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INVITATION TO COMMENT  
CALCRIM

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Title	Action Requested
Criminal Jury Instructions (CALCRIM) Revisions	Review and submit comments by December 31, 2013
Recommended by	Proposed Effective Date
Advisory Committee on Criminal Jury Instructions Hon. Sandy R. Kriegler, Chair	February 21, 2014
	Contact
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**Summary**

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

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## 121. Duty to Abide by Translation Provided in Court

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**[Some testimony may be given in \_\_\_\_\_ <insert name or description of language other than English>. An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff).]**

**[[You (may/are about to) hear a recording [that is partially] in a foreign language.] You will receive a transcript with an English language translation of that recording.**

**You must rely on the transcript, even if you understand the language in the recording. Do not share your own translation with other jurors. Please write a note to the clerk or bailiff if you believe the translation is wrong. [If the recording is partially in English, the English parts of the recording are the evidence.]**

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*New January 2006, insert date of council approval.*

### BENCH NOTES

#### *Instructional Duty*

The committee recommends that this instruction be given whenever testimony will be received with the assistance of an interpreter, though no case has held that the court has a sua sponte duty to give the instruction. The instruction may be given at the beginning of the case, when the person requiring translation testifies, or both, at the court's discretion. If a transcript of a ~~tape-recording~~ in a foreign language will be used, the court may modify this instruction by giving the bracketed bracketed paragraph language.:

If the court chooses, the instruction may also be modified and given again at the end of the case, with all other instructions. ~~(See Ninth Circuit Manual of Model Jury Instructions, Criminal Cases, Instruction No. 3.20 (2003).)~~

It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238].) "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call

the matter to the trial court’s attention, not take it upon herself to provide her fellow jurors with the ‘correct’ translation.” (*Id.* at p. 304.)

### **AUTHORITY**

- Juror May Not Retranslate ▶ *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303–304 [281 Cal.Rptr. 238].

### ***Secondary Sources***

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

## 207. Proof Need Not Show Actual Date

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**It is alleged that the crime occurred on [or about] \_\_\_\_\_ <insert alleged date>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day.**

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New January 2006 *[insert date of council approval]*

### 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; ~~and-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].

#### *Secondary Sources*

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

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

**208–219. Reserved for Future Use**

### 301. Single Witness's Testimony

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[Except for the testimony of \_\_\_\_\_ <insert witness's name>, which requires supporting evidence [if you decide (he/she) is an accomplice,] (the/The) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

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*New January 2006; Revised April 2010, February 2012* insert date of council approval

#### BENCH NOTES

##### *Instructional Duty*

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].) Insert the bracketed language if the testimony of an accomplice or other witness requires corroboration. (*People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].)

The following constitutional provisions and statutes require evidence that corroborates a witness's testimony: Cal. Const., art. I, § 18 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 1111.5 [in-custody informant]; 653f [solicitation of felony]; 118 [perjury]; 1108 [abortion and seduction of minor]; 532 [obtaining property by false pretenses].

Give the bracketed phrase “if you decide (he/she) is an accomplice” and CALCRIM No. 334 if the jury must determine whether a witness is an accomplice.

#### AUTHORITY

- Instructional Requirements ▶ Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885 [123 Cal.Rptr. 119, 538 P.2d 247].
- Corroboration Required ▶ *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].

##### *Secondary Sources*

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 111.



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

## RELATED ISSUES

### *Uncorroborated Testimony of Defendant*

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

### *Uncorroborated Testimony in Sex Offense Cases*

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

### 306. Untimely Disclosure of Evidence

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**Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.**

**An attorney for the (People/defense) failed to disclose: \_\_\_\_\_ <describe evidence that was not disclosed> [within the legal time period].**

**In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure on the other side's ability to prepare for trial or respond to that evidence.**

**[However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.]**

*<Consider for multiple defendant cases>*

**[You must not consider the fact that an attorney for defendant \_\_\_\_\_ <insert defendant's name> failed to disclose evidence when you decide the charges against defendant[s] \_\_\_\_\_ <insert names of other defendant[s]>.]**

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*New January 2006 [insert date of council approval]*

### BENCH NOTES

#### ***Instructional Duty***

While the court has discretion to give an instruction on untimely disclosure of evidence (Pen. Code, § 1054.5(b)), the court should not give this instruction unless there is evidence of a prejudicial violation of the discovery statute. (see *People v. Bell* (2004) 118 Cal.App.4th 249, 254–257 [12 Cal.Rptr.3d 808]; *People v. Cabral* (2004) 121 Cal.App.4th 748, 752–753 [17 Cal.Rptr.3d 456]; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942–943 [17 Cal.Rptr.3d 692]), the court should consider whether giving this instruction could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant.

This instruction addresses a failure to comply with Penal Code requirements. If the court imposes additional sanctions, it may choose to instruct the jury accordingly. (See *People v. Zamora* (1980) 28 Cal.3d 88, 103 [167 Cal.Rptr. 573, 615 P.2d 1361]; *People v. Edwards* (1993) 17 Cal.App.4th 1248, 1265 [22 Cal.Rptr.2d 3].) A court may make any order necessary to enforce the disclosure provisions, including, but not limited to, orders for immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. (Pen. Code, § 1054.5(b).)

If the court concludes that one defendant in a multidefendant case failed to comply with the statute, the last bracketed paragraph should be given.

If the court determines that the defendant is personally responsible for discovery abuse, see CALCRIM No. 371, *Consciousness of Guilt: Suppression and Fabrication of Evidence*.

## AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 1054.5(b); *People v. Bell* (2004) 118 Cal.App.4th 249, 254–257 [12 Cal.Rptr.3d 808]; *People v. Cabral* (2004) 121 Cal.App.4th 748, 752–753 [17 Cal.Rptr.3d 456]; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942–943 [17 Cal.Rptr.3d 692].

### *Secondary Sources*

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 79 et seq.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 70, *Discovery and Investigation*, § 70.09[1] (Matthew Bender).

**307–314. Reserved for Future Use**

### 330. Testimony of Child 10 Years of Age or Younger

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**You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony.**

**In evaluating the child’s testimony, you should consider all of the factors surrounding that testimony, including the child’s age and level of cognitive development.**

**When you evaluate the child’s cognitive development, consider the child’s ability to perceive, understand, remember, and communicate.**

**While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child.**

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*New January 2006 [\[insert date of council approval\]](#)*

#### **BENCH NOTES**

##### ***Instructional Duty***

The court has no sua sponte duty to give an instruction on child witnesses; however, it must be given on request. (Pen. Code, § 1127f.)

#### **AUTHORITY**

- [Instructional Requirements](#) ▶ Pen. Code, § 1127f.
- [This Instruction Upheld](#) ▶ *People v. Fernandez* (2013) 216 Cal.App.4th 540, 558-560 [157 Cal.Rptr.3d 43].

##### ***Secondary Sources***

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 88(3).

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 642.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, §§ 82.05[1], [2][a], [b], 82.07, 82.22[3][c], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

## RELATED ISSUES

### *Due Process/Equal Protection Challenges*

“The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom ‘traditional assumptions’ may previously have biased the fact-finding process.” (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392–1394 [7 Cal.Rptr.2d 660] [instructing jury to make credibility determinations based on child’s age, level of cognitive development, and other factors surrounding child’s testimony does not inflate testimony of child witness and thereby lessen prosecutor’s burden of proof and deny defendant due process and equal protection].)

### 3501. Unanimity: When Generic Testimony of Offense Presented

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The defendant is charged with \_\_\_\_\_ <insert description[s] of alleged offense[s]> [in Count[s] \_\_\_] sometime during the period of \_\_\_\_\_ to \_\_\_\_\_.

The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless:

1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense];

OR

2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged].

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New January 2006 [\[insert date of council approval\]](#)

### BENCH NOTES

#### *Instructional Duty*

In *People v. Jones* (1990) 51 Cal.3d 294 [270 Cal.Rptr. 611, 792 P.2d 643], the Court analyzed the due process concerns raised when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics on time and date. The Court held that prosecutions based on this type of evidence satisfied due process where the testimony met specified criteria. (*Id.* at p. 316.) The Court then addressed what type of unanimity instruction is required in such cases:

In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal. App.3d [839,] 855–856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of

them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

(*Id.* at pp. 321–322; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448 [127 Cal.Rptr.2d 472].) If the court concludes that the modified jury instruction is appropriate, give this instruction. If the court determines that the standard unanimity instruction is appropriate, give CALCRIM No. 3500, *Unanimity*.

Give the bracketed portions when the defendant is charged with numerous charges for the same offense alleged to have occurred during the specified time period. (See *People v. Matute, supra*, 103 Cal.App.4th at p. 1448 [15 rapes charged during 15 months].)

## AUTHORITY

- Unanimity Required ▶ Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Instruction Required If Multiple Acts Could Support Single Charge ▶ *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Diedrich* (1982) 31 Cal.3d 263, 282 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Madden* (1981) 116 Cal.App.3d 212, 218 [171 Cal.Rptr. 897]; *People v. Alva* (1979) 90 Cal.App.3d 418, 426 [153 Cal.Rptr. 644].
- Generic Testimony ▶ *People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].
- [This Instruction Upheld ▶ \*People v. Fernandez\* \(2013\) 216 Cal.App.4th 540, 555-558 \[157 Cal.Rptr.3d 43\].](#)

## Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 648.

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. 142, *Crimes Against the Person*, § 142.21[1][c][iii] (Matthew Bender).

### 357. Adoptive Admissions

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If you conclude that someone made a statement outside of court that (accused the defendant of the crime/ [or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

1. The statement was made to the defendant or made in (his/her) presence;
2. The defendant heard and understood the statement;
3. The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true;

AND

4. The defendant could have denied it but did not.

If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

[You must not consider this evidence in determining the guilt of (the/any) other defendant[s].]

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New January 2006 *[insert date of council approval]*

### BENCH NOTES

#### *Instructional Duty*

~~The court has a sua sponte~~ The court has no sua sponte duty to give an instruction on adoptive admissions; however, it must be given if requested by the defendant. Give this instruction if requested by the defendant. ~~duty to instruct on the foundational requirements for adoptive admissions if such evidence is admitted.~~ (*People v. Vindiola-Carter* (2003)1979) 96-Cal.App.3d-37030 Cal.4th 1166, 1198, 381-[135 Cal.Rptr.2d 553, 70 P.3d 981][158-Cal.Rptr. 6], citing *People v. Atwood* (1963) 223-Cal.App.2d 316, 332-334 [35-Cal.Rptr. 831]; see also *People v. Humphries* (1986) 185-Cal.App.3d 1315, 1336 [230-Cal.Rptr. 536].)



If the court instructs on adoptive admissions, the court also has a **sua sponte** duty to instruct on corpus delicti. (See CALCRIM No. 359, *Corpus Delicti: Independent Evidence of a Charged Crime*; see also *People v. Jennings* (1991) 53 Cal.3d 334, 364 [279 Cal.Rptr. 780, 807 P.2d 1009] [discussing corpus delicti rule in the case of an affirmative admission; by analogy the rule also should apply to adoptive admissions].)

The limiting admonition in the last sentence of the instruction must be given on request when other codefendants are on trial. (*People v. Richards* (1976) 17 Cal.3d 614, 618–619 [131 Cal.Rptr. 537, 552 P.2d 97], disapproved on other grounds in *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126 [43 Cal.Rptr.2d 681, 899 P.2d 67]; see generally Evid. Code, § 355.)

Do not give this instruction if the defendant’s failure to reply was based on his or her invocation of the right to remain silent. (See *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]; *People v. Cockrell* (1965) 63 Cal.2d 659 [47 Cal.Rptr. 788, 408 P.2d 116].)

## AUTHORITY

- Instructional Requirements ▶ *People v. Atwood* (1963) 223 Cal.App.2d 316, 332–333 [35 Cal.Rptr. 831]; *People v. Vindiola* (1979) 96 Cal.App.3d 370 [158 Cal.Rptr. 6]; *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1336 [230 Cal.Rptr. 536]; see *People v. Riel* (2000) 22 Cal.4th 1153, 1189 [96 Cal.Rptr.2d 1, 998 P.2d 969].

### *Secondary Sources*

7 Witkin, California Procedure (5th ed. 2008) Trial, § 303

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 102–105.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, §§ 30.04[4], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[3][b] (Matthew Bender).

## RELATED ISSUES

### *Defendant Intoxicated When Admission Made*

“Declarations of a prisoner under the influence of intoxicants are not rendered inadmissible by reason of his drunkenness. That condition would go only to the weight of the evidence.” (*People v. MacCagnan* (1954) 129 Cal.App.2d 100, 112 [276 P.2d 679].)

### 358. Evidence of Defendant's Statements

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

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

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*New January 2006; Revised June 2007, December 2008 [\[insert date of council approval\]](#)*

#### BENCH NOTES

##### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction when there is evidence of an out-of-court oral statement by the defendant. In addition, the court has a **sua sponte** duty to give the bracketed cautionary instruction when there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1].) An exception is that in the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

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

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

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

When a defendant’s statement is a verbal act, as in conspiracy cases, this instruction applies. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 [249 Cal.Rptr. 71, 756 P.2d 795]; *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352 [114 Cal.Rptr. 916]; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases]; but see *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509] [no sua sponte duty to instruct with CALJIC 2.71 in criminal threat case because “truth” of substance of the threat was not relevant and instructing jury to view defendant’s statement with caution could suggest that exercise of “caution” supplanted need for finding guilt beyond a reasonable doubt].)

When a defendant’s statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction does not apply. (*People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509].)

