that the offense was committed at a specific time and place and the defendant has presented a defense of alibi or lack of opportunity; or (2) when two similar offenses are charged in separate counts. (*People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705], overruled on other grounds in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 [263 Cal.Rptr. 513, 781 P.2d 547]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].)

AUTHORITY

- Instructional Requirements. ▶ Pen. Code, § 955; *People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].
- This Instruction Correctly States the Law. ▶ *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304 [188 Cal.Rptr.3d 811].

SECONDARY SOURCES

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[2] (Matthew Bender).

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

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

1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <insert name or description of third party>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being **a victim of** (~~raped/maimed/robbed/~~ _____ <insert ~~inherently~~other forcible and atrocious crime such as rape or mayhem>); _____ <insert noninherently forcible and atrocious crime such as robbery> **under circumstances in which (he/she) reasonably believed that (he/she) would suffer great bodily injury or death**)];
2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

AND

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

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

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

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

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

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

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 233, 526 P.2d 241].) In *Ceballos*, the court identified murder, mayhem, rape, and robbery as examples of forcible and atrocious crimes. The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) However, as noted in *People v. Morales* (2021) 69 Cal.App.5th 978, 992–993 [284 Cal.Rptr.3d 693], *Ceballos* involved a burglary, not a robbery, and contemplated the traditional common law robbery, which, unlike the modern understanding of robbery in California, did not include situations where very little force or threat of force is involved. *Morales* concluded that “[a] robbery therefore cannot trigger the right to use deadly force in self-defense unless the

circumstances of the robbery gave rise to a reasonable belief that the victim would suffer great bodily injury or death.” (Id. at p. 992.)

~~If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select “raped,” “maimed,” or “robbed,” or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.~~

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

Related Instructions

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

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

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

AUTHORITY

- Justifiable Homicide. ▶ Pen. Code, §§ 197–199.
- Fear. ▶ Pen. Code, § 198.
- Lawful Resistance. ▶ Pen. Code, §§ 692–694.
- Burden of Proof. ▶ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. ▶ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241]; *People v. Morales* (2021) 69 Cal.App.5th 978, 992–993 [284 Cal.Rptr.3d 693].

- Imminence. ▶ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142].
- No Duty to Retreat. ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. ▶ Pen. Code, § 198.
- This Instruction Upheld. ▶ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be “some atrocious crime attempted to be committed by force.” (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

RELATED ISSUES

Imperfect Self-Defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant’s belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where defendant’s version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor’s version could only lead to a conviction of

first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1997) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in rape prosecution, no mistake-of-fact instruction was required when two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Defense for Initial Aggressor

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

Transferred Intent Applies

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

Definition of “Imminent”

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

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

(*Ibid.*)

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

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

Reasonable Person Standard and Physical Limitations

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

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 67–85.
- 3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11, 73.12 (Matthew Bender).
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.04[1][c] (Matthew Bender).
- 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.01[1][b] (Matthew Bender).

506. Justifiable Homicide: Defending Against Harm to Person Within Home or on Property

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) to defend (himself/herself) [or any other person] in the defendant's home. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. The defendant reasonably believed that (he/she) was defending a home against _____ <insert name of decedent>, who (intended to or tried to commit _____ <insert forcible and atrocious crime>/ [or] violently[[,] [or] riotously[,]/ [or] tumultuously] tried to enter that home intending to commit an act of violence -against someone inside);
2. The defendant reasonably believed that the danger was imminent;
3. The defendant reasonably believed that the use of deadly force was necessary to defend against the danger;

AND

4. The defendant used no more force than was reasonably necessary to defend against the danger.

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

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

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

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

New January 2006; Revised September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give defense instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252 [87 Cal.Rptr.2d 803]; *People v. Barton* (1995) 12 Cal.4th 186, 195 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *People v. Slater* (1943) 60 Cal.App.2d 358, 367–368 [140 P.2d 846] [error to refuse instruction based on Pen. Code, § 197, subd. 2 when substantial evidence supported inference that victim intended to enter the habitation].)

Penal Code section 197, subdivision 2 provides that “defense of habitation” may be used to resist someone who “intends or endeavors, by violence or surprise, to commit a felony” (Pen. Code, § 197, subd. 2.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that the felony feared must be “some atrocious crime attempted to be committed by force.” (*Id.* at p. 478.) Forcible and atrocious crimes are those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos, supra*, 12 Cal.3d at p. 479.) ~~The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery.~~ (*Id.* at p. 478.) *Ceballos* specifically held that burglaries which “do not reasonably create a fear of great bodily harm” are not sufficient “cause for exaction of human life.” (*Id.* at p. 479.) Thus, although the statute refers to “defense of habitation,” *Ceballos* requires that a person be at risk of great bodily harm or an atrocious felony in order to justify homicide. (*Ibid.*) The instruction has been drafted accordingly.

If the defendant is asserting that he or she was resisting the commission of a forcible and atrocious crime, give the first option in element 1 and insert the name of the crime. If there is substantial evidence that the defendant was resisting a

violent entry into a residence for the general purpose of committing violence against someone inside, give the second option in element 1. (See Pen. Code, § 197, subd. 2.) The court may give the bracketed words “riotously” and “tumultuously” at its discretion.

Related Instructions

CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury*.

AUTHORITY

- Instructional Requirements. ▶ Pen. Code, § 197, subd. 2.
- Actual and Reasonable Fear. ▶ See Pen. Code, § 198; see *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1361 [37 Cal.Rptr.2d 304].
- Burden of Proof. ▶ Pen. Code, § 189.5.
- Fear of Imminent Harm. ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 146, 921 P.2d 1]; *People v. Lucas* (1958) 160 Cal.App.2d 305, 310 [324 P.2d 933].
- Forcible and Atrocious Crimes. ▶ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241]; [*People v. Morales* \(2021\) 69 Cal.App.5th 978, 992–993 \[284 Cal.Rptr.3d 693\]](#).
- No Duty to Retreat. ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].

SECONDARY SOURCES

- 1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, § 88.
- 3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.13 (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).

507. Justifiable Homicide: By 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 (acting as a peace officer/obeying a peace officer's command for aid and assistance). (A/An) [attempted] killing is justified, and therefore not unlawful, if:

1. The defendant was (a peace officer/obeying a peace officer's command for aid and assistance);

AND

2. The [attempted] killing was committed while the defendant either:

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

OR

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

- B1. _____ <insert name of fleeing felon> was fleeing;

- B2. The force was necessary to arrest or detain _____ <insert name of fleeing felon > for the crime of _____ <insert name of felony >;

- B3. The commission of the crime of _____ <insert name of felony> created a risk of or resulted in death or serious bodily injury to another person;

AND

- B4. _____ <insert name of fleeing felon > would cause death or serious bodily injury to another person unless immediately arrested or detained.

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

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

[*Totality of the circumstances* means all facts known to the defendant at the time, including the conduct of the defendant and _____ <insert name of decedent> leading up to the use of deadly force.]

~~[In considering the totality of circumstances, you may consider whether:~~

- ~~• Prior to the use of force, the defendant [identified] [or] [attempted to identify] him or herself as a peace officer and [warned] [or] [attempted to warn] that deadly force may be used(;/.)~~
- ~~• Prior to the use of force, the defendant had objectively reasonable grounds to believe the person was aware that the defendant was a peace officer and that deadly force may be used(;/.)~~
- ~~• The defendant was able, under the circumstances, [[to [identify] [or] [attempt to identify]] him or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].~~

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

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

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

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

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

New January 2006; Revised April 2011, February 2012, August 2012, April 2020, September 2022

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].)

Penal Code sections 196 and 835a, as amended by Statutes 2019, ch.170 (A.B. 392), became effective on January 1, 2020. If the defendant’s act occurred before this date, the court should give the prior version of this instruction.

The jury must determine whether the defendant was 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 in 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 defendant was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the defendant is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the defendant is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

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 Peace Officer. ▶ Pen. Code, §§ 196, 199, 835a.
- 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].
- Peace Officer Defined. ▶ Pen. Code, § 830 et seq.
- Serious Bodily Injury Defined. ▶ Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Deadly Force Defined. ▶ Pen. Code, § 835a(e).

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer's actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham* but those factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer's use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

SECONDARY SOURCES

- 1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, § 95.
- 3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.15[1] (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).

521. First Degree Murder (Pen. Code, § 189)

<Select the appropriate section[s]. Give the final paragraph in every case.>

<Give if multiple theories alleged.>

[The defendant has been prosecuted for first degree murder under (two/___ <insert number>) theories: (1) _____ <insert first theory, e.g., “the murder was willful, deliberate, and premeditated”> [and] (2) _____ <insert second theory, e.g., “the murder was committed by lying in wait”> [_____ <insert additional theories>].

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

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

<A. Deliberation and Premeditation>

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

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

<B. Torture>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:

1. (He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;
2. (He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;
3. The acts causing death involved a high degree of probability of death;

AND

4. The torture was a cause of death.]

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person **commits an act deliberately** if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. **A person**~~The defendant~~ **commits an act with acted with premeditation** if (he/she) decided to **inflict extreme and prolonged pain on a person** ~~kill~~ before completing the act[s] that caused death.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. (He/She) concealed (his/her) purpose from the person killed;
2. (He/She) waited and watched for an opportunity to act;

AND

3. Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully

weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is [also] any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <insert type of explosive from Health & Saf. Code, § 12000> is an *explosive*.]

[A *destructive device* is _____ <insert definition supported by evidence from Pen. Code, § 16460>.]

[_____ <insert type of destructive device from Pen. Code, § 16460> is a *destructive device*.]

<E. Weapon of Mass Destruction>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

[_____ <insert type of weapon from Pen. Code, § 11417(a)(1)> is a *weapon of mass destruction*.]

[_____ <insert type of agent from Pen. Code, § 11417(a)(2)> is a *chemical warfare agent*.]]

<F. Penetrating Ammunition>

[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]

<G. Discharge From Vehicle>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. (He/She) shot a firearm from a motor vehicle;
2. (He/She) intentionally shot at a person who was outside the vehicle;

AND

3. (He/She) intended to kill that person.

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 *motor vehicle* includes (a/an) (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/ _____ <insert other type of motor vehicle>).]

<H. Poison>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.

[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]]

[_____ <insert name of substance> is a *poison*.]

[The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.]

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 and the murder is second degree murder.

New January 2006; Revised August 2006, June 2007, April 2010, October 2010, February 2012, February 2013, February 2015, August 2015, September 2017, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final paragraph in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with “The defendant has been prosecuted for first degree murder under.” If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

~~When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of “deliberate” and “premeditated” if those terms have not already been defined for the jury.~~

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, “_____ is a weapon of mass destruction” or “is a chemical warfare agent,” only if the device used is listed in the code section noted in the instruction. For example, “Sarin is a chemical warfare agent.” However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, “the defendant used a chemical warfare agent, sarin,” or “the material used by the defendant, sarin, was a chemical warfare agent.” (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

Do **not** modify this instruction to include the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 [73 Cal.Rptr. 550, 447 P.2d 942]. Although those factors may assist in appellate review of the sufficiency of the evidence to support findings of premeditation and deliberation, they neither define the

elements of first degree murder nor guide a jury's determination of the degree of the offense. (*People v. Moon* (2005) 37 Cal.4th 1, 31 [32 Cal.Rptr.3d 894, 117 P.3d 591]; *People v. Steele* (2002) 27 Cal.4th 1230, 1254 [120 Cal.Rptr.2d 432, 47 P.3d 225]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 [245 Cal.Rptr. 185, 750 P.2d 1342].)

