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INVITATION TO COMMENT

CALCRIM-2024-01

Title
Criminal Jury Instructions: Revisions

Proposed Rules, Forms, Standards, or Statutes
Revised Jury Instructions

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

Action Requested
Review and submit comments by Friday, June 21, 2024

Proposed Effective Date
September 20, 2024

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Summary

Revisions to jury instructions reflecting recent developments in the law and user suggestions.

CALCRIM Proposed Changes: Invitation to Comment May 20 – June 21, 2024

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520	First or Second Degree Murder With Malice Aforethought
522	Provocation: Effect on Degree of Murder
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736	Special Circumstances: Killing by Street Gang Member
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Instruction Number	Instruction Title
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2701	Violation of Court Order: Protective Order or Stay Away
3261	While Committing a Felony: Defined—Escape Rule
3425, 3426, 3427	Unconsciousness; Voluntary Intoxication; Involuntary Intoxication

320. Exercise of Privilege by Witness

<Alternative A—Valid Exercise of Privilege>
[A witness may refuse to answer questions that call for privileged information. Under the law, _____ *<insert name of witness>* **was justified in refusing to answer certain questions. Do not consider (his/her) refusal to answer for any reason at all and do not guess what (his/her) answer would have been.]**

<Alternative B—Invalid Exercise of Privilege>
[_____ *<Insert name of witness>* **did not have the right to refuse to answer questions in this case. You may consider that refusal during your deliberations.]**

*New January 2006; Revised August 2014, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on the exercise of privilege by witnesses; however, it must be given on request. (Evid. Code, § 913(b); see also *People v. Mincey* (1992) 2 Cal.4th 408, 440–441 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Give Alternative A when the court has sustained the exercise of privilege. Give Alternative B when the witness's exercise of privilege is invalid. If the witness was not justified in refusing to answer a question, the jury may draw reasonable inferences regarding why the witness refused to testify. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 468 [99 Cal.Rptr.3d 301]; *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554 [84 Cal.Rptr.2d 655].)

Related Instructions

See CALCRIM No. 355, *Defendant's Right Not to Testify*.

AUTHORITY

- Instructional Requirements. Evid. Code, § 913(b); *People v. Mincey* (1992) 2 Cal.4th 408, 440–441 [6 Cal.Rptr.2d 822, 827 P.2d 388].

- Valid Exercise of Privilege By Absent Witness Through Counsel. *People v. Brooks* (2024) 99 Cal.App.5th 323, 334–336 [317 Cal.Rptr.3d 780]; *People v. Apodaca* (1993) 16 Cal.App.4th 1706, 1713–1715 [21 Cal.Rptr.2d 14].

SECONDARY SOURCES

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.06, Ch. 83, *Evidence*, § 83.09[2], [17], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

321–329. Reserved for Future Use

510. Excusable Homicide: Accident

The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone:

1. **By accident and misfortune~~;~~ or while doing a lawful act in a lawful way;**

   ~~OR~~

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

2. **The defendant was acting with usual and ordinary caution;**

   AND

3. **The defendant was acting without the necessary mental state ~~an unlawful intent to commit~~ for (murder/ [or] manslaughter).**

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

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

New January 2006; Revised August 2012, March 2022, September 2024

BENCH NOTES

Instructional Duty

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

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

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

Related Instructions

CALCRIM No. 3404, *Accident*.

AUTHORITY

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

RELATED ISSUES

Traditional Self-Defense

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

SECONDARY SOURCES

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

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

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

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

520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)

The defendant is charged [in Count __] with murder [in violation of Penal Code section 187].

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

[1A. The defendant committed an act that caused the death of (another person/ [or] a fetus);]

[OR]

[1B. The defendant had a legal duty to (help/care for/rescue/warn/maintain the property of/ _____ *<insert other required action[s]>***) _____***<insert description of decedent/person to whom duty is owed>* and the defendant failed to perform that duty and that failure caused the death of (another person/ [or] a fetus);]**

[AND]

2. When the defendant (acted/ [or] failed to act), (he/she) had a state of mind called malice aforethought(;/.)

<Give element 3 when instructing on justifiable or excusable homicide.>
[AND

3. (He/She) killed without lawful (excuse/ [or] justification).]

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant had *express malice* if (he/she) unlawfully intended to kill.