### ***Related Instructions***

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

## **AUTHORITY**

- Instructional Requirements ▶ *People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1]; *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].
- Custodial Statements by Minors Suspected of Murder ▶ Pen. Code, § 859.5, effective 1/1/2014.

### ***Secondary Sources***

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, §§ 614, 641, 650.

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 51.

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 113.

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

### 359. Corpus Delicti: Independent Evidence of a Charged Crime

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The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may **only** rely on the defendant's out-of-court statements to convict (him/her) **only** if you **first** conclude that other evidence shows that the charged crime [or a lesser included offense] was committed.

That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

**This requirement of other evidence does not apply to proving the**The identity of the person who committed the crime [and the degree of the crime]. **If other evidence shows that the charged crime [or a lesser included offense] was committed, the identity of the person who committed it [and the degree of the crime] may be proved by the defendant's statement[s] alone.,** ~~which may be proved by the defendant's statement[s] alone.~~

You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt.

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*New January 2006; Revised August 2006. [\[insert date of council approval\]](#)*

#### BENCH NOTES

##### *Instructional Duty*

The court has a **sua sponte** duty to instruct on corpus delicti whenever an accused's extrajudicial statements form part of the prosecution's evidence. (*People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].)

The corpus delicti cannot be proved by statements made before or after the crime, but can be proved by statements made during the crime. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 [63 Cal.Rptr.2d 1, 935 P.2d 708].)

Give the bracketed language in the first paragraph if the court will be instructing on lesser included offenses.

[An earlier version of this instruction was upheld in \*People v. Reyes\* \(2007\) 151 Cal.App.4th 1491, 1496 \[60 Cal.Rptr.3d 777\].- A later case, \*People v. Rivas\* \(2013\) 214 Cal.App.4th 1410, 1427-1429 \[155 Cal.Rptr.3d 403\].](#)~~[People v. Rivas](#)~~

[found fault with the same earlier version of the instruction without referring to Reyes. The instruction has been modified in light of the discussion in Rivas.](#)

### ***Related Instructions***

Since the corpus delicti instruction concerns statements of guilt by the defendant, this instruction must always be given along with CALCRIM No. 358, *Evidence of Defendant's Statements*. If the statements are reported oral statements, the bracketed cautionary paragraph in CALCRIM No. 358 must also be given.

### **AUTHORITY**

- Instructional Requirements ▶ *People v. Ray* (1996) 13 Cal.4th 313, 342 [52 Cal.Rptr.2d 296, 914 P.2d 846]; *People v. Jennings* (1991) 53 Cal.3d 334, 368 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].
- Burden of Proof ▶ *People v. Lara* (1994) 30 Cal.App.4th 658, 676.
- [This Instruction Correctly States the Law](#) ▶ *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1496 [60 Cal.Rptr.3d 777].
- [Proof of Identity Independent of “Elements”](#) ▶ *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1427-1429 [155 Cal.Rptr.3d 403].
- Corpus Delicti Rule Does Not Apply Generally to All Uncharged Acts ▶ *People v. Davis* (2008) 168 Cal.App.4th 617, 636 [86 Cal.Rptr.3d 55].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 45–52.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, §§ 30.04[2], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.04[2][c], Ch. 87, *Death Penalty*, § 87.13[17][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.01 (Matthew Bender).

## COMMENTARY

### *Harm Caused by Criminal Conduct*

The instruction states that the other evidence need only “be enough to support a reasonable inference that someone’s criminal conduct caused an injury, loss, or harm.” This is based in part on *People v. Alvarez* (2002) 27 Cal.4th 1161, 1171 [119 Cal.Rptr.2d 903, 46 P.3d 372], in which the court stated that “[t]here is no requirement of independent evidence ‘of every physical act constituting an element of an offense,’ so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency.” (Citing *People v. Jones* (1998) 17 Cal.4th 279, 303 [70 Cal.Rptr.2d 793, 949 P.2d 890].)

### *Scope of Corpus Delicti*

The following are not elements of a crime and need not be proved by independent evidence: the degree of the crime charged (*People v. Cooper* (1960) 53 Cal.2d 755, 765 [3 Cal.Rptr. 148, 349 P.2d 964]), the identity of the perpetrator (*People v. Westfall* (1961) 198 Cal.App.2d 598, 601 [18 Cal.Rptr. 356]), elements of the underlying felony when the defendant is charged with felony murder (*People v. Cantrell* (1973) 8 Cal.3d 672, 680–681 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]), special circumstances when the defendant is charged with a felony-based special circumstance murder as listed in Penal Code section 190.2(a)(17) (Pen. Code, § 190.41; see *People v. Ray* (1996) 13 Cal.4th 313, 341, fn. 13 [52 Cal.Rptr.2d 296, 914 P.2d 846]), the knowledge and intent required for aider-abettor liability (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1128–1129 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Ott* (1978) 84 Cal.App.3d 118, 131 [148 Cal.Rptr. 479]), or facts necessary for a sentencing enhancement (see *People v. Shoemaker* (1993) 16 Cal.App.4th 243, 252–256 [20 Cal.Rptr.2d 36]).

## RELATED ISSUES

### *Truth-in-Evidence Initiative*

The “truth-in-evidence” provision of the California Constitution abrogates the corpus delicti rule insofar as it restricts the admissibility of incriminatory extrajudicial statements by an accused. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173–1174 [119 Cal.Rptr.2d 903, 46 P.3d 372]; see Cal. Const., art. I, § 28(d) [Proposition 8 of the June 8, 1982 General Election].) The constitutional



provision, however, does not eliminate the rule insofar as it prohibits *conviction* when the only evidence that the crime was committed is the defendant's own statements outside of court. Thus, the provision does not affect the rule to the extent it requires a jury instruction that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1180.)

### 415. Conspiracy (Pen. Code, § 182)

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**[I have explained that (the/a) defendant may be guilty of a crime if (he/she) either commits the crime or aids and abets the crime. (He/She) may also be guilty if (he/she) is a member of a conspiracy.]**

**(The defendant[s]/Defendant[s] \_\_\_\_\_ <insert name[s]>) (is/are) charged [in Count \_\_\_] with conspiracy to commit \_\_\_\_\_ <insert alleged crime[s]> [in violation of Penal Code section 182].**

**To prove that (the/a) defendant is guilty of this crime, the People must prove that:**

- 1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>) to commit \_\_\_\_\_ <insert alleged crime[s]>;**
- 2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit \_\_\_\_\_ <insert alleged crime[s]>;**
- 3. (The/One of the) defendant[s][,] [or \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>][,] [or (both/all) of them] committed [at least one of] the following alleged overt act[s] to accomplish \_\_\_\_\_ <insert alleged crime[s]>: \_\_\_\_\_ <insert the alleged overt acts>;**

**AND**

- 4. [At least one of these/This] overt act[s] was committed in California.**

**To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the act[s].**

**To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit \_\_\_\_\_ <insert alleged crime[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

**The People must prove that the members of the alleged conspiracy had an agreement and intent to commit \_\_\_\_\_ <insert alleged crime[s]>. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit (that/one or more of those) crime[s]. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime[s].**

**An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.**

**[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]**

**[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]**

**[The People allege that the defendant[s] conspired to commit the following crimes: \_\_\_\_\_ <insert alleged crime[s]>. You may not find (the/a) defendant guilty of conspiracy unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.] [You must also all agree on the degree of the crime.]**

**[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]**

**[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]**

**[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]**

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*New January 2006; Revised August 2006 [\[insert date of council approval\]](#)*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) If the defendant is charged with conspiracy to commit murder, do not give this instruction. Give CALCRIM No. 563, *Conspiracy to Commit Murder*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give this instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537] ; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of the offense or offenses alleged as targets of the conspiracy.

The court has a **sua sponte** duty to give a unanimity instruction if “the evidence suggested two discrete crimes, i.e., two discrete conspiracies . . . .” (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971].) A unanimity instruction is not required if there is “merely possible uncertainty on how the defendant is guilty of a particular conspiracy.” (*People v. Russo, supra*, 25 Cal.4th at p. 1135.) Thus, the jury need not unanimously agree as to what overt act was committed or who was part of the conspiracy. (*People v. Russo, supra*, 25 Cal.4th at pp. 1135–1136.) However, it appears that a unanimity instruction is required when the prosecution alleges multiple crimes that may have been the target of the conspiracy. (See *People v. Diedrich, supra*, 31 Cal.3d at pp. 285–286 [approving of unanimity instruction as to crime that was target of conspiracy]; but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210] [not error to decline to give unanimity instruction; if was error, harmless].) Give the bracketed paragraph that begins, “The People alleged that the defendant[s] conspired to commit the following crimes,” if multiple crimes are alleged as target offenses of the conspiracy. Give the bracketed sentence regarding the degree of the crime if any target felony has different punishments for different degrees. (See Pen. Code, § 182(a).) The court must also give the jury a verdict form on which it can state the specific crime or crimes that the jury unanimously agrees the defendant conspired to commit.

In addition, if a conspiracy case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction

may be required. (*People v. Russo, supra*, 25 Cal.4th at p. 1136, fn. 2; see also Related Issues section below on statute of limitations.)

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with “You must make a separate decision,” if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Give the bracketed sentence that begins with “A member of a conspiracy does not have to personally know,” on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

### ***Defenses—Instructional Duty***

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal From Conspiracy*.

## **AUTHORITY**

- Elements ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75]; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368 [277 Cal.Rptr. 309]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11 [24 Cal.Rptr.2d 480].
- Association Alone Not a Conspiracy ▶ *People v. Drolet* (1973) 30 Cal.App.3d 207, 218 [105 Cal.Rptr. 824]; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].

- Elements of Underlying Offense ▶ *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].
- Two Specific Intent ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved on other ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Unanimity on Specific Overt Act Not Required ▶ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Unanimity on Target Offenses of Single Conspiracy ▶ *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210].
- Penal Code Section 182 Refers to Crimes Under California Law Only ▶ *People v. Zacarias* (2007) 157 Cal.App.4th 652, 660 [69 Cal.Rptr.3d 81].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 68–97.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01, 141.02, 141.10 (Matthew Bender).

## **COMMENTARY**

It is sufficient to refer to coconspirators in the accusatory pleading as “persons unknown.” (*People v. Sacramento Butchers’ Protective Ass’n* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

## **LESSER INCLUDED OFFENSES**

The court has a **sua sponte** duty to instruct the jury on a lesser included target offense if there is substantial evidence from which the jury could find a conspiracy to commit that offense. (*People v. Horn* (1974) 12 Cal.3d 290, 297 [115 Cal.Rptr. 516, 524 P.2d 1300], disapproved on other ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1237–1238 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Cook*

(2001) 91 Cal.App.4th 910, 918 [111 Cal.Rptr.2d 204]; *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1365–1366, 1370 [269 Cal.Rptr. 900]. ~~Alternatively, the court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra*, 91 Cal.App.4th at pp. 919–920, 922; contra, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708–1709 [54 Cal.Rptr.2d 608] [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)~~

There is a split of authority whether a court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra*, 91 Cal.App.4th at pp. 919–920, 922 [court may look to overt acts to determine whether charged offense includes a lesser included offense]; contra, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708–1709 [54 Cal.Rptr.2d 608] [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)

## RELATED ISSUES

### *Acquittal of Coconspirators*

The “rule of consistency” has been abandoned in conspiracy cases. The acquittal of all alleged conspirators but one does not require the acquittal of the remaining alleged conspirator. (*People v. Palmer* (2001) 24 Cal.4th 856, 858, 864–865 [103 Cal.Rptr.2d 13, 15 P.3d 234].)

### *Conspiracy to Collect Insurance Proceeds*

A conspiracy to commit a particular offense does not necessarily include a conspiracy to collect insurance proceeds. (*People v. Leach* (1975) 15 Cal.3d 419, 435 [124 Cal.Rptr. 752, 541 P.2d 296].)

### *Death of Coconspirator*

A surviving conspirator is liable for proceeding with an overt act after the death of his or her coconspirator. (*People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1262 [98 Cal.Rptr.2d 737].)

### ***Factual Impossibility***

Factual impossibility of accomplishing a substantive crime is not a defense to conspiracy to commit that crime. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1130–1131 [54 Cal.Rptr.2d 578]; see also *United States v. Jimenez Recio* (2003) 537 U.S. 270, 274–275 [123 S.Ct. 819, 154 L.Ed.2d 744] [rejecting the rule that a conspiracy ends when the object of the conspiracy is defeated].)

### ***Statute of Limitations***

The defendant may assert the statute of limitations defense for any felony that is the primary object of the conspiracy. The limitations period begins to run with the last overt act committed in furtherance of the conspiracy. (*Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 410 [173 Cal.Rptr. 906]; *People v. Crosby* (1962) 58 Cal.2d 713, 728 [25 Cal.Rptr. 847, 375 P.2d 839]; see Pen. Code, §§ 800, 801.) If the substantive offense that is the primary object of the conspiracy is successfully attained, the statute begins to run at the same time as for the substantive offense. (*People v. Zamora* (1976) 18 Cal.3d 538, 560 [134 Cal.Rptr. 784, 557 P.2d 75].) “[I]f there is a question regarding the statute of limitations, the court may have to require the jury to agree an overt act was committed within the limitations period.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641] [dicta].) See generally CALCRIM No. 3410, *Statute of Limitations* and CALCRIM No. 3500, *Unanimity*.

### ***Supplier of Goods or Services***

A supplier of lawful goods or services put to an unlawful use is not liable for criminal conspiracy unless he or she both knows of the illegal use of the goods or services and intends to further that use. The latter intent may be established by direct evidence of the supplier’s intent to participate, or by inference based on the supplier’s special interest in the activity or the aggravated nature of the crime itself. (*People v. Lauria* (1967) 251 Cal.App.2d 471, 476–477, 482 [59 Cal.Rptr. 628].)