AUTHORITY

- Types of Statutory First Degree Murder. ▶ Pen. Code, § 189.
- Armor Piercing Ammunition Defined. ▶ Pen. Code, § 16660.
- Destructive Device Defined. ▶ Pen. Code, § 16460.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death. ▶ *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22, 139 P.3d 492].
- Mental State Required for Implied Malice. ▶ *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- Explosive Defined. ▶ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined. ▶ Pen. Code, § 11417.
- Discharge From Vehicle. ▶ *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements. ▶ *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 582-585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined. ▶ *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined. ▶ *People v. Pearson* (2013) 56 Cal.4th 393, 443–444 [154 Cal.Rptr.3d 541, 297 P.3d 793]; *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements. ▶ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679];

People v. Wiley (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

LESSER INCLUDED OFFENSES

- Murder. ▶ Pen. Code, § 187.
- Voluntary Manslaughter. ▶ Pen. Code, § 192(a).
- Involuntary Manslaughter. ▶ Pen. Code, § 192(b).
- Attempted First Degree Murder. ▶ Pen. Code, §§ 663, 189.
- Attempted Murder. ▶ Pen. Code, §§ 663, 187.
- Elements of Special Circumstances Not Considered in Lesser Included Offense Analysis. ▶ *People v. Boswell* (2016) 4 Cal.App.5th 55, 59-60 [208 Cal.Rptr.3d 244].

RELATED ISSUES

Premeditation and Deliberation—Heat of Passion Provocation

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 *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree 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].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim’s death. “The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation].” (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

Torture—Instruction on Voluntary Intoxication

“[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering.” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242 [278 Cal.Rptr. 640, 805 P.2d 899]; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899].)

Torture—Premeditated Intent to Inflict Pain

Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation

In *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481], the court approved this instruction regarding the length of time a person lies in wait: “[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.”

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, § 117.

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

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

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

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

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

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

AND

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

BUT

- 3. At least one of those beliefs was unreasonable.**

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

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

<The following definition may be given if requested>

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

See discussion of imperfect self-defense in Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

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

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

Related Instructions

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

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

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

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

AUTHORITY

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

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Intimate Partner Battered Women's Syndrome and Its Effects

Evidence relating to ~~battered women's syndrome~~intimate partner battering (formerly “battered women’s syndrome”) and its effects may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]; see also *In re Walker* (2007) 147 Cal.App.4th 533, 536, fn.1 [54 Cal.Rptr.3d 411].)

Blakeley Not Retroactive

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

Inapplicable to Felony Murder

Imperfect self-defense does not apply to felony murder. “Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant.” (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753]; see also

People v. Anderson (1991) 233 Cal.App.3d 1646, 1666 [285 Cal.Rptr. 523];
People v. Loustana (1986) 181 Cal.App.3d 163, 170 [226 Cal.Rptr. 216].)

Fetus

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

See also the Related Issues section to CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

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

Reasonable Person Standard and Physical Limitations

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

SECONDARY SOURCES

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

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

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

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

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 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)/*inherently dangerous assaultive (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)/*inherently dangerous assaultive (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.

BENCH NOTES

Instructional Duty

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

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

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

The court has a **sua sponte** duty to instruct on involuntary manslaughter based on the commission of an inherently dangerous assaultive felony and to instruct on the elements of the predicate offense(s). (*People v. Brothers* (2015) 236 Cal.App.4th 24, 33–34 [186 Cal.Rptr.3d 98]; see also *People v. Bryant* (2013) 56 Cal.4th 959, 964 [157 Cal.Rptr.3d 522, 301 P.3d 1136].)

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 **su a 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.

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

AUTHORITY

- 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].

- Inherently Dangerous Assaultive Felonies ▶ -*People v. Bryant* (2013) 56 Cal.4th 959, 964 [157 Cal.Rptr.3d 522, 301 P.3d 1136]; *People v. Brothers* (2015) 236 Cal.App.4th 24, 33-34 [186 Cal.Rptr.3d 98].

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*.

SECONDARY SOURCES

4 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 246–260.

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).

850. Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness

You have heard testimony from _____ <insert name of expert>
regarding the effect of (battered women’s syndrome/intimate partner
battering/ _____ <insert other description used by expert for syndrome>).

**(Battered women’s syndrome/Intimate partner battering and its
effects/ _____ <insert other description used by expert for syndrome>)
relate to a pattern of behavior which may be present in domestic abuse cases.
Testimony as to (battered women’s syndrome/the effects of intimate partner
battering/ _____ <insert other description used by expert for
syndrome>) is offered only to explain certain behavior of an alleged victim of
domestic abuse.**

_____’s <insert name of expert> testimony about (battered women’s
syndrome/intimate partner battering/ _____ <insert other description
used by expert for syndrome>) is not evidence that the defendant committed
any of the crimes charged against (him/her) [or any conduct or crime[s] with
which (he/she) was not charged].

You may consider this evidence only in deciding whether or not _____’s
<insert name of alleged victim of abuse> conduct was **not inconsistent** with the
conduct of someone who has been abused, and in evaluating the believability
of (his/her) testimony.

New January 2006; Revised March 2017, April 2020, September 2022

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give a similar limiting instruction (see CALCRIM No. 1193, *Testimony on Child Sexual Abuse Accommodation Syndrome*) when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 92 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6

Cal.App.4th 947, 958–959 [9 Cal.Rptr.2d 431], which did find a sua sponte duty to give CALCRIM No. 1193.

In *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574], the Supreme Court held that testimony from an expert in battered women’s syndrome could be admitted under Evidence Code section 801 even though there was no evidence of prior incidents of violence between the defendant and the alleged victim. The court held that the expert could testify generally about the “cycle of violence” and the frequency of recantation by victims of domestic abuse, without testifying specifically about “battered women’s syndrome”. (*Ibid.*) It is unclear if the court is required to give a cautionary admonition sua sponte when such evidence is admitted.

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness Testimony*.

See also CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

AUTHORITY

- Instructional Requirements ▶ See Evid. Code, § 1107(a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Abuse Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6203.
- Domestic Violence Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6211.
- Relevant After Single Incident of Abuse ▶ See *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129 [93 Cal.Rptr.2d 356].
- Relevant to Rehabilitate Victim’s Credibility ▶ *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594–595 [92 Cal.Rptr.2d 890] [victim recanted incident and reunited with abuser]; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215–1217 [68 Cal.Rptr.2d 772] [victim recanted].
- This Instruction Upheld ▶ *People v. Sexton* (2019) 37 Cal.App.5th 457, 465–468 [250 Cal.Rptr.3d 496].

RELATED ISSUES

Assumptions Underlying Expert Testimony

It is unnecessary, and potentially misleading, to instruct that the expert testimony assumes that physical or mental abuse has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660] [in context of child sexual abuse accommodation syndrome].)

Definition and Preferred Name

In 2004, the Legislature amended Evidence Code section 1107(d), changing all references from “battered women’s syndrome” to “intimate partner battering and its effects.” Previous decisional law continues to apply. (Evid. Code, § 1107(f).) Battered women’s syndrome has been defined as “a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1083–1084 [56 Cal.Rptr.2d 142, 921 P.2d 1].) The Supreme Court had previously noted that experts prefer to call the syndrome “expert testimony on battered women’s experiences.” (See *People v. Humphrey, supra*, 13 Cal.4th at pp. 1083–1084, fn. 3.)

No Testimony on Actual State of Mind

While evidence is admissible “to explain how [a] defendant’s asserted subjective perception of a need to defend herself ‘would reasonably follow from the defendant’s experience as a battered woman,’ ” an expert may not give an opinion “that the defendant *actually perceived* that she was in danger and needed to defend herself.” (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1400, 1401 [67 Cal.Rptr.2d 740] [§ 1107(a) codifies existing rules regarding battered women’s syndrome testimony; original italics].) Section 1107 “does not create an exception to Penal Code section 29,” which prohibits an expert who is testifying about a mental defect from testifying about whether a defendant had a required mental state. (*People v. Erickson, supra*, 57 Cal.App.4th at pp. 1401–1402 [syndrome was characterized as mental defect].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 49–52.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][C] (Matthew Bender).

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

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

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

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

<instruct with elements 3 and 4 for assault>
 3. When the defendant did the act, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;
 4. When the defendant did the act, (he/she) had the present ability to apply force to a person(;/.)]
 - (3/5). When the defendant (did the act/touched _____ <insert name of alleged victim> in a harmful or offense manner), the defendant was performing or purporting to perform (his/her) duties as a *public officer*;
- [AND]
- (4/6). When the defendant (did the act/touched _____ <insert name of alleged victim>), (he/she) was not acting out of *lawful necessity*.
- [AND]
- [(5/7). When the defendant (did the act/touched _____ <insert name of alleged victim>), (he/she) was not defending (himself/herself).]

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

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

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

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

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

[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.]

Lawful necessity means the amount of force that was necessary under the circumstances.

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

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

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

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

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

OR

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

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

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

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

AND

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

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

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

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

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

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

New September 2022

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

- Elements ▶ Pen. Code, § 149.
- Violation of Statute Does Not Include Detention Without Lawful Authority ▶ *People v. Lewelling* (2017) 16 Cal.App.5th 276, 298 [224 Cal.Rptr.3d 255].
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Public Officer ▶ See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff’s or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] [“public officers” is broader category than “peace officers”]; *In re*

Eddie D. (1991) 235 Cal.App.3d 417, 421–422 [286 Cal.Rptr. 684]; *In re M.M.* (2012) 54 Cal.4th 530, 536–539 [142 Cal.Rptr.3d 869, 278 P.3d 1221]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].

- Public Officer Includes De Facto Officer ▶ *People v. Cradlebraugh* (1914) 24 Cal.App. 489, 491–492.
- Peace Officer Defined ▶ Pen. Code, § 830 et seq.
- Without Lawful Necessity ▶ *People v. Dukes* (1928) 90 Cal.App. 657, 661–662; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140 & fn.20 [142 Cal.Rptr.3d 423]; *People v. Lewelling* (2017) 16 Cal.App.5th 276, 298–299 [224 Cal.Rptr.3d 255]; *People v. Perry* (2019) 36 Cal.App.5th 444 [248 Cal.Rptr.3d 522].
- Color of Authority ▶ *People v. Plesinarski* (1971) 22 Cal.App.3d 108, 114 [99 Cal.Rptr. 196].

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer’s actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham* but those factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer’s use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

RELATED ISSUES

Sexual Battery

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

1021. Oral Copulation by Fraud (Pen. Code, § 287(a), (j))

The defendant is charged [in Count __] with oral copulation by fraud [in violation of Penal Code section 287(j)].

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

1. The defendant committed an act of oral copulation with someone else;
2. The other person submitted to the oral copulation because (he/she) believed the defendant was someone (he/she) knew, other than the defendant;

AND

3. The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity.

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

New January 2006; Revised February 2015, September 2022

BENCH NOTES

Instructional Duty

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

~~Former Penal Code section 288a(a) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

AUTHORITY

- Elements. ▶ Pen. Code, § 287(a), (j).

- Oral Copulation Defined. ▶ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. ▶ Pen. Code, §§ 663, 287.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crime Against Decency, § 38.

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

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

1036. Sodomy by Fraud (Pen. Code, § 286(j))

The defendant is charged [in Count __] with sodomy by fraud [in violation of Penal Code section 286(j)].

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

1. The defendant committed an act of sodomy with someone else;
2. The other person submitted to the sodomy because (he/she) believed the defendant was someone (he/she) knew, other than the defendant;

AND

3. The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that he was someone (he/she) knew, while intending to hide his own identity.