The defendant had *implied malice* if:

1. **(He/She) intentionally (committed the act/ [or] failed to act);**

2. **The natural and probable consequences of the (act/ [or] failure to act) were dangerous to human life in that the (act/ [or] failure to act) involved a high degree of probability that it would result in death;**

3. **At the time (he/she) (acted/ [or] failed to act), (he/she) knew (his/her) (act/ [or] failure to act) was dangerous to human life;**

AND

4. **(He/She) deliberately (acted/ [or] failed to act) with conscious disregard for (human/ [or] fetal) life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

[It is not necessary that the defendant be aware of the existence of a fetus to be guilty of murdering that fetus.]

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

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

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

[(A/An) _____<*insert description of person owing duty*> **has a legal duty to (help/care for/rescue/warn/maintain the property of/** _____ <*insert other required action[s]*>**)** _____<*insert description of decedent/person to whom duty is owed*>**.]**

<Give the following bracketed paragraph if the second degree is the only possible degree of the crime for which the jury may return a verdict>

[If you find the defendant guilty of murder, it is murder of the second degree.]

<Give the following bracketed paragraph if there is substantial evidence of first degree murder>

[If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. ___ *<insert number of appropriate first degree murder instruction>*.**]**

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*New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017, March 2019, September 2019, March 2021, March 2024, September 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction and definition in the second bracketed causation paragraph. (See *People v. Carney* (2023) 14 Cal.5th 1130, 1138–1139 [310 Cal.Rptr.3d 685, 532 P.3d 696]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give element 1B. Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *First Degree Murder*. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first degree felony murder, instruct on that crime and give CALCRIM No. 548, *Murder: Alternative Theories*.

AUTHORITY

- Elements. Pen. Code, § 187.
- Malice. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- "Dangerous to Human Life" Defined. *People v. Reyes* (2023) 14 Cal.5th 981, 989 [309 Cal.Rptr.3d 832, 531 P.3d 357].
- Causation. *People v. Carney* (2023) 14 Cal.5th 1130, 1137–1139 [310 Cal.Rptr.3d 685, 532 P.3d 696] [concurrent causation]; *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274] [successive causation].
- "Fetus" Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice. *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Prior Version of This Instruction Upheld. *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).

- Attempted Murder. Pen. Code, §§ 663, 189.
- Sentence Enhancements and Special Circumstances Not Considered in Lesser Included Offense Analysis. *People v. Boswell* (2016) 4 Cal.App.5th 55, 59-60 [208 Cal.Rptr.3d 244].

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) and vehicular manslaughter (Pen. Code, § 192(c)) are not lesser included offenses of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Bettasso* (2020) 49 Cal.App.5th 1050, 1059 [263 Cal.Rptr.3d 563].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry, supra,* 37 Cal.App.4th at pp. 362–363; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts, supra,* 2 Cal.4th at p. 315 [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result"].)

Second Degree Murder of a Fetus

The defendant does not need to know a woman is pregnant to be convicted of second degree murder of her fetus. (*People v. Taylor* (2004) 32 Cal.4th 863, 868 [11 Cal.Rptr.3d 510, 86 P.3d 881] ["[t]here is no requirement that the defendant specifically know of the existence of each victim"].) "[B]y engaging in the conduct he did, the defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

Youth as a Factor for Implied Malice

In *People v. Pittman* (2023) 96 Cal.App.5th 400, 416–418 [314 Cal.Rptr.3d 409], the court considered the role of youth — commonly defined as 25 years or younger — in analyzing a resentencing petition under Penal Code section 1172.6 where the defendant was 21 years old at the time of the offense. The court

concluded that youth was a relevant factor and remanded the case for the trial court to consider whether the defendant's youth had impacted his ability to form the requisite mental state for implied malice second degree murder. (*Id.* at p. 418.) In reaching this conclusion, *Pittman* relied on a series of cases that found youth relevant to reckless indifference determination in the felony murder context. That line of cases can be found in the authority section of No. 540B, *Felony Murder: First Degree – Coparticipant Allegedly Committed Fatal Act*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 96-101, 112-113.

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

522. Provocation: Effect on Degree of Murder

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

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

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

*New January 2006; Revised April 2011, March 2017, September 2023, September 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811] [court adequately instructed on relevance of provocation to whether defendant acted with intent to torture for torture murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-880 [48 Cal.Rptr.3d 1, 141 P.3d 135].) This is a pinpoint instruction, to be given on request where evidence supports the theory. (*People v. Thomas* (2023) 14 Cal.5th 327, 384 [304 Cal.Rptr.3d 1, 523 P.3d 323].)