### ***Wharton’s Rule***

If the cooperation of two or more persons is necessary to commit a substantive crime, and there is no element of an alleged conspiracy that is not present in the substantive crime, then the persons involved cannot be charged with both the substantive crime and conspiracy to commit the substantive crime. (*People v. Mayers* (1980) 110 Cal.App.3d 809, 815 [168 Cal.Rptr. 252] [known as Wharton’s Rule or “concert of action” rule].)



**563. Conspiracy to Commit Murder (Pen. Code, § 182)**

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(The defendant[s]/Defendant[s] \_\_\_\_\_ <insert name[s]>) (is/are) charged [in Count \_\_] with conspiracy to commit murder [in violation of Penal Code section 182].

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

1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>) to intentionally and unlawfully kill;
2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would intentionally and unlawfully kill;
3. (The/One of the) defendant[s],[,] [or \_\_\_\_\_ <insert name[s] or description[s] of coparticipant[s]>],[,] [or (both/all) of them] committed [at least one of] the following overt act[s] alleged to accomplish the killing: \_\_\_\_\_ <insert the alleged overt acts>;

**AND**

4. [At least one of these/This] overt act[s] was committed in California.

To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the overt act[s].

To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit *murder*, please refer to Instructions \_\_, which define that crime.

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

**An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.**

**[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]**

**[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]**

**[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]**

**[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]**

**[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]**

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Revised August 2006; Revised April 2010 [*insert date of council approval*]

## **BENCH NOTES**

### ***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) Use this instruction only if the defendant is charged with conspiracy to commit murder. If the defendant is charged with conspiracy to commit another crime, give CALCRIM No. 415, *Conspiracy*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give either instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–

1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of murder.

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with “You must all agree that at least one overt act alleged” if multiple overt acts are alleged in connection with a single conspiracy. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136 [108 Cal.Rptr.2d 436, 25 P.3d 641].)

Give the bracketed sentence that begins with “You must make a separate decision,” if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Do not cross-reference the murder instructions unless they have been modified to delete references to implied malice. Otherwise, a reference to implied malice could confuse jurors, because conspiracy to commit murder may not be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 602-603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) Give the bracketed sentence that begins with “A member of a conspiracy does not have to personally know,” on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

### ***Defenses—Instructional Duty***

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal From Conspiracy*.

If the case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also Related Issues section to CALCRIM No. 415, *Conspiracy*, and CALCRIM 3500, *Unanimity*.)

### ***Related Instructions***

CALCRIM No. 415, *Conspiracy*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

### **AUTHORITY**

- Elements ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75].
- Elements of Underlying Offense ▶ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Express Malice Murder ▶ *People v. Swain* (1996) 12 Cal.4th 593, 602–603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].
- Premeditated First Degree Murder ▶ *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Two Specific Intent for Conspiracy ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved by *People v. Cortez* (1998) 18 Cal.4th 1223 [77 Cal.Rptr.2d 733, 960 P.2d 537] to the extent it suggests instructions on premeditation and deliberation must be given in every conspiracy to murder case.
- Unanimity on Specific Overt Act Not Required ▶ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 77, 78.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[2], 141.02[3], [4][b], [5][c], Ch. 142, *Crimes Against the Person*, § 142.01[2][e] (Matthew Bender).

### **COMMENTARY**

It is sufficient to refer to coconspirators in the accusatory pleading as “persons unknown.” (*People v. Sacramento Butchers’ Protective Association* (1910) 12

Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

Conspiracy to commit murder cannot be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 602-603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) All conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr. 2d 733, 960 P.2d 537].)

## LESSER INCLUDED OFFENSES

There is no crime of conspiracy to commit attempted murder. (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79 [116 Cal.Rptr.2d 634].)

The court has a **sua sponte** duty to instruct the jury on a lesser included target offense if there is substantial evidence from which the jury could find a conspiracy to commit that offense. (*People v. Horn* (1974) 12 Cal.3d 290, 297 [115 Cal.Rptr. 516, 524 P.2d 1300], disapproved on other ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1237–1238 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Cook* (2001) 91 Cal.App.4th 910, 918 [111 Cal.Rptr.2d 204]; *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1365–1366, 1370 [269 Cal.Rptr. 900].

There is a split of authority whether a court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra*, 91 Cal.App.4th at pp. 919–920, 922 [court may look to overt acts pleaded in charge of conspiracy to determine whether charged offense includes a lesser included offense]; contra, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708–1709 [54 Cal.Rptr.2d 608] [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)

## RELATED ISSUES

### ***Multiple Conspiracies***

Separately planned murders are punishable as separate conspiracies, even if the separate murders are incidental to a single objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1133 [54 Cal.Rptr.2d 578].)

See the Related Issues section to CALCRIM No. 415, *Conspiracy*.

**564–569. Reserved for Future Use**

**570. Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code, § 192(a))**

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

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

- 1. The defendant was provoked;**
- 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;**

**AND**

- 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.**

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

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

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

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

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

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New January 2006; Revised December 2008 [\[insert date of council approval\]](#)

## 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].)

### *Related Instructions*

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

## AUTHORITY

- Elements ▶ Pen. Code, § 192(a).
- Heat of Passion Defined ▶ [People v. Beltran \(2013\) 56 Cal.4th 935, 938, 942, 957 \[157 Cal.Rptr. 3d 503, 301 P.3d 1120\]](#); *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1]; *People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001].
- “Average Person” Need Not Have Been Provoked to Kill, Just to Act Rashly and Without Deliberation ▶ [\(People v. Beltran \(2013\) 56 Cal.4th 935, 938, 942, 957 \[157 Cal.Rptr. 3d 503, 301 P.3d 1120\].\)](#); *People v. Najera* (2006) 138 Cal.App.4th 212, 223 [41 Cal.Rptr.3d 244].

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 207–219.



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][e], 142.02[1][a], [e], [f], [2][a], [3][c] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Attempted Voluntary Manslaughter ▶ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

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

### ***Heat of Passion: Sufficiency of Provocation—Examples***

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant’s yard and attacked defendant’s car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694 [230 Cal.Rptr. 86]); a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211 [138 P. 989]); verbal taunts by an unfaithful wife (*People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777]); and the infidelity of a lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–329 [325 P.2d 97]).

In the following cases, ~~provocation evidence~~ has been found inadequate ~~to warrant instruction on provocation as a matter of law~~: evidence of name calling, smirking, or staring and looking stone-faced (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [64 Cal.Rptr.2d 282]); ~~insulting words or gestures~~ (*People v. Odell David Dixon* (1961) 192 Cal.App.2d 88, 91 [13 Cal.Rptr. 277]); ~~calling someone a particular epithet~~ (*People v. Manriquez* (2006) 37 Cal.4th 547, 585-586 [36 Cal.Rptr.3d 340, 123 P.3d 614]) ~~calling someone a particular epithet~~ refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555–1556 [38 Cal.Rptr.2d 859]); a victim’s resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [248 Cal.Rptr. 510,

755 P.2d 960)]; the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 [54 Cal.Rptr.2d 608]); and a long history of criticism, reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1246–1247 [7 Cal.Rptr.3d 401]). In addition the Supreme Court has suggested that mere vandalism of an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3 [30 Cal.Rptr.2d 33, 872 P.2d 574].)

### ***Heat of Passion: Types of Provocation***

Heat of passion does not require anger or rage. It can be “any violent, intense, high-wrought or enthusiastic emotion.” (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

### ***Heat of Passion: Verbal Provocation Sufficient***

The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001]; *People v. Valentine* (1946) 28 Cal.2d 121, 138–139 [169 P.2d 1].)

### ***Heat of Passion: Defendant Initial Aggressor***

“[A] defendant who provokes a physical encounter by rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent (or actual) use of such force.” (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303, 1312–1313 [7 Cal.Rptr.3d 161].)

### ***Heat of Passion: Defendant’s Own Standard***

Unrestrained and unprovoked rage does not constitute heat of passion and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1] [court approved admonishing jury on this point]; *People v. Danielly* (1949) 33 Cal.2d 362, 377 [202 P.2d 18]; *People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777].) The objective element of this form of voluntary manslaughter is not satisfied by evidence of a defendant’s “extraordinary character and environmental deficiencies.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1253 [120 Cal.Rptr.2d 432, 47 P.3d 225] [evidence of intoxication, mental deficiencies, and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

***Premeditation and Deliberation—Heat of Passion Provocation***

Provocation and heat of passion that is insufficient to reduce a murder to manslaughter may nonetheless 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 the idea of premeditation or deliberation].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32–33 [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*.

***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.*)

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

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

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

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

AND

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

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

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

*<If criminal street gang has already been defined>*

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

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

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

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

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

**AND**

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

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

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

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of):

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>

**1A. (any combination of two or more of the following crimes/[,,][or] two or more occurrences of [one or more of the following crimes]:)**

\_\_\_\_\_ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;

**[OR]**

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

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

**AND**

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

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

**AND**

**4. The crimes were committed on separate occasions, or by two or more persons.]**

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

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

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

**[Other instructions explain what is necessary for the People to prove that a member of the gang [or the defendant] committed \_\_\_\_\_ <insert crimes from Pen. Code, § 186.22(e)(1)–(30), (31)–(33) inserted in definition of pattern of criminal gang activity>.]**

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*New January 2006; Revised August 2006; June 2007 [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

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

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of

same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

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

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

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

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

### ***Related Instructions***

CALCRIM No. 562, *Transferred Intent*.

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

## **AUTHORITY**

- Special Circumstance ▶ Pen. Code, § 190.2(a)(22).
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].

- Transferred Intent Under Penal Code Section 190.2(a)(22) ▶ *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Felonious Criminal Conduct Defined ▶ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458 [119 Cal.Rptr.2d 272].

### *Secondary Sources*

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, § 443.

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

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

## **RELATED ISSUES**

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

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



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

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

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

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

AND

3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:
  - a. directly and actively committing a felony offense;

OR

- b. aiding and abetting a felony offense.

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

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

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

<If criminal street gang has already been defined.>

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

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

- 1. That has a common name or common identifying sign or symbol;**
- 2. That has, as one or more of its primary activities, the commission of \_\_\_\_\_ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;**

**AND**

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

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

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

**[To decide whether the organization, association, or group has, as one of its primary activities, the commission of \_\_\_\_\_ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>* please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of):**

*<Give Alternative 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33).>*

**1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)**

\_\_\_\_\_ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

[OR]

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

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

**AND**

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

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

**AND**

- 4. The crimes were committed on separate occasions or were personally committed by two or more persons.]**

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

**[To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_** *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

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

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

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

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

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

1. A member of the gang committed the crime;
2. The defendant knew that the gang member intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

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

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

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

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the

**defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]**

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

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

**AND**

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

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

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*New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013 [\[insert date of council approval\]](#)*

## **BENCH NOTES**

### ***Instructional Duty***

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

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

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If

one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

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

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

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

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

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

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

### ***Defenses—Instructional Duty***

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

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

### ***Related Instructions***

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

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

## **AUTHORITY**

- Elements ▶ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined ▶ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].

- Separate Intent From Underlying Felony ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132–1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143]; *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].
- Temporal Connection Between Active Participation and Felonious Criminal Conduct ▶ *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458 [119 Cal.Rptr.2d 272].

### *Secondary Sources*

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

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

## COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran, supra*, 97 Cal.App.4th at 1458 [original italics].) The “felonious criminal conduct” need not



be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062].)

## LESSER INCLUDED OFFENSES

### *Predicate Offenses Not Lesser Included Offenses*

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

## RELATED ISSUES

### *Conspiracy*

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

### *Labor Organizations or Mutual Aid Activities*

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

### *Related Gang Crimes*

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

### *Unanimity*

The “continuous-course-of-conduct exception” applies to the “pattern of criminal gang activity” element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758].)

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

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

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

To prove this allegation, the People must prove that:

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

**AND**

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

<If criminal street gang has already been defined.>

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

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

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

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

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

**AND**

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

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

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

**[To decide whether the organization, association, or group has, as one of its primary activities, the commission of \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 186.22(e)(1)-(25), (31)-(33)> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of):

*<Give Alternative 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)-(25), (31)-(33).>*

**1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)**

\_\_\_\_\_ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>;

**[OR]**

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

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

**AND**

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

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

**AND**

4. The crimes were committed on separate occasions or were personally committed by two or more persons.]

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

**[To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

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

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

New January 2006; Revised August 2006, June 2007, April 2008, December 2008,  
February 2013, August 2013, [insert date of council approval](#)

## BENCH NOTES

### ***Instructional Duty***

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

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra*, 26 Cal.4th at 323–324.)

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 182.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

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

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

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23

Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

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

The court may bifurcate the trial on the gang enhancement, at its discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 [16 Cal.Rptr.3d 880, 94 P.3d 1080].)

### ***Related Instructions***

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

## **AUTHORITY**

- Enhancement ▶ Pen. Code, § 186.22(b)(1).
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required ▶ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▶ *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].
- Defendant Need Not Act With Another Gang Member ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138 [150 Cal.Rptr.3d 533].
- [Crimes Committed After Charged Offense Not Predicates ▶ \*People v. Duran\* \(2002\) 97 Cal.App.4th 1448, 1458 \[119 Cal.Rptr.2d 272\].](#)

## *Secondary Sources*

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 25.

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

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

## **RELATED ISSUES**

### ***Commission On or Near School Grounds***

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

### ***Enhancements for Multiple Gang Crimes***

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

### ***Wobblers***

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

### ***Murder—Enhancements Under Penal Code section 186.22(b)(1) May Not Apply at Sentencing***

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

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



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

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

To prove this allegation, the People must prove that:

1. When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;
2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

AND

3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:
  - a. Directly and actively committing a felony offense;

OR

- b. aiding and abetting a felony offense.