Sodomy is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]

New January 2006; Revised February 2015, September 2022

BENCH NOTES

Instructional Duty

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

~~Penal Code section 286(j) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▶ Pen. Code, § 286(j).

- Sodomy Defined. ▶ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].

LESSER INCLUDED OFFENSES

- Attempted Sodomy by Fraud. ▶ Pen. Code, §§ 664, 286(j).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 30.

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

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

1051. Sexual Penetration by Fraud (Pen. Code, § 289(f))

The defendant is charged [in Count __] with sexual penetration by fraud [in violation of Penal Code section 289(f)].

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

1. The defendant committed an act of sexual penetration with another person;
2. At the time of the act, the defendant and the other person were not married to each other;
3. The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);
4. The other person submitted to the act because (he/she) believed the person (committing the act/ causing the act to be committed) was someone (he/she) knew, other than the defendant;

AND

5. The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity.

Sexual penetration means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

New January 2006; Revised February 2015, April 2020, September 2022

BENCH NOTES

Instructional Duty

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

~~Penal Code section 289(f) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▶ Pen. Code, § 289(f).
- Specific Intent Crime. ▶ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Foreign Object, Substance, Instrument, or Device Defined. ▶ Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a “foreign object”].
- Sexual Penetration Defined. ▶ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. ▶ Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Attempted Sexual Penetration by Fraud. ▶ Pen. Code, §§ 664, 289(f).
- Battery. ▶ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 58.

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

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

1060. Lewd or Lascivious Act: Dependent Person (Pen. Code, § 288(b)(2) & (c)(2))

The defendant is charged [in Count __] with a lewd or lascivious act on a dependent person [by force or fear] [in violation of Penal Code section 288].

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

1. The defendant was a caretaker of a dependent person;
2. The defendant, ~~while serving as a caretaker,~~ willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on ~~that a~~ person;

[AND]

3. The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent person(;/.)

<Give element 4 when instructing on force or violence>

[AND]

4. In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent person or someone else.]

A lewd or lascivious act is any touching of a person with the intent to sexually arouse the perpetrator or the other person. A lewd or lascivious act includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]

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

A caretaker is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including (a/an) _____ <insert specific facility from Pen. Code, § 288(f)(1)>, that provides care for dependent persons or for those aged 65 or older.

A dependent person is someone who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have been significantly diminished by age.

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

[The *force* used must be substantially different from or substantially greater than the force needed to accomplish the lewd and lascivious act itself.]

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

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

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

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

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

New January 2006; Revised February 2013, September 2017, March 2022, September 2022

BENCH NOTES

Instructional Duty

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

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

If the defendant is charged with using force or fear in committing the lewd act on a dependent person, give bracketed element 4 and the bracketed sentence that begins with “The force must be substantially different.” (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [court has **sua sponte** duty to define “force” as used in Pen. Code, § 288(b)(1)]; *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) On request, give any of the relevant bracketed definitions of duress, menace, or fear.

In the paragraph defining “caretaker,” insert applicable caretaker facilities listed in Penal Code section 288(f)(1), such as a 24-hour health facility, a home health agency, or a community care or respite care facility, depending on the facts of the case.

Penal Code section 288(b)(2) or (c)(2) does not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person. (Pen. Code, § 288(h).)

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

Defenses—Instructional Duty

Give the bracketed paragraph that begins with “It is not a defense that” on request, if there is evidence that the dependent adult consented to the act. (*People v. Montoya* (2021) 68 Cal.App.5th 980, 999 [284 Cal.Rptr.3d 18] [“nothing in the language of section 288, subdivisions (a) and (c)(2) indicates that lack of consent is an element of lewd conduct by a caretaker upon a dependent person.”].) ~~In the context of lewd acts accomplished by force on a minor, there is disagreement as to whether knowing consent by the minor is an affirmative defense. (See *People v.*~~

~~*Cicero* (1984) 157 Cal.App.3d 465, 484–485 [204 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero, supra*, 157 Cal.App.3d at pp. 487–488, dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dieta].) If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, *Rape by Force, Fear, or Threats*.)~~

AUTHORITY

- Elements. ▶ Pen. Code, § 288(b)(2) & (c)(2).
- Caretaker Defined. ▶ Pen. Code, § 288(f)(1) & (g).
- Dependent Person Defined. ▶ Pen. Code, § 288(f)(3).
- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Elder Defined. ▶ See Pen. Code, § 368(g).
- Menace Defined. ▶ See Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. ▶ See *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching With Intent to Arouse. ▶ See *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Dependent Person Touching Own Body Parts at Defendant’s Instigation. ▶ See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] [“constructive” touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. ▶ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].

- Lewd Defined. ▶ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Defendant Need Not Be Victim’s Caretaker. ▶ *People v. Montoya* (2021) 68 Cal.App.5th 980, 1001 [284 Cal.Rptr.3d 18].

COMMENTARY

The instruction includes definitions of “force” and “fear” because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The Court of Appeal has held that the definition of “force” as used in Penal Code section 288(b), subsection (1) (lewd acts by force with a minor) is different from the meaning of “force” as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582] disapproved on other grounds by *People v. Soto*, (2011) 51 Cal.4th 229, 241–244 [119 Cal.Rptr.3d 775, 245 P.3d 410].) In other sex offense statutes, such as Penal Code section 261 defining rape, “force” does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, “force” means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of “force.” (*People v. Pitmon, supra*, 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra*, 33 Cal.4th at pp. 1026–1028.) It would seem that this definition of “force” would also apply to the crime of lewd acts with a dependant person, under Penal Code section 288(b), subsection (2).

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 288 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress].) Optional definitions are provided for the court to use at its discretion. The definition of “duress” is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of “menace” is based on the statutory definition contained in Penal Code section 261 (rape). (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in

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

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Dependent Person. ▶ Pen. Code, §§ 664, 288(c)(2).
- Attempted Lewd Act by Force With Dependent Person. ▶ Pen. Code, §§ 664, 288(b)(2).
- Simple Battery Not Lesser Included Offense of Lewd Act on Dependent Person Under the Statutory Elements Test.- ▶ *People v. Chenelle* (2016) 4 Cal.App.5th 1255, 1263-1264 [209 Cal.Rptr.3d 371].

RELATED ISSUES

Developmental Disability

If the dependent person has a developmental disability, arguably there is no sua sponte duty to define “developmental disability” under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase in other code sections to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (See *People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation of disabled person].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 41, 47–55, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18, 12:19 (The Rutter Group).

1141. Distributing Obscene Matter Showing Sexual Conduct by a Minor (Pen. Code, §§ 311.1(a), 311.2(b))

The defendant is charged [in Count __] with distributing obscene matter that shows a minor engaging in sexual conduct [in violation of _____ <insert appropriate code section[s]>].

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

<Alternative 1A—sent or brought>

[1. The defendant (sent/ [or] brought) obscene matter into California [or caused obscene matter to be (sent/ [or] brought) into California];]

<Alternative 1B—possessed>

[1. The defendant (possessed[,]/ [or] prepared[,]/ [or] published[,]/ [or] produced[,]/ [or] developed[,]/ [or] duplicated[,]/ [or] printed) obscene matter;]

<Alternative 1C—offered to distribute>

[1. The defendant offered to distribute obscene matter to someone else;]

<Alternative 1D—distributed>

[1. The defendant (distributed/ [or] showed/ [or] exchanged) obscene matter (to/with) someone else;]

2. When the defendant acted, (he/she) knew the character of the matter;

[AND]

3. When the defendant acted, (he/she) knew that the matter showed a person under the age of 18 years who was personally participating in or simulating sexual conduct(;/.)

<Give element 4 when instructing with alternative 1A, 1B or 1C; see Bench Notes>

[AND]

4. When the defendant acted, (he/she) intended to (sell or distribute/distribute, show, or exchange/distribute) the matter to someone else [for money or other commercial benefit].]

You must decide whether the matter at issue in this case meets the definition of obscene matter. Matter is *obscene* if, when considered as a whole:

1. It shows or describes sexual conduct in an obviously offensive way;
2. A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value;

AND

3. An average adult person, applying contemporary statewide standards, would conclude it appeals to a prurient interest.

A prurient interest is a shameful or morbid interest in nudity, sex, or excretion.

Matter means any representation of information, data, or image, including any (film/filmstrip/photograph/negative/slide/photocopy/videotape/video laser disc/computer hardware or software/computer floppy disk/data storage medium/CD-ROM/computer-generated equipment/ [or] computer-generated image that contains any film or filmstrip).

Applying contemporary statewide standards means using present-day standards and determining the effect of the matter on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women; religious and nonreligious people; and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The *contemporary statewide standard* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community ought to accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you must make an objective determination of what would offend the statewide community as a whole.

[You may consider evidence of local community standards in deciding what the contemporary statewide standard is. However, you may not use the

standard of a local community, by itself, to establish the contemporary statewide standard.]

The material is not obscene unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value. When deciding whether the material is obscene, do not weigh its value against its prurient appeal.

[Matter is not considered obscene under the law if (all persons under the age of 18 depicted in the matter are legally emancipated/ [or] it only shows lawful conduct between spouses).]

[The depiction of nudity, by itself, does not make matter obscene. In order for matter containing nudity to be obscene, it must depict sexual activity and it must meet the requirements for obscenity listed above.]

[The depiction of sexual activity, by itself, does not make matter obscene. In order for matter depicting sexual activity to be obscene, it must meet the requirements for obscenity listed above.]

Sexual conduct means actual or simulated (sexual intercourse/ [or] oral copulation[,]/ [or] anal intercourse[,]/ [or] anal oral copulation[,]/ [or] _____ <insert other sexual conduct as defined in Pen. Code, § 311.4(d)(1)>). An act is simulated when it gives the appearance of being sexual conduct.

The People must prove that the defendant knew the obscene nature of the matter but do not need to prove that the defendant knew whether the matter met the definition of obscene.

[*To distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

[Commerical benefit means receipt of, or intent to receive, financial value or compensation.]

[A person accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

[In deciding the matter's nature and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ presentation[,]/ sale[,]/ dissemination[,]/ distribution[,]/

publicity) indicate that the matter was being commercially exploited because of its prurient appeal. You must decide the weight, if any, to give this evidence.]

[In deciding whether the matter lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the matter showed persons under the age of 16 years engaging in sexual conduct. You must decide the weight, if any, to give this evidence.]

[In deciding whether, applying contemporary statewide standards, the matter appeals to a prurient interest, you may consider whether similar matter is openly shown in the community. You must decide the weight, if any, to give this evidence.]

[If it appears from the nature of the matter or the circumstances of its distribution or showing that it is designed for clearly defined deviant sexual groups, the appeal of the matter must be judged based on its intended audience.]

[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/other people).]

[A person who possesses obscene matter for his or her own personal use is not guilty of this crime.]

<Defense: Legitimate scientific or educational purpose>

[The defendant is not guilty of this crime if (he/she) was engaging in legitimate medical, scientific, or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate medical, scientific, or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Law enforcement agent>

[The defendant is not guilty of this offense if (he/she) was a member [or agent] of a law enforcement or prosecuting agency and was involved in the investigation or prosecution of criminal offenses. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting as a member [or agent] of a law enforcement or prosecuting agency. If the People

have not met this burden, you must find the defendant not guilty of this crime.

[A person is an *agent* of a law enforcement or prosecuting agency if he or she does something at the request, suggestion, or direction of a law enforcement or prosecuting agency.]