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

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

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

AUTHORITY

- Provocation Reduces From First to Second Degree. *People v. Thomas, supra,* 25 Cal.2d at p. 903; see also *People v. Cole, supra,* 33 Cal.4th at pp. 1211–1212.
- Pinpoint Instruction. *People v. Rogers, supra,* 39 Cal.4th at pp. 877–878.
- This Instruction Upheld. *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333-1335 [107 Cal.Rptr.3d 915].
- Victim, Not Third Party, Must Be Reason for Provocation. *People v. Verdugo* (2010) 50 Cal.4th 263, 294 [113 Cal.Rptr.3d 803, 236 P.3d 1035] [murder to manslaughter]; *People v. Nunez* (2023) 97 Cal.App.5th 362, 370 [315 Cal.Rptr.3d 452] [first degree to second degree murder].

SECONDARY SOURCES

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

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

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

562. Transferred Intent

<A. Only unintended victim is killed.>
[If the defendant intended to kill one person, but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed.]

<B. Both intended and unintended victims are killed.>
[If the defendant intended to kill one person, but by mistake or accident also killed someone else, then the crime, if any, is the same for the unintended killing as it is for the intended killing.]

*New January 2006; Revised September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if transferred intent is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].)

Give optional paragraph A if only an unintended victim is killed. Give optional paragraph B if both the intended victim and an unintended victim or victims are killed. (See discussion in Commentary, below.)

Any defenses that apply to the intended killing apply to the unintended killing as well. (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628].) This includes defenses that decrease the level of culpable homicide such as heat of passion or imperfect self-defense.

Do not give this instruction for a charge of attempted murder. The transferred intent doctrine does not apply to attempted murder. A defendant's guilt of attempted murder must be judged separately for each alleged victim. (*People v. Bland* (2002) 28 Cal.4th 313, 327–328, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107]; see CALCRIM No. 600, *Attempted Murder*.)

Related Instructions

Always give the appropriate related homicide instructions.

AUTHORITY

- Common Law Doctrine of Transferred Intent. *People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628].
- Senate Bill 1437 Revisions to Homicide Liability Did Not Abrogate Doctrine. *People v. Lopez* (2024) 99 Cal.App.5th 1242, 1247–1250 [318 Cal.Rptr.3d 625].

COMMENTARY

Intent Transfers to Unintended Victim

"[A] person's intent to kill the intended target is not 'used up' once it is employed to convict the person of murdering that target. It can also be used to convict of the murder of others the person also killed. . . . [A]ssuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree. . . . Intent to kill transfers to an unintended homicide victim even if the intended target is killed." (*People v. Bland* (2002) 28 Cal.4th 313, 322, 323–324, 326 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [disapproving *People v. Birreuta* (1984) 162 Cal.App.3d 454, 458, 463 [208 Cal.Rptr. 635]].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 13–15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[2][b][vii] (Matthew Bender).

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

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.

New January 2006; Revised December 2008, February 2014, August 2015, September 2024

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].)

If the victim's gender identity or sexual orientation raises specific issues concerning whether provocation was objectively reasonable, give an instruction tailored to those issues on request. (Pen. Code, § 192(f)~~, amended effective January 1, 2015~~.)

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].

- Gender Identity and Sexual Orientation Not Proper Basis for Finding Provocation Objectively Reasonable. Pen. Code, § 192(f)~~, amended effective January 1, 2015~~.

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.Rtpr.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, evidence has been found inadequate to warrant instruction on provocation: 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]); calling someone a particular epithet (*People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 [36 Cal.Rptr.3d 340, 123 P.3d 614]); 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*, *supra*, ~~(1998)~~ 19 Cal.4th at p.~~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*, *supra*, ~~(1998)~~ 19 Cal.4th at pp.~~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].)

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*.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person §§ 111, 224, 226-245.

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).

640. Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide

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[For each count charging murder,] (Y/y)ou (have been/will be) given verdict forms for guilty and not guilty of first degree murder (, /and) [second degree murder] [(, /and)] [voluntary manslaughter] [(, /and)] [involuntary manslaughter].