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

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

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

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

- 1. That has a common name or common identifying sign or symbol;**
- 2. That has, as one or more of its primary activities, the commission of \_\_\_\_\_ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;**

**AND**

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

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

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

**[To decide whether the organization, association, or group has, as one of its primary activities, the commission of \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)**

*<Give Alternative 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33).>*

**1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)**

\_\_\_\_\_ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;

**[OR]**

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

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

**AND**

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

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

**AND**

- 4. The crimes were committed on separate occasions or were personally committed by two or more persons.**

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

**[To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

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

To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_ <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

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

1. A member of the gang committed the crime;
2. The defendant knew that the gang member intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

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

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

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

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

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

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

**AND**

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

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

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

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*New January 2006; Revised August 2006, June 2007, December 2008, February 2012, August 2013 [\[insert date of council approval\]](#)*

## **BENCH NOTES**

### ***Instructional Duty***

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

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

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

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

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

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

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

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

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

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

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

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

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

#### ***Defenses—Instructional Duty***

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

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

#### ***Related Instructions***

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

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

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

## **AUTHORITY**

- Factors ▶ Pen. Code, §§ 25400(c)(3), 25850(c)(3) Sentencing Factors, Not Elements ▶ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Elements of Gang Factor ▶ Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458 [119 Cal.Rptr.2d 272].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 31–46, 203-204, 249-250.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][d], 144.03[2] (Matthew Bender).

## RELATED ISSUES

### *Gang Expert Cannot Testify to Defendant's Knowledge or Intent*

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

[The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.... ¶... [The gang expert] simply informed the



jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

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

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

**801. Mayhem (Pen. Code, § 203)**

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The defendant is charged [in Count \_\_\_] with mayhem [in violation of Penal Code section 203].

To prove that the defendant is guilty of mayhem, the People must prove that the defendant ~~caused serious bodily injury when (he/she)~~ unlawfully and maliciously:

[1. Removed a part of someone's body(;/.)]

[OR]

[2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]

[OR]

[3. Permanently disfigured someone(;/.)]

[OR]

[4. Cut or disabled someone's tongue(;/.)]

[OR]

[5. Slit someone's (nose[, ]/ear[,]/ [or] lip) (;/.)]

[OR]

[6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

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

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

~~\_\_\_\_\_ <Insert description of injury when appropriate; see Bench Notes> is a serious bodily injury.~~

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

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New January 2006; Revised August 2006 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph.

The last bracketed sentence may be given on request if there is evidence of a disfiguring injury that may be repaired by medical procedures. (See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [28 Cal.Rptr.2d 783] [not error to instruct that injury may be permanent even though cosmetic repair may be medically feasible].)

## AUTHORITY

- Elements ▶ Pen. Code, § 203.
- Malicious Defined ▶ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- No Serious Bodily Injury Requirement ▶ *People v. Santana* (2013) 56 Cal.4th 999, 1010 [157 Cal.Rptr.3d 547, 301 P.3d 1157].
- ~~Serious Bodily Injury Defined ▶ *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559–1560 [273 Cal.Rptr. 389].~~
- Disabled ▶ See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [158 Cal.Rptr. 120] [serious ankle injury lasting over six months], overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803].

- General Intent Crime ▶ *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1226 [113 Cal.Rptr.2d 1]; *People v. Sekona* (1994) 27 Cal.App.4th 443, 453 [32 Cal.Rptr.2d 606].
- Permanent Disfigurement ▶ *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783]; *Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [174 Cal.Rptr. 637] [head is member of body for purposes of disfigurement].
- Put Out Eye ▶ *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1138 [215 Cal.Rptr. 750]; *People v. Green* (1976) 59 Cal.App.3d 1, 3–4 [130 Cal.Rptr. 318] [addressing corrective lenses]; *People v. Nunes* (1920) 47 Cal.App. 346, 350 [190 P. 486].
- Slit Lip ▶ *People v. Caldwell* (1984) 153 Cal.App.3d 947, 952 [200 Cal.Rptr. 508] [defendant bit through victim’s lower lip].

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 84–86.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.16 (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Attempted Mayhem ▶ Pen. Code, §§ 203, 663.
- Assault ▶ Pen. Code, § 240; see *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 [159 Cal.Rptr. 111] [mayhem occurred during continuing assault].
- ~~Battery With Serious Bodily Injury ▶ Pen. Code, § 243(d); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 859 [20 Cal.Rptr.3d 371].~~
- Battery ▶ Pen. Code, § 242.

Assault with force likely to produce great bodily injury (Pen. Code, § 245(a)(1)) is not a lesser included offense to mayhem. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 862–863 [20 Cal.Rptr.3d 371].)

## RELATED ISSUES

### *Disfigurement*

Disfigurement constitutes mayhem “only when the injury is permanent.” (*Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783].) However, the “possibility that a victim’s disfigurement might be alleviated through reconstructive surgery is no bar to a finding of ‘permanent’ injury.” (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1774 [54 Cal.Rptr.2d 521].) “We . . . reject [the] contention that evidence of medical alleviation may be used in a mayhem trial to prove an injury, permanent by its nature, may be corrected by medical procedures.” (*People v. Hill, supra*, 23 Cal.App.4th at 1574.) In addition, “[t]he fact that [disfiguring injuries] are on a normally unexposed portion of [a] body does not render them any less significant.” (*People v. Keenan* (1991) 227 Cal.App.3d 26, 36 [277 Cal.Rptr. 687] [burns inflicted on victim’s breasts by a cigarette].)

### *Imperfect Self-Defense Not Available*

“[A]part from the *McKelvy* lead opinion, there is no authority to support [the] claim that the mere use of the term ‘malicious’ in section 203 requires a court to instruct a jury that an actual but unreasonable belief will negate the malice required to convict for mayhem . . . . [Mayhem] involves a different requisite mental state and has no statutory history recognizing a malice aforethought element or the availability of the *Flannel* defense.” (*People v. Sekona* (1994) 27 Cal.App.4th 443, 457 [32 Cal.Rptr.2d 606]; contra, *People v. McKelvy* (1987) 194 Cal.App.3d 694, 702–704 [239 Cal.Rptr. 782] (lead opn. of Kline, P.J.).)

### *Victim Must Be Alive*

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058 [99 Cal.Rptr.2d 1, 5 P.3d 68]; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629 [138 Cal.Rptr. 250].)

## 802–809. Reserved for Future Use

## 852. Evidence of Uncharged Domestic Violence

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**The People presented evidence that the defendant committed domestic violence that was not charged in this case[, specifically: \_\_\_\_\_ <insert other domestic violence alleged>.]**

*<Alternative A—As defined in Pen. Code, § 13700>*

**[Domestic violence means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).]**

*<Alternative B—As defined in Fam. Code, § 6211>*

**[Domestic violence means abuse committed against a (child/grandchild/parent/grandparent/brother/sister) of the defendant.]**

**Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.**

**[A fully emancipated minor is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]**

**[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as husband and wife, (5) the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.]**

**You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.**

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

**If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ <insert charged offense[s] involving domestic violence>, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ <insert charged offense[s] involving domestic violence>. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

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

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*New January 2006; Revised August 2006, June 2007, April 2008 [\[insert date of council approval\]](#)*

## **BENCH NOTES**

### ***Instructional Duty***

The court must give this instruction on request when evidence of other domestic violence has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor

conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

The definition of “domestic violence” contained in Evidence Code section 1109(d) was amended, effective January 1, 2006. The definition is now in subd. (d)(3), which states that, as used in section 1109:

‘Domestic violence’ has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to section 352, which shall include consideration of any corroboration and remoteness in time, ‘domestic violence’ has the further meaning as set forth in section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.

If the court determines that the evidence is admissible pursuant to the definition of domestic violence contained in Penal Code section 13700, give the definition of domestic violence labeled alternative A. If the court determines that the evidence is admissible pursuant to the definition contained in Family Code section 6211, give the definition labeled alternative B.

Depending on the evidence, give on request the bracketed paragraphs defining “emancipated minor” (see Fam. Code, § 7000 et seq.) and “cohabitant” (see Pen. Code, § 13700(b)).

In the paragraph that begins with “If you decide that the defendant committed,” the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the final sentence that begins with “Do not consider” on request.

***Related Instructions***

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person.*



## AUTHORITY

- Instructional Requirement ▶ Evid. Code, § 1109(a)(1); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- Abuse Defined ▶ Pen. Code, § 13700(a).
- Cohabitant Defined ▶ Pen. Code, § 13700(b).
- Domestic Violence Defined ▶ Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); Fam. Code, § 6211; see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Emancipation of Minors Law ▶ Fam. Code, § 7000 et seq.
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].
- This Instruction Upheld ▶ *People v. Johnson* (2008) 164 Cal.App.4th 731, 738 [79 Cal.Rptr.3d 568].
- No Sua Sponte Duty To Give Similar Instruction ▶ *People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163].

### *Secondary Sources*

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Trial, § 640.

1 Witkin, *California Evidence* (4th ed. 2000) Circumstantial Evidence, § 98.

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.13 (Matthew Bender).

## COMMENTARY

The paragraph that begins with “If you decide that the defendant committed” tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with “If you decide that the defendant committed the uncharged domestic violence” may be replaced with the following:

If you decide that the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed \_\_\_\_\_ <insert charged offense involving domestic violence>. Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged offense involving domestic violence>. The People must still prove (the/each) (charge/ [and] allegation) of \_\_\_\_\_ <insert charged offense involving domestic violence> beyond a reasonable doubt.

## RELATED ISSUES

### *Constitutional Challenges*

Evidence Code section 1109 does not violate a defendant’s rights to due process (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096 [98 Cal.Rptr.2d 696]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028–1029 [92 Cal.Rptr.2d 208]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 [91 Cal.Rptr.2d 596]; see *People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182] (construing Evid. Code, § 1108, a parallel statute to Evid. Code, § 1109); *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870] (construing Evid. Code, § 1108) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; see *People v. Fitch* (1997) 55 Cal.App.4th 172, 184–185 [63 Cal.Rptr.2d 753] (construing Evid. Code, § 1108).

***Exceptions***

Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109 of the Evidence Code, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

### 853. Evidence of Uncharged Abuse of Elder or Dependent Person

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The People presented evidence that the defendant committed abuse of (an elder/a dependent person) that was not charged in this case[, specifically: \_\_\_\_\_ <insert other abuse alleged>.] Abuse of (an elder/a dependent person) means (physical abuse[,]/ [or] sexual abuse[,]/ [or] neglect[,]/ [or] financial abuse[,]/ [or] abandonment[,]/ [or] isolation[,]/ [or] abduction[,]/[or] the act by a care custodian of not providing goods or services that are necessary to avoid physical harm or mental suffering[,]/ [or] [other] treatment that results in physical harm or pain or mental suffering).

[An *elder* is a person residing in California who is age 65 or older.]

[A *dependent person* is a person 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 significantly diminished because of age.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged abuse of (an elder/a dependent person). Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit abuse of (an elder/a dependent person), and based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ <insert charged offense[s] involving abuse of elder or dependent person>, as charged here. If you conclude that the defendant committed the uncharged abuse of (an elder/a dependent person), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ <insert charged offense[s] involving abuse of elder or dependent person>. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

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

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New January 2006; Revised April 2008 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

The court must give this instruction on request when evidence of other abuse of an elder or dependent person has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

Depending on the evidence, give on request the bracketed definition of an elder or dependent person. (See Welf. & Inst. Code, §§ 15610.23 [dependent adult], 15610.27 [elder].) Other terms may be defined on request depending on the evidence. See the Authority section below for references to selected definitions from the Elder Abuse and Dependent Adult Civil Protection Act. (See Welf. & Inst. Code, § 15600 et seq.)

In the paragraph that begins with “If you decide that the defendant committed,” the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with “Do not consider” on request.

***Related Instructions***

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, or Common Plan, etc.*

CALCRIM No. 852, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 1191, *Evidence of Uncharged Sex Offense.*

**AUTHORITY**

- Instructional Requirement ▶ Evid. Code, § 1109(a)(2).
- Abandonment Defined ▶ Welf. & Inst. Code, § 15610.05.
- Abduction Defined ▶ Welf. & Inst. Code, § 15610.06.
- Abuse of Elder or Dependent Person Defined ▶ Evid. Code, § 1109(d)(1).
- Care Custodian Defined ▶ Welf. & Inst. Code, § 15610.17.
- Dependent Person Defined ▶ Evid. Code, § 177.
- Elder Defined ▶ Welf. & Inst. Code, § 15610.27.
- Financial Abuse Defined ▶ Welf. & Inst. Code, § 15610.30.
- Goods and Services Defined ▶ Welf. & Inst. Code, § 15610.35.
- Isolation Defined ▶ Welf. & Inst. Code, § 15610.43.
- Mental Suffering Defined ▶ Welf. & Inst. Code, § 15610.53.
- Neglect Defined ▶ Welf. & Inst. Code, § 15610.57.
- Physical Abuse Defined ▶ Welf. & Inst. Code, § 15610.63.
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [in context of prior domestic violence offenses]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].
- No Sua Sponte Duty To Give Similar Instruction ▶ *People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163].

## *Secondary Sources*

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 98.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[5] (Matthew Bender).

## **COMMENTARY**

The paragraph that begins with “If you decide that the defendant committed” tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with “If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person)” may be replaced with the following:

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person>. Remember, however, that evidence of uncharged abuse of (an elder/a dependent person) is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person>. The People must still prove (the/each) (charge/ [and] allegation) of \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person> beyond a reasonable doubt.