New January 2006; Revised September 2022

BENCH NOTES

Instructional Duty

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

In element 1, give one of the alternatives A–D depending on the charges and evidence in the case. Give element 4 when instructing with alternative 1A, 1B, or 1C. (*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [143 Cal.Rptr. 604]; *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [67 Cal.Rptr. 28]; *In re Klor* (1966) 64 Cal.2d 816, 819 [51 Cal.Rptr. 903, 415 P.2d 791].) When giving alternative 1A, select “sell or distribute” in element 4. When giving alternative 1B, select “distribute, show, or exchange” in element 4. When giving alternative 1C, select “distribute.” Do not give element 4 with alternative 1D. No published case has held that distributing or showing obscene material requires specific intent. Give the bracketed phrase “for money or other commercial benefit” in element 4 if the defendant is charged under Penal Code section 311.2(b).

Give any of the other bracketed paragraphs on request.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, §§ 311.2(e); 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] [“legitimate” does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

If there is sufficient evidence that the defendant was acting as a law enforcement agent, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 311.2(e).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].)

AUTHORITY

- Elements. ▶ Pen. Code, §§ 311.1(a), 311.2(b).
- Specific Intent to Distribute or Exhibit. ▶ *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [143 Cal.Rptr. 604] [possession with intent to distribute or exhibit]; see *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [67 Cal.Rptr. 28] [preparation or publication with specific intent to distribute]; *In re Klor* (1966) 64 Cal.2d 816, 819 [51 Cal.Rptr. 903, 415 P.2d 791].
- Obscene Matter Defined. ▶ Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81 [127 Cal.Rptr. 317, 545 P.2d 229]; *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [107 S.Ct. 1918, 95 L.Ed.2d 439].
- Contemporary Community Standards. ▶ See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Prurient Interest Defined. ▶ *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [127 Cal.Rptr. 317, 545 P.2d 229].
- Sexual Conduct Defined. ▶ Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- Person Defined. ▶ Pen. Code, § 311(c).
- Distribute Defined. ▶ Pen. Code, § 311(d).
- Knowingly Defined. ▶ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Exhibit Defined. ▶ Pen. Code, § 311(f).
- Matter Designed for Deviant Sexual Group. ▶ Pen. Code, § 311(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15 [143 Cal.Rptr. 604].
- Commercial Exploitation Is Probative of Matter’s Nature. ▶ Pen. Code, § 311(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].

- Knowledge That Matter Depicts Child Under 16 Is Probative of Matter’s Nature. ▶ Pen. Code, § 311(a)(3).
- Similar Matter Shown in Community. ▶ *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Exceptions to Statutory Prohibitions. ▶ Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); Pen. Code, § 311.8.
- Agent Defined. ▶ See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527] [in context of entrapment].
- Taken or Considered as a Whole. ▶ *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Obscenity Contrasted With Sex. ▶ *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Obscenity Contrasted With Nudity. ▶ *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Possessing For Personal Use Not a Crime. ▶ *Stanley v. Georgia* (1969) 394 U.S. 557, 568 [89 S.Ct. 1243, 22 L.Ed.2d 542].
- Constructive vs. Actual Possession. ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Commercial Benefit Defined. ▶ *People v. Wimer* (2022) 74 Cal.App.5th 113, 129 [289 Cal.Rptr.3d 164].

LESSER INCLUDED OFFENSES

- Attempted Distribution of Obscene Matter. ▶ Pen. Code, §§ 664, 311.1(a).
- Attempted Distribution of Obscene Matter for Commercial Consideration. ▶ Pen. Code, §§ 664, 311.2(b).

RELATED ISSUES

Advertising Obscene Matter Involving Minors

It is a felony to advertise for sale or distribution any obscene matter knowing that it depicts a minor engaged in sexual conduct. (Pen. Code, § 311.10.)

Employing or Using Minor to Pose in Film

It is a felony to employ, use, or persuade a minor to engage in or assist others in posing or modeling for the purpose of preparing a commercial or noncommercial film or other medium involving sexual conduct by a minor. (See Pen. Code, § 311.4(b), (c).)

Producing child pornography and posting it on the Internet to induce others to trade such pornography without making a monetary profit satisfies the “commercial purposes” requirement of Penal Code section 311.4(b). (*People v. Cochran* (2002) 28 Cal.4th 396, 406–407 [121 Cal.Rptr.2d 595, 48 P.3d 1148].)

Excluded Conduct

Neither section 311.1 nor 311.2 applies to law enforcement and prosecuting agencies investigating or prosecuting criminal offenses, to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses. (Pen. Code, §§ 311.1(b), 311.2(e); see Pen. Code, § 311.8(a) [“defense” that act committed in aid of legitimate scientific or educational purpose].) Nor do these sections apply to depictions of a minor who is legally emancipated. (Pen. Code, §§ 311.1(c), 311.2(f); see Fam. Code, § 7000 et seq. [emancipation of minors].)

Telephone Services

A telephone corporation (see Pub. Util. Code, § 234) does not violate section 311.1 or 311.2 by carrying or transmitting messages described in these sections, or by performing related activities in providing telephone services. (Pen. Code, §§ 311.1(d), 311.2(g).)

Expert Testimony Not Required

Neither the prosecution nor the defense is required to introduce expert witness testimony regarding the obscene nature of the matter. (Pen. Code, § 312.1 [abrogating *In re Giannini* (1968) 69 Cal.2d 563, 574 [72 Cal.Rptr. 655, 446 P.2d 535]].)

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 94–106, 131.

7 Witkin, *Summary of California Law* (11th ed. 2017) Constitutional Law, §§ 486-492.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.12 (Matthew Bender).

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

1181. Sexual Abuse of Animal (Pen. Code, §§ 286.5, ~~597f~~)

The defendant is charged [in Count __] with sexual abuse of an animal [in violation of Penal Code section 286.5].

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

1. The defendant **had** ~~sexually~~ **contact with** ~~assaulted~~ an animal;

AND

~~1.2.~~ **2.** The defendant did so with the intent of **sexual arousal or gratification, abuse, or financial gain** ~~arousing or gratifying (his/her) own sexual desire;~~

AND

2. ~~The animal was (abandoned or neglected/~~ _____ ~~<insert other description of “animal protected by Pen. Code, § 597f”>).~~

Sexual contact means any act between a person and an animal involving contact between the sex organs or anus of one and the mouth, sex organs, or anus of the other, or, without a bona fide veterinary or animal husbandry purpose, the insertion, however slight, of any part of the body of a person or any object into the vaginal or anal opening of an animal, or the insertion of any part of the body of an animal into the vaginal or anal opening of a person.

[Animal means any nonhuman creature, whether alive or dead.]

<Defense: Veterinarian>

[The defendant is not guilty of this offense if (he/she) was a licensed veterinarian who performed a lawful and accepted practice related to veterinary medicine. The People have the burden of proving beyond a reasonable doubt that the defendant was not a veterinarian who performed a lawful and accepted practice. If the People have not met this burden, you must find the defendant not guilty of this offense.]

<Defense: Veterinary Technician>

[The defendant is not guilty of this offense if (he/she) was a certified veterinary technician who, under the guidance of a licensed veterinarian, performed a lawful and accepted practice related to veterinary medicine. The

People have the burden of proving beyond a reasonable doubt that the defendant was not a veterinary technician who performed a lawful and accepted practice under the guidance of a licensed veterinarian. If the People have not met this burden, you must find the defendant not guilty of this offense.]

<Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) performed any artificial insemination of animals for reproductive purposes, any accepted animal husbandry practices such as raising, breeding, or assisting with the birthing process of animals or any other practice that provides care for an animal, or to any generally accepted practices related to the judging of breed conformation. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to perform the act. If the People have not met this burden, you must find the defendant not guilty of this offense.]

New January 2006; Revised September 2022

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 that the defendant was a licensed veterinarian, a certified veterinary technician, or was otherwise authorized to perform the act, give the relevant bracketed *Defense* paragraph.

~~Penal Code section 286.5 only applies to an “animal protected by Section 597f.” Penal Code section 597f broadly establishes the authority of public officers to take possession of and care for abandoned and neglected animals. Thus, the committee has included element 3.~~

AUTHORITY

- Elements. ▶ Pen. Code, §§ 286.5; ~~597f.~~
- Sexual Contact Defined. ▶ Pen. Code, § 286.5(c)(2).
- Animal Defined. ▶ Pen. Code, § 286.5(c)(1).
- Exceptions. ▶ Pen. Code, § 286.5(b).

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 27.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.12[1] (Matthew Bender).

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

1192. Testimony on Rape Trauma Syndrome

You have heard testimony from _____ <insert name of expert> regarding rape trauma syndrome.

Rape trauma syndrome relates to a pattern of behavior which may be present in rape cases. Testimony as to the trauma syndrome is offered only to explain certain behavior of an alleged victim of rape.

_____’s <insert name of expert> testimony about rape trauma syndrome is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].

You may consider this evidence only in deciding whether or not _____’s <insert name of alleged rape victim> conduct was ~~not in~~consistent with the conduct of someone who has been raped, and in evaluating the believability of **the alleged victim**~~her testimony~~.

New January 2006; Revised April 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on rape trauma syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [8 Cal.Rptr.2d 431] [**sua sponte** duty in context of child sexual abuse accommodation syndrome (CSAAS)]; *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 2019) Sua Sponte Instructions, § 2.163; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] [instruction on CSAAS only required on request].)

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness Testimony*.

AUTHORITY

- Rebut Inference That Victim’s Conduct Inconsistent With Claim of Rape. ▶ *People v. Bledsoe* (1984) 36 Cal.3d 236, 247–248 [203 Cal.Rptr. 450, 681 P.2d 291].
- Syndrome Evidence Not Admissible to Prove Rape Occurred. ▶ *People v. Bledsoe* (1984) 36 Cal.3d 236, 251 [203 Cal.Rptr. 450, 681 P.2d 291].

COMMENTARY

It is unnecessary and potentially misleading to instruct that the expert testimony assumes that a rape has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660] [in context of child molestation].)

SECONDARY SOURCES

1 Witkin, *California Evidence* (5th ed. 2012) Opinion Evidence, § 53.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.23[3][d] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* § 12:7 (The Rutter Group).

1193. Testimony on Child Sexual Abuse Accommodation Syndrome

You have heard testimony from _____ <insert name of expert> regarding child sexual abuse accommodation syndrome.

Child sexual abuse accommodation syndrome relates to a pattern of behavior which may be present in child sexual abuse cases. Testimony as to the accommodation syndrome is offered only to explain certain behavior of an alleged victim of child sexual abuse.

_____’s <insert name of expert> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].

You may consider this evidence only in deciding whether or not _____’s <insert name of alleged victim of abuse> conduct was **not inconsistent** with the conduct of someone who has been molested, and in evaluating the believability of **the alleged victim(his/her) testimony.**

New January 2006; Revised August 2016, April 2020, March 2021, September 2022

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give this instruction when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 921 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958-959 [9 Cal.Rptr.2d 431], which did find a sua sponte duty to give this instruction.

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness*.

AUTHORITY

- Eliminate Juror Misconceptions or Rebut Attack on Victim’s Credibility. ▶ *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394 [249 Cal.Rptr. 886].
- This Instruction Upheld. ▶ *People v. Munch* (2020) 52 Cal.App.5th 464, 473–474 [266 Cal.Rptr.3d 136]; *People v. Gonzales* (2017) 16 Cal.App.5th 494, 504 [224 Cal.Rptr.3d 421].