It is up to you to decide the order in which y~~Y~~ou ~~may~~ consider these different kinds of homicide ~~in whatever order you wish,~~ and the relevant evidence. For example, you do not have to reach a verdict on the first degree murder charge[s] before considering the (second degree murder[,]/ [(and/or)] voluntary manslaughter[,]/ (and/or) involuntary manslaughter) charge[s]. However, ~~but~~ I can accept a verdict of guilty or not guilty of _____ <*insert second degree murder or, if the jury is not instructed on second degree murder as a lesser included offense, each form of manslaughter, voluntary and/or involuntary, on which the jury is instructed***> only if all of you have found the defendant not guilty of first degree murder, [and I can accept a verdict of guilty or not guilty of (voluntary/involuntary/voluntary or involuntary) manslaughter only if all of you have found the defendant not guilty of both first and second degree murder].**

[As with all of the charges in this case,] (To/to) return a verdict of guilty or not guilty on a count, you must all agree on that decision.

Follow these directions before you give me any completed and signed final verdict form[s]. [Return the unused verdict form[s] to me, unsigned.]

1. **If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms [for that count].**

2. **If all of you cannot agree whether the defendant is guilty of first degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].**

<*In addition to paragraphs 1-2, give the following if the jury is instructed on second degree murder as a lesser included offense.***>**

[3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and the form for guilty of second degree murder. Do not complete or sign any other verdict forms [for that count].

4. If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].]

<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder as the only lesser included offense. >

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the verdict forms for not guilty of both. Do not complete or sign any other verdict forms [for that count].]

< In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and only one form of manslaughter (voluntary or involuntary) as lesser included offenses.>

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder and the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].

6. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder and

inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

7. If all of you agree that the defendant is not guilty of first degree murder, not guilty of second degree murder, and not guilty of (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms [for that count].]

<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and <u>both</u> voluntary and involuntary manslaughter as lesser included offenses.>

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder.

6. If all of you agree on a verdict of guilty or not guilty of voluntary or involuntary manslaughter, complete and sign the appropriate verdict form for each charge on which you agree. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count]. Do not complete or sign any other verdict forms [for that count].

7. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]

<*In addition to paragraphs 1-2, give the following if the jury is not instructed on second degree murder and the jury is instructed on <u>one</u> form of manslaughter (voluntary or involuntary) as the <u>only</u> lesser included offense.****>***

[3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for not guilty of first degree murder and the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].

4. If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for not guilty of first degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

5. If all of you agree that the defendant is not guilty of first degree murder or (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms [for that count].]

<In addition to paragraphs 1-2, give the following if the jury is instructed on both voluntary and involuntary manslaughter, but not second degree murder, as lesser included offenses.>

[3. If all of you agree that the defendant is not guilty of first degree murder, complete and sign the form for not guilty of first degree murder.

4. If all of you agree on a verdict of guilty or not guilty of voluntary or involuntary manslaughter, complete and sign the appropriate verdict form for each charge on which you agree. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count]. Do not complete or sign any other verdict forms [for that count].

5. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]

New January 2006; Revised April 2008, August 2009, September 2024

BENCH NOTES

Instructional Duty

In all homicide cases in which the defendant is charged with first degree murder and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not*

to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)*

If the court chooses to follow the procedure suggested in *Stone,* the court may give this instruction or CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, in place of this instruction.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court's instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra,* 13 Cal.4th at p. 307; Pen. Code, § 1023.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 330–331.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909 [98 Cal.Rptr.2d 431, 4 P.3d 265].)

AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; *People v. Breverman, supra,* (1998) 19 Cal.4th at p.142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Degree to Be Set by Jury. Pen. Code, § 1157; *People v. Avalos, supra,* (1984) 37 Cal.3d at p.216, 228 [207 Cal.Rptr. 549, 689 P.2d 121]; *People v. Dixon, supra,* (1979) 24 Cal.3d at p.43, 52 [154 Cal.Rptr. 236, 592 P.2d 752].
- Reasonable Doubt as to Degree. Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry, supra,* (1959) 51 Cal.2d at pp.548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Re-trial on Greater. Pen. Code, § 1023; *People v. Fields, supra,* (1996) 13 Cal.4th at pp.289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman, supra,* (1988) 46 Cal.3d at p.322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields, supra,* (1996) 13 Cal.4th at p.289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall, supra,* (1996) 13 Cal.4th at p.799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court, supra,* (1982) 31 Cal.3d at p.503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].
- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter. *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 713.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

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

641. Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses

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[For each count charging (murder/ manslaughter),] (Y/y)ou (have been/will be) given verdict forms for [guilty of first degree murder][,] [guilty of second degree murder][,] [guilty of voluntary manslaughter][,] [guilty of involuntary manslaughter][,] and not guilty.