## **RELATED ISSUES**

### ***Exceptions***

Evidence of abuse of an elder or dependent person occurring more than 10 years before the charged offense is inadmissible under Evidence Code section 1109, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of

administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

**854–859. Reserved for Future Use**



## 1191. Evidence of Uncharged Sex Offense

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The People presented evidence that the defendant committed the crime[s] of \_\_\_\_\_ *<insert description of offense[s]>* that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

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

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

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ *<insert charged sex offense[s]>*, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ *<insert charged sex offense[s]>*. The People must still prove (the/each) \_\_\_\_\_ (charge/ [and] allegation) beyond a reasonable doubt.

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

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*New January 2006; Revised April 2008, February 2013* *[\[insert date of council approval\]](#)*

### BENCH NOTES

#### *Instructional Duty*

*[Although there is ordinarily no sua sponte duty \(People v. Cottone \(2013\) 57 Cal.4th 269, 293, fn. 15 \[159 Cal.Rptr.3d 385, 303 P.3d 1163\]\) ¶the court must give this instruction on request when evidence of other sexual offenses has been introduced. \(See People v. Falsetta \(1999\) 21 Cal.4th 903, 924 \[89 Cal.Rptr.2d](#)*

847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727] [in context of prior acts of domestic violence]; ~~but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.1112(e) [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)~~

Evidence Code section 1108(a) provides that “evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101.” Subdivision (d)(1) defines “sexual offense” as “a crime under the law of a state or of the United States that involved any of the following[,]” listing specific sections of the Penal Code as well as specified sexual conduct. In the first sentence, the court must insert the name of the offense or offenses allegedly shown by the evidence. The court **must** also instruct the jury on elements of the offense or offenses.

In the fourth paragraph, the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with “Do not consider” on request.

### ***Related Instructions***

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 852, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 853, *Evidence of Uncharged Abuse to Elder or Dependent Person.*

## **AUTHORITY**

- Instructional Requirement ▶ Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- CALCRIM No. 1191 Upheld ▶ *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [57 Cal.Rptr.3d 922]; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 [62 Cal.Rptr.3d 848].

- Sexual Offense Defined ▶ Evid. Code, § 1108(d)(1).
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [same].
- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity ▶ *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].

### *Secondary Sources*

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 96–97.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:9 (The Rutter Group).

## **COMMENTARY**

The fourth paragraph of this instruction tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433] [in context of prior acts of domestic violence].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other sexual offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the fourth paragraph may be replaced with the following:

If you decide that the defendant committed the other sexual offense[s], you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the

defendant committed \_\_\_\_\_ <insert charged sex offense>. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged sex offense>. The People must still prove (the/each) \_\_\_\_\_ (charge/ [and] allegation) of \_\_\_\_\_ <insert charged sex offense> beyond a reasonable doubt.

## RELATED ISSUES

### ***Constitutional Challenges***

Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra*, 55 Cal.App.4th at pp. 184–185).

### ***Expert Testimony***

Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution's case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496 [92 Cal.Rptr.2d 884] [expert testified on ultimate issue of abnormal sexual interest in child].)

### ***Rebuttal Evidence***

When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

### ***Subsequent Offenses Admissible***

“[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108.” (*People v. Medina* (2003) 114 Cal.App.4th 897, 903 [8 Cal.Rptr.3d 158].)

### ***Evidence of Acquittal***

If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663 [14 Cal.Rptr.3d 534].)

See also the Related Issues section of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

**915. Simple Assault (Pen. Code, §§ 240, ~~241(a)~~)**

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The defendant is charged [in Count \_\_\_] with assault [in violation of Penal Code section 241(a)].

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

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

[AND]

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

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

[AND]

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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New January 2006 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

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

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

## AUTHORITY

- Elements ▶ Pen. Code, § 240.
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197]; *People v. Wright* (2002) 100 Cal.App.4th 703, 706 [123 Cal.Rptr.2d 494].
- 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]].

- This Instruction Upheld ▶ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1193–1195 [67 Cal.Rptr.3d 871].

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 6–11, 15.

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

## **RELATED ISSUES**

### ***Transferred Intent***

The doctrine of transferred intent does not apply to general intent crimes such as assault. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1737 [34 Cal.Rptr.2d 723].)

**960. Simple Battery (Pen. Code, §§ 242, ~~243(a)~~)**

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The defendant is charged with battery [in violation of Penal Code section ~~243(a)~~242].

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

1. The defendant willfully [and unlawfully] touched \_\_\_\_\_ <insert name> in a harmful or offensive manner(;/.)

<Give element 2 when instructing on self-defense, defense of another, or reasonable discipline.>

[AND

2. The defendant did not act (in self-defense/ [or] in defense of someone else/ [or] while reasonably disciplining a child).]

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

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

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

[Words alone, no matter how offensive or exasperating, are not an excuse for this crime.]

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*New January 2006; Revised August 2013, [insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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



If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words “and unlawfully” in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If there is sufficient evidence of reasonable parental discipline, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words “and unlawfully” in element 1, and CALCRIM No. 3405, *Parental Right to Punish a Child*.

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

### AUTHORITY

- Elements ▶ Pen. Code, §§ 242, ~~243(a)~~; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- 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]].
- Defense of Parental Discipline ▶ *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051 [12 Cal.Rptr.2d 33].

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 12-16.

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

### LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.

### RELATED ISSUES

***Touching of Something Attached to or Closely Connected with Person***

The committee could not locate any authority on whether it is sufficient to commit a battery if the defendant touches something attached to or closely connected with the person. Thus, the committee has not included this principle in the instruction.

***Battery Against Elder or Dependent Adult***

When a battery is committed against an elder or dependent adult as defined in Penal Code section 368, with knowledge that the victim is an elder or a dependent adult, special punishments apply. (Pen. Code, § 243.25.)

**961–964. Reserved for Future Use**

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

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

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

1. The defendant had sexual intercourse with a woman;
2. He and the woman were (not married/married) to each other at the time of the intercourse;
3. The woman did not consent to the intercourse;

AND

4. The defendant accomplished the intercourse by

<Alternative 4A—force or fear>

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

<Alternative 4B—future threats of bodily harm>

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

<Alternative 4C—threat of official action>

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

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

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

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

1. She communicated through words or acts to the defendant that she ~~objected no longer consented~~ to the act of intercourse ~~and attempted to stop the act~~;
2. ~~She~~ A reasonable person would have understood that her words or acts communicated her objection through words or acts that a reasonable person would have understood as showing expressed her lack of consent;

AND

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

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

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

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

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

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

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

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

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

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

*<Defense: Reasonable Belief in Consent>*

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

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*New January 2006; Revised February 2013 [\[insert date of council approval\]](#)*

## **BENCH NOTES**

### ***Instructional Duty***

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

The court should select the appropriate alternative in element 4 describing how the sexual intercourse was allegedly accomplished.

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

The defendant must continue to actually and reasonably believe in the victim’s consent throughout the act. If the act of intercourse begins consensually and the victim then changes her mind, the victim must clearly and unequivocally communicate to the defendant her withdrawal of consent to the act. If, however, the defendant initiates the use of nonconsensual duress, menace, or force during the act, the victim’s subsequent withdrawal of consent to the act may be inferred from the circumstances and need not be expressed. (*People v. Ireland* (2010) 188

Cal.App.4th 328, 338 [114 Cal.Rptr.3d 915]). If there is an issue regarding the defendant's continued belief in the victim's consent, give the second optional first sentence in the definition of "*Defense: Reasonable Belief in Consent.*"

### ***Defenses—Instructional Duty***

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

### ***Related Instructions***

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

## **AUTHORITY**

### ***Rape:***

- Elements ▶ Pen. Code, § 261(a)(2), (6) & (7).
- Consent Defined ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined ▶ Pen. Code, § 261(b).
- Menace Defined ▶ Pen. Code, § 261(c).
- Penetration Defined ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Fear Defined ▶ *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [level of fear].
- Force Defined ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Mistake of Fact Regarding Consent ▶ *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].
- Circumstances Requiring *Mayberry* Instruction ▶ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866].
- Withdrawal of Consent ▶ *In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].

- [Inferring Lack of Consent From Circumstances](#) ▶ *People v. Ireland* (2010) 188 Cal.App.4th 328, 338 [114 Cal.Rptr.3d 915].
- [Victim Need Not Resist](#) ▶ *People v. Barnes* (1986) 42 Cal.3d 284, 297-302 [288 Cal.Rptr. 228, 721 P.2d 110].

***Spousal Rape:***

- Elements ▶ Pen. Code, § 262(a)(1), (4) & (5).
- Duress Defined ▶ Pen. Code, § 262(b).
- Menace Defined ▶ Pen. Code, § 262(c).
- Mistake of Fact Regarding Consent ▶ *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1148–1149 [222 Cal.Rptr. 630]; see *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].

***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–12, 18.

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

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

**COMMENTARY**

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

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

“[T]he offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. . . . ‘[I]t is immaterial at what

point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.” (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].)

The instruction includes definitions of “duress,” “menace,” and the sufficiency of “fear” because those terms have meanings in the context of rape that are technical and may not be readily apparent to jurors. (See Pen. Code, §§ 262(b) [duress] and (c) [menace]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear].)

The term “force” as used in the rape statutes does not have a specialized meaning and court is not required to define the term *sua sponte*. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin, supra*, the Supreme Court further stated,

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

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

The committee has provided a bracketed definition of “force,” consistent with *People v. Griffin, supra*, that the court may give on request.

## LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Assault With Intent to Commit Rape ▶ Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape ▶ Pen. Code, §§ 663, 261.
- Attempted Spousal Rape ▶ Pen. Code, §§ 663, 262.



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

## RELATED ISSUES

### ***Consent Obtained by Fraudulent Representation***

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

### ***Minor Victim and Unanimity***

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

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

***Mistake-of-Fact Defense and Developmental Disability***

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

***Multiple Rapes***

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

***Resistance Is Not Required***

Resistance by the victim is not required for rape; any instruction to that effect is erroneous. (*People v. Barnes* (1986) 42 Cal.3d 284, 292, 302 [228 Cal.Rptr. 228, 721 P.2d 110].)

**1170. Failure to Register as Sex Offender (Pen. Code, § 290(b))**

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**The defendant is charged [in Count \_\_\_] with failing to register as a sex offender [in violation of Penal Code section 290(b)].**

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

- 1. The defendant was previously (convicted of/found to have committed) \_\_\_\_\_ <specify the offense for which the defendant is allegedly required to register>;**
- 2. The defendant resided (in \_\_\_\_\_ <insert name of city>, California/in an unincorporated area or a city with no police department in \_\_\_\_\_ <insert name of county> County, California/on the campus or in the facilities of \_\_\_\_\_ <insert name of university or college>in California);**

**The defendant actually knew (he/she) had a duty under Penal Code section 290 to register as a sex offender [living at \_\_\_\_\_ <insert specific address or addresses in California] and that (he/she) had to register within five working days of \_\_\_\_\_ <insert triggering event specified in Penal Code section 290(b)>;**

**AND**

*<Alternative 4A—change of residence>*

- [4. The defendant willfully failed to register as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus or its facilities) within five working days of (coming into/ [or] changing (his/her) residence within) that (city/county/campus).]**

*<Alternative 4B—birthday>*

- [4. The defendant willfully failed to annually update (his/her) registration as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus) within five working days of (his/her) birthday.]**

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

**[Residence means one or more addresses where someone regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address. A residence may include, but is not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.]**

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New January 2006; Revised August 2006, April 2010, October 2010, February 2013 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This instruction is based on the language of the statute effective January 1, 2006. The instruction may not be appropriate for offenses that occurred before that date. Note also that this is an area where case law is developing rapidly. The court should review recent decisions on Penal Code section 290 before instructing.

In element 3, choose the option “living at \_\_\_\_\_ <*insert specific address in California*> if there is an issue whether the defendant actually knew that a place where he or she spent time was a residence triggering the duty to register. (*People v. Cohens* (2009) 178 Cal.App.4th 1442, 1451 [101 Cal.Rptr.3d 289]; *People v. LeCorno* (2003) 109 Cal.App.3d 1058, 1068-1069 [135 Cal.Rptr.2d 775].

In element 4, give alternative 4A if the defendant is charged with failing to register within five working days of changing his or her residence or becoming homeless. (Pen. Code, § 290(b).) Give alternative 4B if the defendant is charged with failing to update his or her registration within five working days of his or her birthday. (Pen. Code, § 290.012.)

If the defendant is charged with a prior conviction for failing to register, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (See *People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr. 2d 21]; *People v. Bouzas* (1991) 53 Cal.3d 467, 477-480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].)

For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is “acting with general criminal intent, even though he may not know that his act or conduct is unlawful.” (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v.*

*Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) The court should consider whether it is more appropriate to give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, or to give a modified version of CALCRIM No. 250, *Union of Act and Intent: General Intent*, as explained in the Related Issues section to CALCRIM No. 250.