COMMENTARY

The jurors must understand that the research on child sexual abuse accommodation syndrome assumes a molestation occurred and seeks to describe and explain children’s common reactions to the experience. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 [249 Cal.Rptr. 886].) However, it is unnecessary and potentially misleading to instruct that the expert testimony assumes that a molestation has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660].)

The prosecution must identify the myth or misconception the evidence is designed to rebut (*People v. Bowker, supra*, 203 Cal.App.3d at p. 394; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735 [256 Cal.Rptr. 446]; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449–450 [271 Cal.Rptr. 653]), or the victim’s credibility must have been placed in issue (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745 [32 Cal.Rptr.2d 345]).

RELATED ISSUES

Expert Testimony Regarding Parent’s Behavior

An expert may also testify regarding reasons why a parent may delay reporting molestation of his or her child. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300–1301 [283 Cal.Rptr. 382, 812 P.2d 563].)

SECONDARY SOURCES

1 Witkin, *California Evidence* (5th ed. 2012) Opinion Evidence, §§ 54–56.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][d] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:7 (The Rutter Group).

1300. Criminal Threat (Pen. Code, § 422)

The defendant is charged [in Count __] with having made a criminal threat [in violation of Penal Code section 422].

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

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____ <insert name of complaining witness or member[s] of complaining witness's immediate family>;
2. The defendant made the threat -(orally/in writing/by electronic communication device);
3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____ <insert name of complaining witness>];
4. **Under the circumstances, ~~T~~the threat was so clear, immediate, unconditional, and specific that it communicated to _____ <insert name of complaining witness> a serious intention and the immediate prospect that the threat would be carried out;**
5. The threat actually caused _____ <insert name of complaining witness> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

6. _____'s <insert name of complaining witness> fear was reasonable under the circumstances.

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

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

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

Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory.

[An immediate ability to carry out the threat is not required.]

[An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

New January 2006; Revised August 2006, June 2007, February 2015, February 2016, March 2018, September 2020, September 2022

BENCH NOTES

Instructional Duty

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

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

Give the bracketed definition of “electronic communication” on request. (Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining “immediate family” should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If instructing on attempted criminal threat, give the third element in the bench notes of CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].)

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

AUTHORITY

- Elements ▶ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances ▶ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threatening Hand Gestures Not Verbal Threats Under Penal Code Section 422 ▶ *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147 [218 Cal.Rptr.3d 150, 394 P.3d 1074].

- Threat Not Required to Be Unconditional On Its Face ▶ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- ~~Conditional Threat May Be True Threat, Depending on Context~~ ▶ ~~*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].~~
- Immediate Ability to Carry Out Threat Not Required ▶ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear ▶ *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024 [109 Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].
- Verbal Statement, Not Mere Conduct, Is Required ▶ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].
- Attempted Criminal Threats ▶ *People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter ▶ *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].

COMMENTARY

This instruction uses the current nomenclature “criminal threat,” as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called “terrorist threat”]. (See also Stats. 2000, ch. 1001, § 4.)

Because a threat need only be “so” unconditional, a conditional threat may nonetheless violate Penal Code section 422 if it conveys a gravity of purpose and the immediate prospect of execution. (See *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76].)

LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ▶ See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].

- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

In *In re George T.* (2004) 33 Cal.4th 620, 628–629 [16 Cal.Rptr.3d 61, 93 P.3d 1007], a minor gave two classmates a poem containing language that referenced school shootings. The court held that “the text of the poem, understood in light of the surrounding circumstances, was not ‘as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.’ ” (*Id.* at p. 638.)

Related Statutes

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4 [102 Cal.Rptr.2d 269]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539 [70 Cal.Rptr.2d 878].)

Whether Threat Actually Received

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 24–30.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142,
Crimes Against the Person, § 142.11A[1] (Matthew Bender).

1403. Limited Purpose of Evidence of Gang Activity

You may consider evidence of gang activity only for the limited purpose of deciding whether:

- [The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related (crime[s]/ [and] enhancement[s]/ [and] special circumstance allegations) charged(;/.)]

[OR]

- [The defendant had a motive to commit the crime[s] charged(;/.)]

[OR]

- [The defendant actually believed in the need to defend (himself/herself)/ [or]someone else) and acted under fear of imminent death or great bodily injury to (himself/herself/ [or]someone else)(;/.)]

[OR]

- [The defendant acted in the heat of passion(;/.)]

[OR]

- [_____ <insert other reason court admitted gang evidence>.]

[You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.]

You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that (he/she) has a disposition to commit crime.

New January 2006; Revised September 2022

BENCH NOTES

Instructional Duty

On request, the court must give a limiting instruction when evidence of gang activity has been admitted. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) There is, however, no sua sponte duty to instruct the jury on this issue.

AUTHORITY

- Instruction Must Be Given on Request ▶ *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].
- This Instruction Upheld ▶ *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1170 [91 Cal.Rptr.3d 874]; *People v. Kaihea* (2021) 70 Cal.App.5th 257, 265 [285 Cal.Rptr.3d 334].
- Defense of Others ▶ *People v. Kaihea* (2021) 70 Cal.App.5th 257, 266–267 [285 Cal.Rptr.3d 334].

SECONDARY SOURCES

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

1404–1499. Reserved for Future Use

1704. Possession of Burglary Tools (Pen. Code, § 466)

The defendant is charged [in Count __] with possessing [a]burglary tool[s], [in violation of Penal Code section 466].

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

1. The defendant possessed [a](picklock[s][,]/ [or]crow[bar][s][,]/ [or]keybit[s][,]/ [or]screwdriver[s][,]/ [or]vise grip[s][,]/ [or]pliers[,]/ [or]water-pump pliers[,]/ [or]slidehammer[s][,]/ [or]slim jim[s][,]/ [or]tension bar[s][,]/ [or]lock pick gun[s][,]/ [or]tubular lock pick[s][,]/ [or]bump key[s][,]/ [or]floor-safe door puller[s][,]/ [or]master key[s][,]/ [or]ceramic or porcelain spark plug chips or pieces/ [or] _____ <insert other instrument or tool>);
2. When the defendant possessed the (picklock[s][,]/ [or]crow[bar][s][,]/ [or]keybit[s][,]/ [or]screwdriver[s][,]/ [or]vise grip[s][,]/ [or]pliers[,]/ [or]water-pump pliers[,]/ [or]slidehammer[s][,]/ [or]slim jim[s][,]/ [or]tension bar[s][,]/ [or]lock pick gun[s][,]/ [or]tubular lock pick[s][,]/ [or]bump key[s][,]/ [or]floor-safe door puller[s][,]/ [or]master key[s][,]/ [or]ceramic or porcelain spark plug chips or pieces/ [or] _____ <insert other instrument or tool>), (he/she) intended to use the item[s] to break or enter into a (building/railroad car/aircraft/vessel/trailer coach/vehicle);

AND

3. When the defendant possessed the (picklock[s][,]/ [or]crow[bar][s][,]/ [or]keybit[s][,]/ [or]screwdriver[s][,]/ [or]vise grip[s][,]/ [or]pliers[,]/ [or]water-pump pliers[,]/ [or]slidehammer[s][,]/ [or]slim jim[s][,]/ [or]tension bar[s][,]/ [or]lock pick gun[s][,]/ [or]tubular lock pick[s][,]/ [or]bump key[s][,]/ [or]floor-safe door puller[s][,]/ [or]master key[s][,]/ [or]ceramic or porcelain spark plug chips or pieces/ [or] _____ <insert other instrument or tool>), (he/she) intended to commit [a](theft/ [or] _____ <insert one or more felonies>) within a (building/railroad car/aircraft/vessel/trailer coach/vehicle).]

[To decide whether the defendant intended to commit _____ <insert one or more felonies>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People allege that the defendant intended to commit _____ <insert one or more felonies>. You may not find the defendant guilty unless you all agree that (he/she) intended to commit one of those crimes when (he/she) possessed the item. You do not all have to agree on which one of those crimes (he/she) intended.]

[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 *vehicle* is a device by which any person or property may be propelled, moved, or drawn upon a highway, except a device moved exclusively by human power or used exclusively upon stationary rails or tracks.]

[A *trailer coach* is a vehicle, other than a motor vehicle, designed for human habitation or human occupancy for industrial, professional, or commercial purposes, for carrying property on its own structure, and for being drawn by a motor vehicle.]

[An *aircraft* is a manned contrivance used or designed for navigation of, or flight in, the air requiring certification and registration as prescribed by federal statute or regulation.]

New September 2022

BENCH NOTES

Instructional Duty

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

Penal Code section 466 encompasses additional conduct. This instruction addresses only possession of burglary tools.

AUTHORITY

- Elements ▶ Pen. Code, § 466.
- Intent Requirement ▶ *In re H.W.* (2019) 6 Cal.5th 1068, 1076 [245 Cal.Rptr.3d 51, 436 P.3d 941].
- Statute Prohibits Constructive Possession ▶ *People v. Bay* (2019) 40 Cal.App.5th 126, 133 [253 Cal.Rptr.3d 26].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Vehicle Defined ▶ Veh. Code, § 670.
- Trailer Coach Defined ▶ Veh. Code, § 635.
- Aircraft Defined ▶ Public Utilities Code, § 21012.

COMMENTARY

Other Instrument or Tool

In addition to items expressly listed as burglary tools in Penal Code section 466, the statute also contemplates a violation based on possession of some “other instrument or tool.” In *In re H.W.* (2019) 6 Cal.5th 1068, 1076, the California Supreme Court held that even if a nonenumerated item such as pliers qualified as an “other instrument or tool,” a person may not be convicted of violating Penal Code section 466 without “a showing that the defendant intended to use the instrument or tool possessed to break or effectuate physical entry into a structure in order to commit theft or a felony within the structure.” For example, in *In re H.W.*, pliers used to remove a security tag, rather than to enter the store, were found not to be a burglary tool.

2040. Unauthorized Use of Personal Identifying Information (Pen. Code, § 530.5(a))

The defendant is charged [in Count __] with the unauthorized use of someone else's personal identifying information [in violation of Penal Code section 530.5(a)].

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

1. The defendant willfully obtained someone else's personal identifying information;
2. The defendant willfully used that information for an unlawful purpose;

AND

3. The defendant used the information without the consent of the person whose identifying information (he/she) was using.

Personal identifying information means _____ <insert relevant items from Pen. Code, § 530.55(b)> or an equivalent form of identification.

[As used here, *person* means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity, or any other legal entity.]

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

An *unlawful purpose* includes unlawfully (obtaining/[or] attempting to obtain) (credit[,]/[or] goods[,]/[or] services[,]/[or] real property[,]/ [or] medical information)/ [[or] _____ <insert other unlawful purpose>] without the consent of the other person].

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.

New January 2006; Revised August 2006, June 2007, August 2009, April 2010, August 2012, August 2013, September 2022

BENCH NOTES

Instructional Duty

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

In the definition of personal identifying information, give the relevant items based on the evidence presented.

The definition of unlawful purpose is not limited to acquiring information for financial motives, and may include any unlawful purpose for which the defendant may have acquired the personal identifying information, such as using the information to facilitate violation of a restraining order. (See, e.g., *People v. Tillotson* (2007) 157 Cal.App.4th 517, 533 [69 Cal.Rptr.3d 42].)

AUTHORITY

- Elements ▶ Pen. Code, § 530.5(a).
- Personal Identifying Information Defined ▶ Pen. Code, § 530.55(b).
- Person Defined ▶ Pen. Code, § 530.55(a).
- No Personation Requirement ▶ *People v. Barba* (2012) 211 Cal.App.4th 214, 223-224 [149 Cal.Rptr.3d 371].
- **Proof of Knowledge that Information Belonged to a Real Person Not Required ▶ *People v. Zgurski* (2021) 73 Cal.App.5th 250, 264 [288 Cal.Rptr.3d 214].**

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 210, 212.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1], [4][h] (Matthew Bender).

2131. Refusal—Enhancement (Veh. Code, §§ 23577, 23612)

If you find the defendant guilty of (causing injury while driving under the influence/ [or] [the lesser offense of] driving under the influence), you must then decide whether the People have proved the additional allegation that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug).

To prove this allegation, the People must prove that:

1. A peace officer asked the defendant to submit to a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug);
2. The peace officer fully advised the defendant of the requirement to submit to a test and the consequences of not submitting to a test;

~~AND~~

3. The defendant willfully refused to (submit to a test/ [or] to complete the test)(./;)

~~AND~~

4. The peace officer lawfully arrested the defendant and had reasonable cause to believe that defendant was driving a motor vehicle in violation of Vehicle Code section 23140, 23152, or 23153.

To have *fully advised the defendant*, the peace officer must have told (him/her) all of the following information:

1. (He/She) may choose a blood(/ or) breath[, or urine] test; [if (he/she) completes a breath test, (he/she) may also be required to submit to a blood [or urine] test to determine if (he/she) had consumed a drug;] [if only one test is available, (he/she) must complete the test available;] [if (he/she) is not able to complete the test chosen, (he/she) must submit to (the other/another) test;]

2. **(He/She) does not have the right to have an attorney present before saying whether (he/she) will submit to a test, before deciding which test to take, or during administration of a test;**
3. **If (he/she) refuses to submit to a test, the refusal may be used against (him/her) in court;**
4. **Failure to submit to or complete a test will result in a fine and mandatory imprisonment if (he/she) is convicted of driving under the influence or with a blood alcohol level of 0.08 percent or more;**

AND

5. **Failure to submit to or complete a test will result in suspension of (his/her) driving privilege for one year or revocation of (his/her) driving privilege for two or three years.**

<Short Alternative; see Bench Notes>

[(His/Her) driving privilege will be revoked for two or three years if (he/she) has previously been convicted of one or more specific offenses related to driving under the influence or if (his/her) driving privilege has previously been suspended or revoked.]

<Long Alternative; see Bench Notes>

[A. (His/Her) driving privilege will be revoked for two years if (he/she) has been convicted within the previous (seven/ten) years of a separate violation of Vehicle Code section 23140, 23152, 23153, or 23103 as specified in section 23103.5, or of Penal Code section 191.5 or 192(c)(3). (His/Her) driving privilege will also be revoked for two years if (his/her) driving privilege has been suspended or revoked under Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion within the previous (seven/ten) years;

AND

B. (His/Her) driving privilege will be revoked for three years if (he/she) has been convicted within the previous (seven/ten) years of two or more of the offenses just listed. (His/Her) driving privilege will also be revoked for three years if (his/her) driving privilege was previously suspended or revoked on two occasions, or if (he/she) has had any combination of two convictions,

suspensions, or revocations, on separate occasions, within the previous (seven/ten) years.]

[Vehicle Code section 23140 prohibits a person under the age of 21 from driving with a blood alcohol content of 0.05 percent or more. Vehicle Code section 23152 prohibits driving under the influence of alcohol or drugs or driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23153 prohibits causing injury while driving under the influence of alcohol or drugs or causing injury while driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23103 as specified in section 23103.5 prohibits reckless driving involving alcohol. Penal Code section 191.5 prohibits gross vehicular manslaughter while intoxicated, and Penal Code section 192(c)(3) prohibits vehicular manslaughter while intoxicated.]

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

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

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

[A defendant’s silence in response to an officer’s request to (submit to a chemical test/ [or] complete a chemical test) may be a refusal. If you conclude that the defendant was silent in response to an officer’s request to (submit to a chemical test/[or] complete a chemical test), you must decide whether that conduct was a refusal.]

The People have the burden of proving beyond a reasonable doubt that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug). If the People have not met this burden, you must find this allegation has not been proved.

New January 2006; Revised August 2009, March 2017, September 2022

BENCH NOTES

Instructional Duty

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

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b), (c).)

The implied consent statute states that “[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153.” (Veh. Code, § 23612(a)(1)(C).) ~~If there is a factual issue whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider whether giving bracketed element 4 is appropriate and whether the jury should be instructed on these additional issues.~~ For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

No reported case has established the degree of detail with which the jury must be instructed regarding the refusal admonition mandated by statute. The committee has provided several different options. The first sentence of element 5 under the definition of “fully advised” **must** be given. The court then may add either the short alternative or the long alternative or neither. If there is no issue regarding the two- and three-year revocations in the case and both parties agree, the court may choose to use the short alternative or to give just the first sentence of element 5. The court may choose to use the long alternative if there is an objection to the short version or the court determines that the longer version is more appropriate. The court may also choose to give the bracketed paragraph defining the Vehicle and Penal Code sections discussed in the long alternative at its discretion.

When giving the long version, give the option of “ten years” for the time period in which the prior conviction may be used, unless the court determines that the law prior to January 1, 2005 is applicable. In such case, the court must select the “seven-year” time period.

The jury must determine whether the witness 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 witness was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the witness is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the witness is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

AUTHORITY

- Enhancements ▶ Veh. Code, §§ 23577 & 23612.
- Statute Constitutional ▶ *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369 [237 Cal.Rptr. 397].
- Statutory Admonitions Not Inherently Confusing or Misleading ▶ *Blitzstein v. Dept. of Motor Vehicles* (1988) 199 Cal.App.3d 138, 142 [244 Cal.Rptr. 624].
- Silence in Response to Request May Constitute Refusal ▶ *Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4th 73, 82-84 [109 Cal.Rptr.3d 906].

RELATED ISSUES

Admonition Must Convey Strong Likelihood of Suspension

It is insufficient for the officer to advise the defendant that his or her license “could” be suspended. (*Decker v. Dept. of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906 [101 Cal.Rptr. 387, 495 P.2d 1307]; *Giomi v. Dept. of Motor Vehicles* (1971) 15 Cal.App.3d 905, 907 [93 Cal.Rptr. 613].) The officer must convey to the defendant that there is a strong likelihood that his or her license will be suspended. (*Decker, supra*, 6 Cal.3d at p. 906; *Giomi, supra*, 15 Cal.App.3d at p. 907.)

Admonition Must Be Clearly Conveyed

“[T]he burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver.” (*Thompson v. Dept. of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363 [165 Cal.Rptr. 626].) Thus, in *Thompson, supra*, 107 Cal.App.3d at p. 363, the court set aside the defendant’s license suspension because radio traffic prevented the defendant from hearing the admonition. However, where the defendant’s own “obstreperous conduct . . . prevented the officer from completing the admonition,” or where the defendant’s own intoxication prevented him or her from understanding the admonition, the defendant may be held responsible for refusing to submit to a chemical test. (*Morphew v. Dept. of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743–744 [188 Cal.Rptr. 126]; *Bush v. Bright* (1968) 264 Cal.App.2d 788, 792 [71 Cal.Rptr. 123].)

Defendant Incapable of Understanding Due to Injury or Illness

When the defendant, through no fault of his or her own, is incapable of understanding the admonition or of submitting to the test, the defendant cannot be penalized for refusing. (*Hughey v. Dept. of Motor Vehicles* (1991) 235 Cal.App.3d

752, 760 [1 Cal.Rptr.2d 115].) Thus, in *Hughey, supra*, 235 Cal.App.3d at p. 760, the court held that the defendant was rendered incapable of refusing due to a head trauma. However, in *McDonnell v. Dept. of Motor Vehicles* (1975) 45 Cal.App.3d 653, 662 [119 Cal.Rptr. 804], the court upheld the license suspension when defendant's use of alcohol triggered a hypoglycemic attack. The court held that because voluntary alcohol use aggravated the defendant's illness, the defendant could be held responsible for his subsequent refusal, even if the illness prevented the defendant from understanding the admonition. (*Ibid.*)

See the Related Issues section in CALCRIM No. 2130, *Refusal—Consciousness of Guilt*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 293–302.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[2][f], [4][a], [b] (Matthew Bender).

2132–2139. Reserved for Future Use

2500. Illegal Possession, etc., of Weapon

The defendant is charged [in Count __] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending/buying/receiving) a weapon, specifically (a/an) _____ <insert type of weapon > [in violation of Penal Code section[s] _____ <insert appropriate code section[s]>].

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

1. The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____ <insert type of weapon>;
2. The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the _____ <insert type of weapon>;

[AND]

<Alternative 3A—object capable of innocent uses>

- [3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon (;/.)]

<Alternative 3B—object designed solely for use as weapon>

- [3. The defendant knew that the object (was (a/an) _____ <insert characteristics of weapon, e.g., “unusually short shotgun, penknife containing stabbing instrument”>/could be used _____ <insert description of weapon, e.g., “as a stabbing weapon,” or “for purposes of offense or defense”>).]

<Give element 4 only if defendant is charged with offering or exposing for sale.>

[AND]

4. The defendant intended to sell it.]

[The People do not have to prove that the defendant intended to use the object as a weapon.]

<Give only if alternative 3A is given.> **[When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)[,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]**

<Give only if alternative 3B is given.>

[(A/An) _____ *<insert type of weapon>* means _____ *<insert appropriate definition>*.]

<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>

[A _____ *<insert type of weapon specified in element 3B>* is _____ *<insert defining characteristics of weapon>*.

[The People do not have to prove that the object was (concealable[,/ [or] carried by the defendant on (his/her) person[,/ [or] (displayed/visible)).]

[(A/An) _____ *<insert prohibited firearm>* does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[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/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the following weapons: _____ *<insert description of each weapon when multiple items alleged>*. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be

manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) at least one of these weapons and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received).]

<Defense: Statutory Exemptions>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/give/lend/buy/receive) (a/an) _____ *<insert type of weapon>* if _____ *<insert exception>*. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____ *<insert type of weapon>*. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised August 2006, April 2008, February 2012, February 2015, March 2017, March 2019, September 2022

BENCH NOTES

Instructional Duty

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

Penal Code section 12020 has been repealed. In its place, the legislature enacted numerous new statutes that became effective January 1, 2012. Whenever a blank in the instruction calls for inserting a type of weapon, an exception, or a definition, refer to the appropriate new Penal Code section.

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed “as a weapon.” (*People v. Fannin, supra*, 91 Cal.App.4th at p. 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object “has no conceivable innocent function” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in the Penal Code (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

For any of the weapons not defined in the Penal Code, use an appropriate definition from the case law, where available.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was “fragmented as to time . . . [or] space,” the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning “The People allege that the defendant possessed the following weapons,” inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, “The defendant did not unlawfully . . .”.

AUTHORITY

- Elements. ▶ Pen. Code, §§ 19200, 20310, 20410, 20510, 20610, 20710, 20910, 21110, 21810, ~~22010~~, 22210, 24310, 24410, 24510, 24610, 24710, 30210, 31500, 32310, 32311, 32900, 33215, 33600.
- Need Not Prove Intent to Use. ▶ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required. ▶ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Specific Intent Required for Offer to Sell. ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon. ▶ *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon. ▶ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. ▶ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable. ▶ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun. ▶ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart. ▶ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession. ▶ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Knowledge of Specific Characteristics of Weapon. ▶ *People v. King* (2006) 38 Cal.4th 617, 628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Intent to Use as a Weapon. ▶ *People v. Baugh* (2018) 20 Cal.App.5th 438, 446 [228 Cal.Rptr.3d 898].