## AUTHORITY

- Elements ▶ Pen. Code, §§ 290(b) [change in residence], 290.012 [birthday]; *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Spousal Rape Not Registerable Offense Absent Force or Violence ▶ *People v. Mason* (2013) 218 Cal.App.4th 818, 825-826 [160 Cal.Rptr.3d 516].
- Definition of Residence ▶ Pen. Code, § 290.011(g); *People v. Gonzales* (2010) 183 Cal.App.4th 24, 35 [107 Cal.Rptr.3d 11].
- Willfully Defined ▶ Pen. Code, § 7(1); see *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507].
- Actual Knowledge of Duty Required ▶ *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Continuing Offense ▶ *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527–528 [63 Cal.Rptr.2d 322, 936 P.2d 101].
- General Intent Crime ▶ *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Johnson* (1998) 67 Cal.App.4th 67, 72 [78 Cal.Rptr.2d 795].
- No Duty to Define Residence ▶ *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219 [64 Cal.Rptr.2d 545].
- Registration is Not Punishment ▶ *In re Alva* (2004) 33 Cal.4th 254, 262 [14 Cal.Rptr.3d 811, 92 P.3d 311].
- Jury May Consider Evidence That Significant Involuntary Condition Deprived Defendant of Actual Knowledge ▶ *People v. Sorden* (2005) 36 Cal.4th 65, 72 [29 Cal.Rptr.3d 777, 113 P.3d 565].
- People Must Prove Defendant Was California Resident at Time of Offense ▶ *People v. Wallace* (2009) 176 Cal.App.4th 1088, 1102-1104 [98 Cal.Rptr.3d 618].
- Defendant Must Have Actual Knowledge That Location is Residence for Purpose of Duty to Register ▶ (*People v. Aragon* (2012) 207 Cal.App.4th 504, 510 [143 Cal.Rptr.3d 476]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1067-1070 [135 Cal.Rptr.2d 775].

### *Secondary Sources*

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, §§ 184–188.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 93, *Disabilities Flowing From Conviction*, § 93.04[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.20[1][a], Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

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

## **RELATED ISSUES**

### *Other Violations of Section 290*

This instruction applies to violations under Penal Code sections 290(b) and 290.012. Section 290 imposes numerous other duties on persons convicted of sex offenses. For example, a registered sex offender must:

1. Notify the agency where he or she was *last* registered of any new address or location, whether inside or outside California, or any name change. (See Pen. Code, §§ 290.013–290.014; *People v. Smith* (2004) 32 Cal.4th 792, 800–802 [11 Cal.Rptr.3d 290, 86 P.3d 348] [under former Pen. Code, § 290(f), which allowed notice of change of address in writing, there is sufficient notice if defendant mails change of address form even if agency does not receive it]; *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740 [10 Cal.Rptr.3d 712] [discussing meaning of “changed” residence]; *People v. Davis* (2002) 102 Cal.App.4th 377, 385 [125 Cal.Rptr.2d 519] [must instruct on requirement of actual knowledge of duty to notify law enforcement when moving out of jurisdiction]; see also *People v. Franklin* (1999) 20 Cal.4th 249, 255–256 [84 Cal.Rptr.2d 241, 975 P.2d 30] [construing former Pen. Code, § 290(f), which did not specifically require registration when registrant moved outside California].)
2. Register multiple residences wherever he or she regularly resides. (See Pen. Code, § 290.010; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222 [127 Cal.Rptr.2d 662] [court failed to instruct that jury must

find that defendant actually knew of duty to register multiple residences; opinion cites former section 290(a)(1)(B)]; *People v. Vigil* (2001) 94 Cal.App.4th 485, 501 [114 Cal.Rptr.2d 331].)

3. Update his or her registration at least once every 30 days if he or she is “a transient.” (See Pen. Code, § 290.011.)

A sexually violent predator who is released from custody must verify his or her address at least once every 90 days and verify any place of employment. (See Pen. Code, § 290.012.) Other special requirements govern:

1. Residents of other states who must register in their home state but are working or attending school in California. (See Pen. Code, § 290.002.)
2. Sex offenders enrolled at, employed by, or carrying on a vocation at any university, college, community college, or other institution of higher learning. (See Pen. Code, § 290.01.)

In addition, providing false information on the registration form is a violation of section 290.018. (See also *People v. Chan* (2005) 128 Cal.App.4th 408 [26 Cal.Rptr.3d 878].)

### ***Forgetting to Register***

If a person actually knows of his or her duty to register, “just forgetting” is not a defense. (*People v. Barker* (2004) 34 Cal.4th 345, 356–357 [18 Cal.Rptr.3d 260, 96 P.3d 507].) In reaching this conclusion, the court stated, “[w]e do not here express an opinion as to whether forgetfulness resulting from, for example, an *acute psychological condition*, or a *chronic deficit of memory or intelligence*, might negate the willfulness required for a section 290 violation.” (*Id.* at p. 358 [italics in original].)

### ***Registration Requirement for Consensual Oral Copulation With Minor***

Penal Code section 290 requires lifetime registration for a person convicted of consensual oral copulation with a minor but does not require such registration for a person convicted of consensual sexual intercourse with a minor. (Pen. Code, § 290(c).) The mandatory registration requirement for consensual oral copulation with a minor is unenforceable because this disparity denies equal protection of the laws. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1191, 1205–1206 [39 Cal.Rptr.3d 821, 129 P.3d 29].) A defendant convicted of consensual oral copulation with a minor might, however, be required to register pursuant to judicial discretion under [former] section 290(a)(2)(E) (after October 13, 2007 section 290.006). (*Id.* at p. 1208.)

***Moving Between Counties—Failure to Notify County Leaving and County Moving To Can Only Be Punished as One Offense***

A person who changes residences a single time, failing to notify both the jurisdiction he or she is departing from and the jurisdiction he or she is entering, commits two violations of Penal Code section 290 but can only be punished for one. (*People v. Britt* (2004) 32 Cal.4th 944, 953–954 [12 Cal.Rptr.3d 66, 87 P.3d 812].) Further, if the defendant has been prosecuted in one county for the violation, and the prosecutor in the second county is aware of the previous prosecution, the second county cannot subsequently prosecute the defendant. (*Id.* at pp. 955–956.)

***Notice of Duty to Register on Release From Confinement***

No reported case has held that the technical notice requirements are elements of the offense, especially when the jury is told that they must find the defendant had actual knowledge. (See former Pen. Code, § 290(b), after October 13, 2007, section 290.017; *People v. Garcia* (2001) 25 Cal.4th 744, 754, 755–756 [107 Cal.Rptr.2d 355, 23 P.3d 590] [if defendant willfully and knowingly failed to register, *Buford* does not require reversal merely because authorities failed to comply with technical requirements]; see also *People v. Buford* (1974) 42 Cal.App.3d 975, 987 [117 Cal.Rptr. 333] [revoking probation for noncompliance with section 290, an abuse of discretion when court and jail officials also failed to comply].) The court in *Garcia* did state, however, that the “court’s instructions on ‘willfulness’ should have required proof that, in addition to being formally notified by the appropriate officers as required by section 290, in order to willfully violate section 290 the defendant must actually know of his duty to register.” (*People v. Garcia, supra*, 25 Cal.4th at p. 754.)

**1171–1179. Reserved for Future Use**



**1243. Human Trafficking (Pen. Code, § 236.1(a) & (b))**

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The defendant is charged [in Count \_\_\_] with human trafficking [in violation of Penal Code section 236.1].

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

1. The defendant either deprived another person of personal liberty or violated that other person's personal liberty;

[AND]

*<Give Alternative 2A if the defendant is charged with a violation of subsection (a).>*

**[2A. When the defendant acted, (he/she) intended to obtain forced labor or services(./;)]**

[OR]

*<Give Alternative 2B if the defendant is charged with a violation of subsection (b).>*

**[2B. When the defendant acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of \_\_\_\_\_ <insert appropriate code section[s]>.)]**

**~~Deprivation or violation of~~ Depriving or violating another person's personal liberty, as used here, includes substantial and sustained restriction of another person's liberty accomplished through \_\_\_\_\_ <insert terms that apply from statutory definition, i.e.: force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury> to the victim or to another person under circumstances in which the person receiving or perceiving the threat reasonably believes that it is likely that the person making the threat would carry it out.**

**[Forced labor or services, as used here, means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, duress, or coercion, or equivalent conduct that would reasonably overbear the will of the person.]**

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

[*Duress* includes (a direct or implied threat to destroy, conceal, remove, confiscate, or possess any actual or purported passport or immigration document of the other person/ [or] knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the other person).]

[*Violence* means using physical force that is greater than the force reasonably necessary to restrain someone.]

[*Menace* means a verbal or physical threat of harm[, including use of a deadly weapon]. The threat of harm may be express or implied.]

[Coercion includes any scheme, plan, or pattern intended to cause a person to believe that failing to perform an act would result in (serious harm to or physical restraint against someone else/ [or] the abuse or threatened abuse of the legal process/ [or] debt bondage/ [or] providing or facilitating the possession of any controlled substance to impair the other person's judgment).]

[When you decide whether the defendant ~~(used duress/ [or] used coercion/ [or] deprived another person of personal liberty or violated that other person's personal liberty)~~, ~~consider all of the circumstances, including the age of the other person, (his/her) relationship to the defendant [or defendant's agent[s]], and the other person's handicap or disability, if any.~~]

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*New August 2009; Revised August 2013, [insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

If necessary, insert the correct Penal Code section into the blank provided in element 2B and give the corresponding CALCRIM instruction.

This instruction is based on the language of the statute effective November 7, 2012, and only applies to crimes committed on or after that date.

The court is not required to instruct sua sponte on the definition of “menace” or “violence” and Penal Code section 236.1 does not define these terms. (*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.

### **AUTHORITY**

- Elements and Definitions ▶ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment] ▶ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Violence Defined [in context of false imprisonment] ▶ *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 278.

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

**NEW: 1244. Causing Minor to Engage in Commercial Sex Act (Pen. Code, § 236.1(c))**

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The defendant is charged [in Count \_\_] with (causing, inducing, or persuading / (and/or) attempting to cause, induce, or persuade) a minor to engage in a commercial sex act [in violation of Penal Code section 236.1(c)].

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

1. The defendant (caused/ [or] induced/ [or] persuaded) [or] attempted to (cause/ [or] induce/ [or] persuade) another person to engage in a commercial sex act;
2. When the defendant acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of \_\_\_\_\_ <insert appropriate code section[s]>;

**AND**

3. When the defendant did so, the other person was under 18 years of age.

**A commercial sex act** is sexual conduct that takes place in exchange for anything of value.

When you decide whether the defendant (caused/ [or] induced/ [or] persuaded) the other person to engage in a commercial sex act, consider all of the circumstances, including the age of the other person, (his/her) relationship to the defendant [or defendant's agent[s]], and the other person's handicap or disability, if any.

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

[The other person's consent is not a defense to this crime.]

[Being mistaken about the other person's age is not a defense to this crime.]

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*[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

Insert the correct Penal Code section into the blank provided in element 2 and give the corresponding instruction or instructions.

This instruction is based on the language of the statute effective November 7, 2012, and only applies to crimes committed on or after that date.

## AUTHORITY

- Elements and Definitions ▶ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment] ▶ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Calculating Age ▶ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 278.

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

**NEW: 3184. Sex Offenses: Sentencing Factors—Using Force or Fear to Cause Minor to Engage in Commercial Sex Act (Pen. Code, § 236.1(c)(2))**

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If you find the defendant guilty of the crime[s] charged in [in Count[s] \_\_\_] \_\_\_\_\_ <insert count[s] charging violation[s] of Penal Code section 236.1(c)> you must then decide whether[, for each crime,] the People have proved the additional allegation that when the defendant committed (that/those) crime[s], (he/she) used (force[,]/ [or] fear[,]/ [or] deceit[,]/ [or] coercion[,]/ [or] violence[,]/ [or] duress[,]/ [or] menace) [on]) ( [or] threat of unlawful injury to) (the other person/ [or] to someone else).

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to].

[*Duress* includes (a direct or implied threat to destroy, conceal, remove, confiscate, or possess any actual or purported passport or immigration document of the other person/ [or] knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the other person).]

[*Menace* means a verbal or physical threat of harm[, including use of a deadly weapon]. The threat of harm may be express or implied.]

[*Coercion* includes any scheme, plan, or pattern intended to cause a person to believe that failing to perform an act would result in (serious harm to or physical restraint against someone else/ [or] the abuse or threatened abuse of the legal process/ [or] debt bondage/ [or] providing or facilitating the possession of any controlled substance to impair the other person's judgment).]

[*Serious harm* includes any harm, either physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the circumstances, to force a reasonable person of the same background and in the same circumstances to perform or to continue performing labor, services[, or commercial sex acts] in order to avoid that harm.]

[When you decide whether the defendant acted with (*duress*/ [or] *coercion*), consider all of the circumstances, including the age of the other person,

(his/her) relationship to the defendant [or defendant’s agent[s]], and the other person’s handicap or disability, if any.]

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

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*[insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining this enhancement.

This instruction is based on the language of the statute effective November 7, 2012, and only applies to crimes committed on or after that date.

## **AUTHORITY**

- Elements and Definitions ▶ Pen. Code, § 236.1(c)(2).
- Menace Defined [in context of false imprisonment] ▶ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 278.

**2300. Sale, Transportation, etc., of Controlled Substance (Health & Saf. Code, §§ 11352, 11379)**

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The defendant is charged [in Count \_\_] with (selling/furnishing/administering/giving away/transporting/importing) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant (sold/furnished/administered/gave away/transported/imported into California) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;

[AND]

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of 4A>

**4A.** The controlled substance was \_\_\_\_\_ <insert type of controlled substance>(;/.)

**4B.** The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>(;/.)

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND]

**5.** The controlled substance was in a usable amount.]

[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:



**1. Has a chemical structure substantially similar to the structure of a controlled substance;**

**OR**

**2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported/imported).]

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

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*New January 2006; Revised October 2010. [insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

Transportation of a controlled substance requires a “usable amount.” (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

### AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering ▶ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▶ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount ▶ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

## *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–102.

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

## **LESSER INCLUDED OFFENSES**

- Simple Possession of Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

Note: In reviewing the appropriateness of sentencing enhancements, *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

## **RELATED ISSUES**

### ***Transportation***

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also does not require personal possession by the defendant. (*Ibid.*) “Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . .” (*Id.* at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved “from one location to another,” but the movement may be minimal. (*Id.* at p. 684.)