COMMENTARY

Element 3—Knowledge

“Intent to use a weapon is not an element of the crime of weapon possession.” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].) However, interpreting now-repealed Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that “[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020.” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) Applying this holding to possession of other weapons prohibited under now-repealed Penal Code section 12020(a), the courts have concluded that the

defendant must know that the object is a weapon or may be used as a weapon, or must possess the object “as a weapon.” (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra*, 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra*, 92 Cal.App.4th at p. 547, for example, the court considered the possession of “metal knuckles,” defined in now-repealed Penal Code section 12020(c)(7) as an object “worn for purposes of offense or defense.” The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that “the instrument may be used for purposes of offense or defense.” (*Id.* at p. 547.)

Similarly, in *People v. Taylor, supra*, 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that “[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword.”

Finally, *People v. Fannin, supra*, 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a “slungshot.” The court held that “if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*.” (*Ibid.* [emphasis in original]; see also *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100] [possession of modified baseball bat].)

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M.* (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shotgun was “sawed off” but that failure to give instruction was harmless if error].)

It is not unlawful to possess a large-capacity magazine or large-capacity conversion kit. It is unlawful, however, to receive or buy these items after January 1, 2014, the effective date of Penal Code sections 32310 and 32311.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 211-212.

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

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

2670. Lawful Performance: Peace Officer

The People have the burden of proving beyond a reasonable doubt that _____ <insert name, excluding title> was lawfully performing (his/her) duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of _____ <insert name[s] of all offense[s] with lawful performance as an element>.

A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention).

<A. Unlawful Detention>

[A peace officer may legally detain someone if [the person consents to the detention or if]:

- 1. Specific facts known or apparent to the officer lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime;**

AND

- 2. A reasonable officer who knew the same facts would have the same suspicion.**

Any other detention is unlawful.

In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime.

In deciding whether the arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she arrested the person.

<Arrest without warrant for most misdemeanors or infractions>

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

<Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence; see Bench Notes>

[In order for an officer to lawfully arrest someone for (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>*) without a warrant, the officer must have probable cause to believe the person to be arrested committed (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>*). However, it is not required that the offense be committed in the officer's presence.]

_____ *<insert crime that was basis for arrest>* **is (a/an) (felony/misdemeanor/infraction).**

<Entering home without warrant>

[In order for an officer to enter a home to arrest someone without a warrant [and without consent]:

- 1. The officer must have probable cause to believe that the person to be arrested committed a crime and is in the home;**

AND

- 2. Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest. [The officer does not have to tell the arrested person these things if the officer has

probable cause to believe that the person is committing or attempting to commit a crime, is fleeing immediately after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which he or she is being arrested if he or she asks for that information.]]]

<When giving either paragraph A on unlawful detention or paragraph B on unlawful arrest, give the following paragraph also, if applicable>

[Photographing or recording a *peace officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime nor a basis for (reasonable suspicion to detain/ [nor] probable cause to arrest).]

<C. Use of Force by a Peace Officer>

[Special rules control the use of force.]

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

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

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

OR

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

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

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

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

AND

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

[*Deadly force* **means any use of is-force** that creates a substantial risk of causing death or serious bodily injury. **Deadly force** includes, but is not limited to, the discharge of a firearm. ~~It does not require that the encounter result in the death of the person against whom the force was used.~~]

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

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

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

~~[In considering the totality of the circumstances, you may consider whether:~~

- ~~• Prior to the use of force, the officer (identified/ [or] attempted to identify) himself or herself as a peace officer and (warned/ [or] attempted to warn) that deadly force may be used(;/.)~~
- ~~• Prior to the use of force, the officer had objectively reasonable grounds to believe the defendant was aware that the officer was a peace officer and that deadly force may be used(;/.)~~
- ~~• The officer was able, under the circumstances, [[to [identify] [or] [attempt to identify]] himself or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].]~~

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

<D. Use of Force by a Person Being Arrested or Detained>

[If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any

weapon to resist an officer’s use of reasonable force. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him or her.]]

If a peace officer uses unreasonable or excessive force while (arresting or attempting to arrest/ [or] detaining or attempting to detain) a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested or detained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer’s use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

New January 2006; Revised August 2016, March 2022, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] [“disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element”]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

Give section A if there is an issue as to whether the officer had a legal basis to detain someone. Give section B if there is an issue as to whether the officer had a legal basis to arrest someone. Give section C if there is an issue as to whether the officer used excessive force in arresting or detaining someone. If the issue is whether the officer used excessive force in some other duty, give section C with any necessary modifications.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the bracketed sentence in section C that begins with “If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her.” (*People v. White, supra*, 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that

bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with “However, you may not find the defendant guilty of resisting arrest.”

When giving the bracketed section under the heading “A. Unlawful Detention,” if there is a factual issue about whether the person was in fact “detained,” the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

In the section headed “B. Unlawful Arrest,” two options are provided for arrests without a warrant. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the officer made the arrest for an infraction or a misdemeanor falling under the general rule, give the bracketed paragraph under the heading “Arrest without warrant for most misdemeanors or infraction.” If the officer made the arrest for a felony or misdemeanor not requiring commission in the officer’s presence give the bracketed paragraph under the heading “Arrest without warrant for felony or misdemeanor not requiring commission in officer’s presence.” The court may also give both bracketed paragraphs, if appropriate.

Give the bracketed section about entering a home without a warrant if the arrest took place in a home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].) If there is a factual issue about whether the officer had consent to enter the home, the court must also instruct on the legal requirements for consent. (*Ibid.*)

AUTHORITY

- Instructional Duty ▶ *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Lawful Detention ▶ *People v. Celis* (2004) 33 Cal.4th 667, 674-675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].

- Lawful Arrest ▶ Pen. Code, §§ 834–836, 841.
- Probable Cause Defined ▶ *People v. Celis* (2004) 33 Cal.4th 667, 673 [16 Cal.Rptr.3d 85, 93 P.3d 1027]; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer’s Training and Experience Relevant ▶ *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention ▶ Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home ▶ *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743]; *People v. Ramey* (1976) 16 Cal.3d 263, 276 [127 Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].
- Reasonable Force ▶ Pen. Code, §§ 692, 693.
- Deadly Force Defined ▶ Pen. Code, § 835a(e).
- Excessive Use of Deadly Force ▶ Pen. Code, § 835a.
- Excessive Force Makes Arrest Unlawful ▶ *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Excessive Force Triggers Right to Self-Defense With Reasonable Force ▶ *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].
- Merely Photographing or Recording Officers Not a Crime ▶ Pen. Code, § 148(g).

RELATED ISSUES

Service of Warrant

An officer is lawfully engaged in his or her duties if he or she is correctly serving “a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].) On the other hand, “the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement.” (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. (*Ibid.*)

Lawfulness of Officer's Conduct Based on Objective Standard

The rule “requires that the officer’s lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant’s mens rea.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) The defendant’s belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. The intended scope of this new legislation is unclear. Until the legislature or courts of review provide further guidance, the court will have to determine whether section 148(g) should apply in an individual case.

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer’s actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham* but those factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer’s use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

SECONDARY SOURCES

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.01-11.06 (Matthew Bender).

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

2672. Lawful Performance: Resisting Unlawful Arrest With Force

The defendant is not guilty of the crime of (battery against a peace officer[,]/ [or] assault against a peace officer[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon) against a peace officer[,]/ [or] _____ <insert other crime charged, e.g., resisting arrest>) if the officer was not lawfully performing (his/her) duties because (he/she) was unlawfully arresting someone.

However, even if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crime of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

On the other hand, if the officer used unreasonable or excessive force, and the defendant used only reasonable force in (self-defense/ [or] defense of another), then the defendant is not guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

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

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

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

OR

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

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

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

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

AND

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

[*Deadly force* means any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm. ~~It does not require that the encounter result in the death of the person against whom the force was used.~~]

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

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

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

~~[In considering the totality of the circumstances, you may consider whether:~~

- ~~{• Prior to the use of force, the officer (identified/ [or] attempted to identify) himself or herself as a peace officer and (warned/ [or] attempted to warn) that deadly force may be used(;/.)}~~
- ~~{• Prior to the use of force, the officer had objectively reasonable grounds to believe the defendant was aware that the officer was a peace officer and that deadly force may be used(;/.)}~~

~~• The officer was able, under the circumstances, [[to identify] [or] [attempt to identify]] himself or herself as a peace officer [and] [to warn] [or] [attempt to warn] that deadly force may be used.]~~

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

The People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing (his/her) duties. If the People have not met this burden, you must find the defendant not guilty [of _____ <insert crimes>].

New January 2006; Revised March 2022, September 2022

BENCH NOTES

Instructional Duty

The court may give this instruction on request.

AUTHORITY

- No Right to Forcibly Resist Arrest ▶ Pen. Code, § 834a.
- Applies to Arrest, Not Detention ▶ *People v. Coffey* (1967) 67 Cal.2d 204, 221 [60 Cal.Rptr. 457, 430 P.2d 15]; *People v. Jones* (1970) 8 Cal.App.3d 710, 717 [87 Cal.Rptr. 625].
- Forcible Resistance to Unlawful Arrest Is Battery or Assault on Nonofficer ▶ *People v. Curtis* (1969) 70 Cal.2d 347, 355–356 [74 Cal.Rptr. 713, 450 P.2d 33]; *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].
- Use of Reasonable Force in Response to Excessive Force Is Complete Defense ▶ *People v. White* (1980) 101 Cal.App.3d 161, 168 [161 Cal.Rptr. 541].
- May Not Be Convicted of Resisting Unlawful Arrest ▶ *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541]; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 10 [108 Cal.Rptr. 338].
- Deadly Force Defined. ▶ Pen. Code, § 835a(e).

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer's actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham* but those factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer's use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

SECONDARY SOURCES

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11[2][b], 73.15[2] (Matthew Bender).

3149. Personally Used Firearm: Intentional Discharge Causing Injury or Death (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

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 and intentionally discharged a firearm during that crime causing (great bodily injury/ [or] death). [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 discharged a firearm during the commission [or attempted commission] of that crime;
2. The defendant intended to discharge the firearm;

AND

3. The defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].

[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.]

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

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, ~~natural, and probable consequence~~ natural and probable consequence of the act and the (injury/ [or] 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 the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] 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 (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime (charged against/intended by) the defendant [of which the intentional discharge of a firearm was a natural and probable consequence]. A person is subject to prosecution if he or she 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 used the firearm “during the commission of” the offense, see Bench Notes.>

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) If the defendant is charged with an enhancement for both intentional discharge *and* intentional discharge causing great bodily injury or death, the court may give CALCRIM No. 3150, *Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged*, instead of this instruction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with “An act causes . . .

.” If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with “There may be more than one cause” (*Id.* at pp. 335–338.)

The court should 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.

If the case involves an issue of whether the defendant used the firearm “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

In element 3, give the bracketed phrase “who was not an accomplice to the crime” if there is evidence that the victim was an accomplice to the intended crime of which the intentional discharge of a firearm was a natural and probable consequence. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].)

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

AUTHORITY

- Enhancement ▶ Pen. Code, §§ 667.61(e)(3), 12022.53(d).

- Firearm Defined ▶ Pen. Code, § 16520.
- “During Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Proximate Cause ▶ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].
- 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].
- Accomplice Exception Attaches to Intended Crime. ▶ *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].

RELATED ISSUES

Need Not Personally Cause Injury or Death

“[Penal Code] Section 12022.53(d) requires that the defendant ‘intentionally and *personally* discharged a firearm’ (italics added), but only that he ‘proximately caused’ the great bodily injury or death. . . . The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things.” (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 336 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [italics in original].)

Person Injured or Killed Need Not Be Victim of Crime

In *People v. Oates* (2004) 32 Cal.4th 1048, 1052 [12 Cal.Rptr.3d 325, 88 P.3d 56], the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The Court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The Court observed that “the phrase, ‘any person other than an accomplice,’ does not mean ‘the victim’ of the underlying crime.” (*Id.* at p. 1055.) Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)

Multiple Enhancements for Single Injury

The Court in *Oates* ((2004) 32 Cal.4th 1048 [12 Cal.Rptr.3d 325, 88 P.3d 56]; discussed above) also held that the trial court was required to impose all five subdivision (d) enhancements because Penal Code section 12022.53(f) requires a court to impose the longest enhancement available. (*Id.* at p. 1056.) The Court further found that Penal Code section 654 did not preclude imposition of multiple

subdivision (d) enhancements due to “the long-recognized, judicially-created exception for cases involving multiple victims of violent crime.” (*Id.* at p. 1062.) Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)

Multiple Enhancements May Not Be Imposed Based on Multiple Participants
In *People v. Cobb* (2004) 124 Cal.App.4th 1051, 1054, fn. 3 [21 Cal.Rptr.3d 869], the defendant and two others simultaneously shot at the decedent. The defendant was convicted of personally inflicting death by use of a firearm. (*Id.* at p. 1053; Pen. Code, § 12022.53(d).) In addition to the sentence for personally using a firearm, the trial court also imposed two sentences under Penal Code section 12022.53(e)(1) based on the other two participants having also fired at the decedent (*People v. Cobb, supra*, at p. 1053.) The Court of Appeal reversed the latter two enhancements, holding that Penal Code section 12022.53(f) did not permit multiple sentence enhancements based on multiple participants in one crime. (*Id.* at p. 1058.)

Self-Defense and Imperfect Self-Defense

Penal Code section 12022.53(l) provides that “[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.” In *People v. Watie* (2002) 100 Cal.App.4th 866, 884 [124 Cal.Rptr.2d 258], the court held, “[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section’s application. It does not exempt imperfect self-defense.” Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 359-360.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

3150. Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death—Both Charged (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

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 allegations that the defendant personally and intentionally discharged a firearm during (that/those) crime[s] and, if so, whether the defendant's act caused (great bodily injury/ [or] death). [You must decide whether the People have proved these allegations for each crime and return a separate finding for each crime.]

To prove that the defendant intentionally discharged a firearm, the People must prove that:

1. The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;

AND

2. The defendant intended to discharge the firearm.

If the People have proved both 1 and 2, you must then decide whether the People also have proved that the defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].

[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.]

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

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, ~~natural, and probable consequence~~ natural and probable consequence of the act and the (injury/ [or] 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 the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] 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 (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime (charged against intended by) the defendant of which the intentional discharge of a firearm was a natural and probable consequence. A person is subject to prosecution if he or she 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 used the firearm “during the commission of” the offense, see Bench Notes.>

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) This instruction may be used when the defendant is charged with an enhancement both for intentional discharge *and* for intentional discharge causing great bodily injury or death. If only one of these enhancements is charged, do not use this instruction. Instead, give CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, or CALCRIM No. 3149,

Personally Used Firearm: Intentional Discharge Causing Injury or Death, whichever is appropriate.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with “An act causes” If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with “There may be more than one cause” (*Id.* at pp. 335–338.)

The court should 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.

If the case involves an issue of whether the defendant used the weapon “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

In the paragraph following the elements, give the bracketed phrase “who was not an accomplice to the crime” if there is evidence that the victim was an accomplice to the intended crime of which the intentional discharge of a firearm was the natural and probable consequence. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].)

If, ~~in the paragraph following the elements,~~ the court gives the bracketed phrase “who 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 second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor])

with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Enhancement ▶ Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- Firearm Defined ▶ Pen. Code, § 16520.
- “During Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Proximate Cause ▶ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].
- 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].
- Accomplice Exception Attaches to Intended Crime. ▶ *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, and CALCRIM No. 3149, *Personally Used Firearm: Intentional Discharge Causing Injury or Death*.

SECONDARY SOURCES

3 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Punishment, §§ 359–360.

5 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

3151–3159. Reserved for Future Use

3406. Mistake of Fact

The defendant is not guilty of _____ <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <insert crime[s]>.

If you find that the defendant believed that _____ <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____ <insert crime[s]>.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes).

New January 2006; Revised April 2008, December 2008, August 2014, September 2018, September 2022

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it, ~~and~~ there is substantial evidence supporting the defense, and the instruction is legally correct. (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997 [125 Cal.Rptr.3d 408, 252 P.3d 968]; *People v. Speck* (2022) 74 Cal.App.5th 784, 791 [289 Cal.Rptr.3d 816] [No sua sponte duty to instruct on mistake of fact 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.~~

The mistake of fact instruction must negate an element of the crime. (*People v. Speck* (2022) 74 Cal.App.5th 784 at 791.)

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].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant’s belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing cannabis to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 287(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. ▶ Pen. Code, § 26(3).
- Burden of Proof. ▶ *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].

- This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14. ▶ *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant’s mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant’s mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant’s abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra*, 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 47.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06 (Matthew Bender).

**3456. Initial Commitment of Offender With A Mentally Health Disordered
Offender
as Condition of Parole (Pen. Code, § 2970)**

The petition alleges that _____ *<insert name of respondent>* is an offender with a mentally health ~~disordered~~ ~~offender~~.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. (He/She) was convicted of _____ *<specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)>* and received a prison sentence for a fixed period of time;
2. (He/She) had a severe mental disorder;
3. The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;
4. (He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;
5. The severe mental disorder either was not in remission, or could not be kept in remission without treatment;

AND

6. Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.

A severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

Remission means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.

[A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on _____ <insert date of hearing, if desired>], the person:

<Give one or more alternatives, as applicable>

- [1. Was physically violent except in self-defense; [or]]
- [2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]
- [3. Intentionally caused property damage; [or]]
- [4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____ <insert name of respondent> is **an offender with a mentally health** ~~disorder~~ ~~offender~~ is true or not true. -To find the allegation true or not true, all of you must agree. -You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008; Revised August 2014, September 2017, September 2020, September 2022

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 **an offender with a mentally health** ~~disorder~~ ~~offender~~.

Give this instruction for an initial commitment as a condition of parole. -For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Offender With A Mentally Health Disordered Offender*.

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

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. -One published case has said in dictum that “the option of ‘cannot be kept in remission without treatment’ requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan.” (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). -The *Buffington* case involved a sexually violent predator.

AUTHORITY

- Elements and Definitions. ▶ Pen. Code, §§ 2962, 2966(b); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. ▶ Pen. Code, § 2966(b); *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].
- Institutions That May Fulfill the 90-Day Treatment Requirement. ▶ Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only. ▶ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. ▶ Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act. ▶ *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407 [32 Cal.Rptr.3d 729].

- Evidence of Later Improvement Not Relevant. ▶ Pen. Code, § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678, 1683 [35 Cal.Rptr.2d 250].
- Board of Parole Hearings. ▶ Pen. Code, § 5075.
- This Instruction Cited As Authority With Implicit Approval. ▶ *People v. Harrison* (2013) 57 Cal.4th 1211, 1230 [164 Cal.Rptr.3d 167, 312 P.3d 88].
- Proof of Recent Overt Act Not Required. ▶ Pen. Code, § 2962(g).
- 90-Day Treatment Period Includes Extension Under Pen. Code, § 2963. ▶ *People v. Parker* (2020) 44 Cal.App.5th 286, 289 [257 Cal.Rptr.3d 493].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 763-767.

**3457. Extension of Commitment as Offender With A Mentally Health
Disordered Offender
(Pen. Code, § 2970)**

The petition alleges that _____ <insert name of respondent> is an offender with a mentally health disordered ~~offender~~.

To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Parole Hearings~~Prison Terms~~]:

1. (He/She) (has/had) a severe mental disorder;
2. The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;

AND

3. Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.

A severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

Remission means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.

[A severe mental disorder cannot be *kept in remission without treatment* if, during the period of the year prior to _____ <insert the date the trial commenced> the person:

<Give one or more alternatives, as applicable.>

- [1. Was physically violent except in self-defense; [or]]

- [2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]
- [3. Intentionally caused property damage; [or]]
- [4. Did not voluntarily follow the treatment plan.]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____ <insert name of respondent> is **an offender with a mentally health disorder**~~ed-offender~~ is true or not true. -To find the allegation true or not true, all of you must agree. -You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008; Revised September 2017, September 2020, September 2022

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 **an offender with a mentally health disorder**~~ed-offender~~.

Give this instruction for a successive commitment. -For an initial commitment as a condition of parole, give CALCRIM No. 3456, *Initial Commitment of Offender With A Mentally Health Disorder* as Condition of Parole.

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

Give the bracketed language in the sentence beginning with “To prove this allegation” and use the past tense for an on-parole recommitment pursuant to Penal Code section

2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. -One published case has said in dictum that “the option of ‘cannot be kept in remission without treatment’ requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan.”- (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). -The *Buffington* case involved a sexually violent predator.

The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists.

AUTHORITY

- Elements and Definitions ▶ Pen. Code, §§ 2966, 2970, 2972; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof ▶ Pen. Code, § 2972(a); *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].
- Treatment Must Be for Serious Mental Disorder Only ▶ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission ▶ Pen. Code, § 2962(a).
- Recommitment Must Be for the Same Disorder That Was Basis For Initial Commitment. ▶ *People v. Torfason* (2019) 38 Cal.App.5th 1062, 1067-68 [252 Cal.Rptr.3d 11]; *People v. Garcia* (2005) 127 Cal.App.4th 558, 565 [25 Cal.Rptr.3d 660].
- Proof of Recent Overt Act Not Required. ▶ Pen. Code, § 2962(g).
- Redesignation of ~~MDO~~-Qualifying Conviction to Misdemeanor Under Penal Code Section 1170.18 Does Not Bar Recommitment. ▶ *People v. Foster* (2019) 7 Cal.5th 1202, 1211 [251 Cal.Rptr.3d 312, 447 P.3d 228].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 767.

3472. Right to Self-Defense: May Not Be Contrived

A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.

[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.]

New January 2006; Revised February 2016, March 2017, September 2022

BENCH NOTES

Instructional Duty

The court may give this instruction on request when supported by the evidence. (*People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596].) The California Supreme Court has held that language in CALJIC No. 5.55, which is similar to this instruction, correctly states California law on self-defense and imperfect self-defense. (*People v. Enraca* (2012) 53 Cal.4th 735, 761-762 [269 P.3d 543]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].)

Give the bracketed sentence if there is evidence that the ~~This instruction may require modification in the rare case in which a~~ defendant intendeds to provoke only a non-deadly confrontation and the victim respondeds with deadly force. (*People v. Eulian*, (2016) 247 Cal.App.4th 1324, 1334 [203 Cal.Rptr.3d 101]; ~~—see also~~ *People v. Ramirez* (2015) 233 Cal.App.4th 940, 952 [183 Cal.Rptr.3d 267].)

AUTHORITY

- Instructional Requirements ▶ *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596]; *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 743–744 [62 P.2d 783]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].
- This Instruction Generally a Correct Statement of Law - ▶ *People v. Eulian*, (2016) 247 Cal.App.4th 1324, 1334 [203 Cal.Rptr.3d 101].)

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, §§ 75, 78.

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

3473. Reserved for Future Use