***Transportation for Personal Use***

A defendant convicted of transporting a controlled substance “for personal use” is entitled to be sentenced to probation with drug treatment pursuant to Penal Code section 1210(a); see *People v. Barasa* (2002) 103 Cal.App.4th 287, 295–297 [126 Cal.Rptr.2d 628].) Two cases have held that the judge, not the jury, may determine whether the defendant transported the drugs for personal use. (*People v. Barasa, supra*, 103 Cal.App.4th at pp. 294–295; *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1115 [7 Cal.Rptr.3d 4].)

**2301. Offering to Sell, Transport, etc., a Controlled Substance (Health & Saf. Code, §§ 11352, 11379)**

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The defendant is charged [in Count \_\_\_\_] with offering to (sell/furnish/administer/give away/transport/import) \_\_\_\_\_ *<insert type of controlled substance>*, a controlled substance [in violation of \_\_\_\_\_ *<insert appropriate code section[s]>*].

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

1. The defendant [unlawfully] offered to (sell/furnish/administer/give away/transport/import into California) \_\_\_\_\_ *<insert type of controlled substance>*, a controlled substance;

AND

2. When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away/transport/import) the controlled substance.

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of 3A>*

**3A. The controlled substance was \_\_\_\_\_ *<insert type of controlled substance>*.**

**3B. The controlled substance was an analog of \_\_\_\_\_ *<insert type of controlled substance>*.**

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ *<insert name of analog drug>* is an analog of \_\_\_\_\_ *<insert type of controlled substance>*. An analog of a controlled substance:**

1. **Has a chemical structure substantially similar to the structure of a controlled substance;**

**OR**

**2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

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New January 2006 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering ▶ Health & Saf. Code, § 11002.
- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

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

### LESSER INCLUDED OFFENSES

- Simple Possession of Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

### RELATED ISSUES

#### ***No Requirement That Defendant Delivered or Possessed Drugs***

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

**2302. Possession for Sale of Controlled Substance (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5)**

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The defendant is charged [in Count \_\_\_\_] with possession for sale of \_\_\_\_\_ *<insert type of controlled substance>*, a controlled substance [in violation of \_\_\_\_\_ *<insert appropriate code section[s]>*].

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

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
- 4.** When the defendant possessed the controlled substance, (he/she) intended to sell it;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 5B and the definition of analog substance below instead of 5A>*

**5A.** The controlled substance was \_\_\_\_\_ *<insert type of controlled substance>*;

**5B.** The controlled substance was an analog of \_\_\_\_\_ *<insert type of controlled substance>*;

AND

- 6.** The controlled substance was in a usable amount.

**Selling for the purpose of this instruction means exchanging \_\_\_\_\_ *<insert type of controlled substance>* for money, services, or anything of value.**

**A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.**



[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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*New January 2006; Revised October 2010. [\[insert date of council approval\]](#)*

## BENCH NOTES

### *Instructional Duty*

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- This Instruction Is Correct ▶ *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [66 Cal.Rptr.3d 668].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 81–93.

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

### **LESSER INCLUDED OFFENSES**

- Simple Possession of a Controlled Substance ▶ *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465].
- Possession of cocaine for sale is not necessarily included offense of selling cocaine base ▶ *People v. Murphy* (2005) 134 Cal.App.4th 1504, 1508 [36 Cal.Rptr.3d 872].

**2303. Possession of Controlled Substance While Armed With Firearm  
(Health & Saf. Code, § 11370.1)**

The defendant is charged [in Count \_\_\_\_] with possessing \_\_\_\_\_ <insert type of controlled substance specified in Health & Saf. Code, § 11370.1>, a controlled substance, while armed with a firearm [in violation of \_\_\_\_\_ <insert appropriate code section(s)>].

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

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
- 3.** The defendant knew of the substance's nature or character as a controlled substance;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of 4A>*

**4A.** *The controlled substance was \_\_\_\_\_ <insert type of controlled substance>;*

**4B.** *The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>;*

~~**The controlled substance was \_\_\_\_\_ <insert type of controlled substance specified in Health & Saf. Code, § 11370.1>;**~~

**5.** The controlled substance was in a usable amount;

**6.** While possessing that controlled substance, the defendant had a loaded, operable firearm available for immediate offensive or defensive use;

**AND**

**7. The defendant knew that (he/she) had the firearm available for immediate offensive or defensive use.**

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:**

**1. Has a chemical structure substantially similar to the structure of a controlled substance;**

**OR**

**2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

**Knowledge that an available firearm is loaded and operable is not required.**

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

**A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.**

**[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]**

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

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

**[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]**

***New January 2006; Revised August 2006, October 2010, August 2013 [insert date of council approval]***

## BENCH NOTES

### *Instructional Duty*

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

### AUTHORITY

- Elements ▶ Health & Saf. Code, § 11370.1; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge of Controlled Substance ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Loaded Firearm ▶ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Knowledge of Presence of Firearm ▶ *People v. Singh* (2004) 119 Cal.App.4th 905, 912–913 [14 Cal.Rptr.3d 769].
- Knowledge That Firearm is Loaded or Operable Not Required ▶ *People v. Heath* (2005) 134 Cal.App.4th 490, 498 [36 Cal.Rptr.3d 66]
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, § 100.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.01[1][f]; Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[d], [3][b] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance Not a Lesser Included Offense ▶  
*People v. Sosa* (2012) 210 Cal.App.4th 946, 949-950 [148 Cal.Rptr.3d 826],  
Health & Saf. Code, §§ 11350, 11377.

See also Firearm Possession instructions, CALCRIM Nos. 2510 to 2530.

## RELATED ISSUES

### ***Loaded Firearm***

“Under the commonly understood meaning of the term ‘loaded,’ a firearm is ‘loaded’ when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not ‘loaded’ if the shell or cartridge is stored elsewhere and not yet placed in a firing position.” (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

**2304. Simple Possession of Controlled Substance (Health & Saf. Code, §§ 11350, 11377)**

The defendant is charged [in Count \_\_] with possessing \_\_\_\_\_ *<insert type of controlled substance>*, a controlled substance [in violation of \_\_\_\_\_ *<insert appropriate code section[s]>*].

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

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
- 3.** The defendant knew of the substance's nature or character as a controlled substance;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of 4A>*

**4A.** The controlled substance was \_\_\_\_\_ *<insert type of controlled substance>(;/.)*

**4B.** The controlled substance was an analog of \_\_\_\_\_ *<insert type of controlled substance>(;/.)*

~~**3.** The controlled substance was \_\_\_\_\_ *<insert type of controlled substance>*;~~

AND

**5.** The controlled substance was in a usable amount.

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ *<insert name of analog drug>* is an analog of \_\_\_\_\_ *<insert type of controlled substance>*. An analog of a controlled substance:**

- 1. Has a chemical structure substantially similar to the structure of a controlled substance;**

**OR**

**2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

**A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.**

**[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]**

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

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

**[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]**

*<Defense: Prescription>*

**[The defendant is not guilty of possessing \_\_\_\_\_ *<insert type of controlled substance>* if (he/she) had a valid, written prescription for that substance from a physician, dentist, podiatrist, [naturopathic doctor], or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]**

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*New January 2006; Revised August 2006, October 2010. [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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



### ***Defenses—Instructional Duty***

The prescription defense is codified in Health and Safety Code sections 11350 and 11377. It is not available as a defense to possession of all controlled substances. The defendant need only raise a reasonable doubt about whether his or her possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense.

A recent amendment to section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.

### **AUTHORITY**

- Elements ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Prescription ▶ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ▶ Health & Saf. Code, § 11150.
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 77–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145,  
*Narcotics and Alcohol Offenses*, § 145.01[1][a]–[d], [2][b] (Matthew Bender).

**2380. Sale, Furnishing, etc., of Controlled Substance to Minor (Health & Saf. Code, §§ 11353, 11354, 11380(a))**

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The defendant is charged [in Count \_\_] with (selling/furnishing/administering/giving away) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance, to someone under 18 years of age [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant [unlawfully] (sold/furnished/administered/gave away) a controlled substance to \_\_\_\_\_ <insert name of alleged recipient>;
2. The defendant knew of the presence of the controlled substance;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. At that time, the defendant was 18 years of age or older;
5. At that time, \_\_\_\_\_ <insert name of alleged recipient> was under 18 years of age;

[AND]

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 6B and the definition of analog substance below instead of 6A>

**6A. The controlled substance was \_\_\_\_\_ <insert type of controlled substance>(;/.)**

**6B. The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>(;/.)**

**The controlled substance was \_\_\_\_\_ <insert type of controlled substance>(;/.)**

<Give element 7 when instructing on usable amount; see Bench Notes.>

[AND

**7. The controlled substance was in a usable amount.]**

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:**

**1. Has a chemical structure substantially similar to the structure of a controlled substance;**

**OR**

**2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

**[Selling for the purpose of this instruction means exchanging \_\_\_\_\_ <insert type of controlled substance> for money, services, or anything of value.]**

**[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]**

**[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]**

**[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away).]**

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

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

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*New January 2006; Revised October 2010. [insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not use bracketed element 7 or the definition of usable amount. There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) The bracketed element 7 and the definition of usable amount are provided here for the court to use at its discretion.

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 4, the court should replace “18 years of age or older” with “under 18 years of age.”

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18 ▶ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Administering ▶ Health & Saf. Code, § 11002.
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.02, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[c], [h], [i], [3][a], [d] (Matthew Bender).

## **LESSER INCLUDED OFFENSES**

- Sale to Person Not a Minor ▶ Health & Saf. Code, §§ 11352, 11379.
- Simple Possession of Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale of Controlled Substance ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

## **RELATED ISSUES**

### *No Defense of Good Faith Belief Over 18*

“The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a

‘mistake of fact’ defense to the intent element of the crime. [Citations omitted.]”  
(*People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454].)

**2381. Offering to Sell, Furnish, etc., Controlled Substance to Minor  
(Health & Saf. Code, §§ 11353, 11354, 11380(a))**

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The defendant is charged [in Count \_\_\_\_] with offering to (sell/furnish/administer/give away) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance, to someone under 18 years of age [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant [unlawfully] offered to (sell/furnish/administer/give away) \_\_\_\_\_ <insert controlled substance>, a controlled substance, to \_\_\_\_\_ <insert name of alleged recipient>;
2. When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away) the controlled substance;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of 3A>*

**3A. The controlled substance was \_\_\_\_\_ <insert type of controlled substance>;**

**3B. The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>;**

**4. At that time, the defendant was 18 years of age or older;**

**AND**

**5. At that time, \_\_\_\_\_ <insert name of alleged recipient> was under 18 years of age.**

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:**

- 1. Has a chemical structure substantially similar to the structure of a controlled substance;**



**OR**

**2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

**[Selling for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]**

**[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]**

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

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*New January 2006 [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace “18 years of age or older” with “under 18 years of age.”

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

## **AUTHORITY**

- Elements ▶ Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18 ▶ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].

- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Administering ▶ Health & Saf. Code, § 11002.
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [h]–[j], [3][a] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Offering to Sell to Person Not a Minor ▶ Health & Saf. Code, §§ 11352, 11360, 11379.
- Simple Possession of Controlled Substance ▶ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale of Controlled Substance ▶ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

## RELATED ISSUES

### *No Requirement That Defendant Delivered or Possessed Drugs*

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

See the Related Issues section to CALCRIM No. 2380, *Sale, Furnishing, etc., of Controlled Substance to Minor*.

**2382. Employment of Minor to Sell Controlled Substance (Health & Saf. Code, §§ 11353, 11354)**

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The defendant is charged [in Count \_\_] with (hiring/employing/using) someone under 18 years of age to (transport/carry/sell/give away/prepare for sale/peddle) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant [unlawfully] (hired/employed/used) \_\_\_\_\_ <insert name of person hired>;

2. \_\_\_\_\_ <insert name of person hired> was (hired/employed/used) to (transport/carry/sell/give away/prepare for sale/peddle) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of 3A>*

**3A. The controlled substance was \_\_\_\_\_ <insert type of controlled substance>;**

**3B. The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>;**

**4. At that time, the defendant was 18 years of age or older;**

**5. At that time, \_\_\_\_\_ <insert name of person hired> was under 18 years of age;**

**AND**

**6. The defendant knew of the substance's nature or character as a controlled substance.**

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of**

<insert type of controlled substance>. An analog of a controlled substance:

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/carried/sold/given away/prepared for sale/peddled), only that (he/she) was aware that it was a controlled substance.]

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

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New January 2006 [insert date of council approval]

## BENCH NOTES

### *Instructional Duty*

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

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace “18 years of age or older” with “under 18 years of age.”

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11353, 11354.
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.12, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [b], [g], [h], [3][a], [b], [c] (Matthew Bender).

**2383. Use of Minor as Agent to Violate Controlled Substance Law  
(Health & Saf. Code, § 11380(a))**

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The defendant is charged [in Count \_\_\_] with using someone under 18 years of age as an agent to (transport/sell/give away/possess/possess for sale) \_\_\_\_\_ *<insert type of controlled substance>*, a controlled substance [in violation of Health and Safety Code section 11380(a)].

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

1. The defendant used \_\_\_\_\_ *<insert name of person hired>* as an agent;

2. \_\_\_\_\_ *<insert name of person hired>* was used by the defendant to (transport/sell/give away/possess/possess for sale) \_\_\_\_\_ *<insert type of controlled substance>*, a controlled substance;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of 3A>*

**3A. The controlled substance was \_\_\_\_\_ *<insert type of controlled substance>*;**

**3B. The controlled substance was an analog of \_\_\_\_\_ *<insert type of controlled substance>*;**

4. At that time, the defendant was 18 years of age or older;

5. At that time, \_\_\_\_\_ *<insert name of person hired>* was under 18 years of age;

AND

6. The defendant knew of the substance's nature or character as a controlled substance.

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ *<insert name of analog drug>* is an analog of**

<insert type of controlled substance>. An analog of a controlled substance:

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]

An *agent* is a person who is authorized to act for the defendant in dealings with other people.

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/sold/given away/possessed/possessed for sale), only that (he/she) was aware that it was a controlled substance.]

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

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New January 2006 [*insert date of council approval*]

## BENCH NOTES

### *Instructional Duty*

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

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



## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11380(a).
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Agent ▶ Civ. Code, § 2295.
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.12, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [b], [d], [e], [g], [h], [3][a] (Matthew Bender).

**2384. Inducing Minor to Violate Controlled Substance Laws (Health & Saf. Code, §§ 11353, 11354, 11380(a))**

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The defendant is charged [in Count \_\_] with (soliciting/inducing/encouraging/intimidating) someone under 18 years of age to commit the crime of \_\_\_\_\_ <insert description of Health and Safety Code violation alleged> [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

**1.** The defendant willfully (solicited/induced/encouraged/intimidated) \_\_\_\_\_ <insert name of person solicited> to commit the crime of \_\_\_\_\_ <insert description of Health and Safety Code violation alleged> [of] \_\_\_\_\_ <insert type of controlled substance a controlled substance>;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 2B and the definition of analog substance below instead of 2A>*

**2A.** The controlled substance was \_\_\_\_\_ <insert type of controlled substance>;

**2B.** The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>;

**3.** The defendant intended that \_\_\_\_\_ <insert name of person solicited> would commit that crime;

**4.** At that time, the defendant was 18 years of age or older;

AND

**5.** At that time, \_\_\_\_\_ <insert name of person solicited> was under 18 years of age.

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of**

<insert type of controlled substance>. An analog of a controlled substance:

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]

To decide whether the defendant intended that \_\_\_\_\_ <insert name of person solicited> would commit the crime of \_\_\_\_\_ <insert description of Health and Safety Code violation alleged>, please refer to the separate instructions that I (will give/have given) you on that crime.

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

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

<Defense: Good Faith Belief Over 18>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that \_\_\_\_\_ <insert name of person solicited> was 18 years of age or older. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that \_\_\_\_\_ <insert name of person solicited> was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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New January 2006 [*insert date of council approval*]

## BENCH NOTES

### *Instructional Duty*

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

Where indicated in the instruction, insert a description of the Health and Safety Code violation allegedly solicited. For example, “the crime of possession for sale of cocaine,” or “the crime of sale of marijuana.”

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace “18 years of age or older” with “under 18 years of age.”

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

### ***Defenses—Instructional Duty***

The court has a **sua sponte** duty to give the final bracketed paragraph if there is substantial evidence supporting the defense that the defendant had a reasonable and good faith belief that the person was over 18 years of age. (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].)

## **AUTHORITY**

- Elements ▶ Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting ▶ *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103, 104.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.12, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [3][a] (Matthew Bender).

**2385–2389. Reserved for Future Use**

**2748. Possession of Controlled Substance or Paraphernalia in Penal Institution (Pen. Code, § 4573.6)**

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The defendant is charged [in Count \_\_] with possessing (\_\_\_\_\_ <insert type of controlled substance>, a controlled substance/an object intended for use to inject or consume controlled substances), in a penal institution [in violation of Penal Code section 4573.6].

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

1. The defendant [unlawfully] possessed (a controlled substance/an object intended for use to inject or consume controlled substances) in a penal institution [or on the grounds of a penal institution];
2. The defendant knew of the (substance's/object's) presence;

[AND]

3. The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming controlled substances)(;/.)

<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of 4A>

**4A. The controlled substance was \_\_\_\_\_ <insert type of controlled substance>;**

**4B. The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>;/.)**

**[4. The controlled substance that the defendant possessed was \_\_\_\_\_ <insert type of controlled substance>;**

AND

**5. The controlled substance was a usable amount.]**

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:**

**1. Has a chemical structure substantially similar to the structure of a controlled substance;**

**OR**

**2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

**A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] (county/ [or] city) jail[,]/ [or] county road camp[,]/ [or] county farm[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees/ [or] place where prisoners or inmates are being held under the custody of a (sheriff[,]/ [or] chief of police[,]/ [or] peace officer[,]/ [or] probation officer).**

**[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]**

**[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]**

**[An object is *intended to be used* for injecting or consuming controlled substances if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]**

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

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

**[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]**

**[The People allege that the defendant possessed the following items:  
\_\_\_\_\_ <insert description of each controlled substance or all paraphernalia  
when multiple items alleged>. You may not find the defendant guilty unless all  
of you agree that the People have proved that the defendant possessed at least  
one of these items and you all agree on which item (he/she) possessed.]**

*<A. Defense: Prescription>*

**[The defendant is not guilty of unlawfully possessing \_\_\_\_\_ <insert type  
of controlled substance> if (he/she) had a valid prescription for that substance  
written by a physician, dentist, podiatrist, or veterinarian licensed to practice  
in California. The People have the burden of proving beyond a reasonable  
doubt that the defendant did not have a valid prescription. If the People have  
not met this burden, you must find the defendant not guilty of possessing a  
controlled substance.]**

*<B. Defense: Conduct Authorized>*

**[The defendant is not guilty of this offense if (he/she) was authorized to  
possess the (substance/item) by (the rules of the (Department of  
Corrections/prison/jail/institution/camp/farm/place)/ [or] the specific  
authorization of the (warden[,]/ [or] superintendent[,]/ [or] jailer[,]/ [or]  
[other] person in charge of the (prison/jail/institution/camp/farm/place)). The  
People have the burden of proving beyond a reasonable doubt that the  
defendant was not authorized to possess the (substance/item). If the People  
have not met this burden, you must find the defendant not guilty of this  
offense.]**

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*New January 2006; Revised October 2010 [\[insert date of council approval\]](#)*

## **BENCH NOTES**

### ***Instructional Duty***

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

If the defendant is charged with possessing a controlled substance, give elements 1 through 5. If the defendant is charged with possession of paraphernalia, give elements 1 through 3 only.

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



bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

Give the bracketed sentence defining “intended to be used” if there is an issue over whether the object allegedly possessed by the defendant was drug paraphernalia. (See *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561].)

The prescription defense is codified in Health & Safety Code sections 11350 and 11377. This defense does apply to a charge of possession of a controlled substance in a penal institution. (*People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].) The defendant need only raise a reasonable doubt about whether his possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence of a prescription, give the bracketed “unlawfully” in element 1 and the bracketed paragraph headed “Defense: Prescription.”

If there is sufficient evidence that the defendant was authorized to possess the substance or item, give the bracketed word “unlawfully” in element 1 and the bracketed paragraph headed “Defense: Conduct Authorized.” (*People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].)

## AUTHORITY

- Elements ▶ Pen. Code, § 4573.6; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717]; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948 [173 Cal.Rptr. 688].
- Knowledge ▶ *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–947 [173 Cal.Rptr. 688].
- Usable Amount ▶ *People v. Carrasco* (1981) 118 Cal.App.3d 936, 948 [173 Cal.Rptr. 688].
- Prescription Defense ▶ Health & Saf. Code, §§ 11350, 11377.
- Prescription ▶ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ▶ Health & Saf. Code, § 11150.
- Prescription Defense Applies ▶ *People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].
- Authorization Is Affirmative Defense ▶ *People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].

- Jail Defined ▶ *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution ▶ *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- “Adjacent to” and “Grounds” Not Vague ▶ *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [78 Cal.Rptr. 811].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity ▶ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, § 124.

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

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 94, *Prisoners’ Rights*, § 94.04 (Matthew Bender).

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

## **RELATED ISSUES**

### ***Inmate Transferred to Mental Hospital***

A prison inmate transferred to a mental hospital for treatment under Penal Code section 2684 is not “under the custody of prison officials.” (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].) However, the inmate is “held under custody by peace officers within the facility.” (*Id.* at p. 1003.) Thus, Penal Code section 4573.6 does apply. (*Ibid.*)

### ***Use of Controlled Substance Insufficient to Prove Possession***

“ ‘[P]ossession,’ as used in that section, does not mean ‘use’ and mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its ‘possession.’ ” (*People v. Spann* (1986) 187 Cal.App.3d 400, 408 [232 Cal.Rptr. 31] [italics in original]; see also *People v. Carrasco* (1981) 118 Cal.App.3d 936, 947 [173 Cal.Rptr. 688].)

### ***Posting of Prohibition***

Penal Code section 4573.6 requires that its “prohibitions and sanctions” be posted on the grounds of the penal institution. (Pen. Code, § 4573.6.) However, that requirement is not an element of the offense, and the prosecution is not required to prove compliance. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 246 [61 Cal.Rptr.2d 583].)

### ***Possession of Multiple Items at One Time***

“[C]ontemporaneous possession in a state prison of two or more discrete controlled substances . . . at the same location constitutes but one offense under Penal Code section 4573.6.” (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1067 [69 Cal.Rptr.2d 563].)

### ***Administrative Punishment Does Not Bar Criminal Action***

“The protection against multiple punishment afforded by the Double Jeopardy Clause . . . is not implicated by prior prison disciplinary proceedings . . . .” (*Taylor v. Hamlet* (N.D. Cal. 2003) 2003 U.S. Dist. LEXIS 19451; see also *People v. Ford* (1959) 175 Cal.App.2d 37, 39 [345 P.2d 354] [Pen. Code, § 654 not implicated].)

### ***Medical Use of Marijuana***

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a defendant charged with violating Penal Code section 4573.6. (*Taylor v. Hamlet* (N.D. Cal. 2003) 2003 U.S. Dist. LEXIS 19451.) However, the common law defense of medical necessity may be available. (*Ibid.*)

## **2749–2759. Reserved for Future Use**

## 2901. Vandalism: Amount of Damage (Pen. Code, § 594(b)(1))

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If you find the defendant guilty of vandalism [in Count[s] \_\_\_], you must then decide whether the People have proved that the amount of damage caused by the vandalism [(in each count/in Count[s]\_\_\_)] was \$400 or more. [If you decide that the amount of damage was \$400 or more, you must then decide whether the People have proved that the damage [(in each count/in Count[s]\_\_\_)] was also \$10,000 or more.]

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

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New January 2006 *[insert date of council approval]*

### BENCH NOTES

#### *Instructional Duty*

The court has a **sua sponte** duty to instruct on these sentencing factors.

This instruction **must** be given with CALCRIM No. 2900, *Vandalism*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved that the damage was \$400 or more and, if appropriate, \$10,000 or more.

### AUTHORITY

- Enhancement ▶ Pen. Code, § 594(b)(1).
- This Instruction Upheld ▶ *People v. Carrasco* (2012) 209 Cal.App.4th 715, 722-723 [147 Cal.Rptr.3d 383].

#### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 277-285.

### RELATED ISSUES

#### *Damage Cannot Be Aggregated*

~~The prosecution cannot charge a felony for vandalism based on the aggregate damage done to property owned by multiple victims~~Damage resulting from multiple acts of vandalism may be aggregated to constitute a felony if the acts were part of a single general impulse, intention, or plan. (In re David (1997) 52 Cal.App.4th 304, 310-311 [60 Cal.Rptr.2d 552].) People v. Carrasco (2012) 209 Cal.App.4th 715, 719-721 [147 Cal.Rptr.3d 383].)

### 2953. Cruelty to Animals (Pen. Code, § 597(a))

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The defendant is charged [in Count \_\_\_] with cruelty to animals [in violation of Penal Code section 597(a)].

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

1. The defendant (maimed[,]/ mutilated[,]/ tortured[,]/ wounded a living animal [or] killed a living animal);

~~2. The defendant intended to (maim[,]/ mutilate[,]/ torture[,]/ [or] wound a living animal/ [or] kill an animal);~~

AND

~~3.2.~~ \_\_\_ The defendant acted maliciously.

[*Torture* means every act, failure to act, or neglect that causes or permits unnecessary or unjustifiable physical pain or suffering.]

[*Maiming* means disabling or disfiguring an animal permanently or depriving it of a limb, organ, or other part of the body.]

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, annoy, or injure an animal.

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New August 2012 *[insert date of council approval]*

### BENCH NOTES

#### *Instructional Duty*

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

The court will need to modify this instruction if Penal Code sections ~~597(b), 597(e) or~~ 599(c) applies.

The committee concluded that the definition of “animal” provided in Penal Code section 599b, including “every dumb creature,” would not be helpful to a jury and that no definition of the word was necessary.

## AUTHORITY

- Elements ▶ Pen. Code, § 597(a).
- Definition of Torture ▶ Pen. Code, § 599b
- Definition of Malicious ▶ Pen. Code, § 7
- Maiming ▶ See CALCRIM No. 800, *Aggravated Mayhem*
- General Intent Crime ▶ *People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1182 [23 Cal.Rptr.3d 391]
- Cruelty ▶ *People v. Burnett* (2003) 110 Cal.App.4th 868, 873 [2 Cal.Rptr.3d 120]
- Any Living Animal ▶ *People v. Thomason* (2000) 84 Cal.App.4th 1064, 1067 [101 Cal.Rptr.2d 247]

- *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. 2000) Crimes Against Property, § ~~265~~310.

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability*, § 23.19 (Matthew Bender).

**2954–2959. Reserved for Future Use**