It is up to you to decide the order in which ~~Y~~you ~~may~~ consider these different kinds of homicide ~~in whatever order you wish,~~ and the relevant evidence. For example, you do not have to reach a verdict on the first degree murder charge[s] before considering the (second degree murder[,]/ [(and/or)] voluntary/involuntary) manslaughter charge[s]. However, ~~but~~ I can accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of [all of] the greater crime[s].

[As with all the charges in this case,] (To/to) return a verdict of guilty or not guilty on a count, you must all agree on that decision.

Follow these directions before you give me any completed and signed, final verdict form. You will complete and sign only one verdict form [per count]. [Return the unused verdict forms to me, unsigned.]

1. **If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms [for that count].**

2. **If all of you cannot agree whether the defendant is guilty of first degree murder, inform me only that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].**

   <*In addition to paragraphs 1-2, give the following if the jury is instructed on second degree murder as a lesser included offense.***>**

3. **[If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree**

murder, complete and sign the form for guilty of second degree murder. Do not complete or sign any other verdict forms [for that count].]

4. **If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of second degree murder, inform me that you cannot reach agreement [on that count]. Do not complete or sign any verdict forms [for that count].**

<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder as the only lesser included offense.>

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the not guilty verdict form.] Do not complete or sign any other verdict forms [for that count].

< In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and only one form of manslaughter (voluntary or involuntary) as lesser included offenses. >

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].

6. **If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, inform me that you cannot reach agreement [on that count]. Do not complete or sign any verdict forms [for that count].**

7. **If all of you agree that the defendant is not guilty of first degree murder, not guilty of second degree murder, and not guilty of (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty. Do not complete or sign any other verdict forms [for that count].]**

<In addition to paragraphs 1-2, give the following if the jury is not instructed on second degree murder and the jury is instructed on one form of manslaughter (voluntary or involuntary) as the only lesser included offense.>

[3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].

4. If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, inform me that you cannot reach agreement [for that count]. Do not complete or sign any verdict forms [for that count].

5. If all of you agree that the defendant is not guilty of first degree murder or (voluntary/involuntary) manslaughter, complete and sign the verdict form for not guilty. Do not complete or sign any other verdict forms [for that count].]

<If the jury is instructed on both voluntary and involuntary manslaughter as lesser included offenses, whether the jury is instructed on second degree murder or not, the court must give the jury guilty and not guilty verdict forms as to first degree murder and all lesser crimes, and instruct pursuant to CALCRIM 640.>

New January 2006; Revised April 2008, August 2009, September 2024

BENCH NOTES

Instructional Duty

In all homicide cases in which the defendant is charged with first degree murder and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When the Defendant Is Charged With First Degree Murder and the Jury Is Given Not Guilty Forms for Each Level of Homicide*. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses];

People v. Dewberry (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give this instruction. If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must provide the jury an opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.) In such cases, the court must give CALCRIM No. 640 and must provide the jury with verdict forms of guilty/not guilty for each offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

If the greatest offense charged is second degree murder, the court should give CALCRIM 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses* instead of this instruction.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court's instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra,* 13 Cal.4th at p. 307; Pen. Code, § 1023.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to re-try the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than re-try the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 322, 330.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909 [98 Cal.Rptr.2d 431, 4 P.3d 265].)

AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; *People v. Breverman, supra,* ~~(1998)~~ 19 Cal.4th at p.~~142,~~ 162~~ [77 Cal.Rptr.2d 870, 960 P.2d 1094]~~.
- Degree to Be Set by Jury. Pen. Code, § 1157; *People v. Avalos, supra,* ~~(1984)~~ 37 Cal.3d at p.~~216,~~ 228~~ [207 Cal.Rptr. 549, 689 P.2d 121]~~; *People v. Dixon, supra,* ~~(1979)~~ 24 Cal.3d at p.~~43,~~ 52~~ [154 Cal.Rptr. 236, 592 P.2d 752]~~.
- Reasonable Doubt as to Degree. Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry, supra,* ~~(1959)~~ 51 Cal.2d at pp.~~548,~~ 555–557~~ [334 P.2d 852]~~.
- Conviction of Lesser Precludes Re-trial on Greater. Pen. Code, § 1023; *People v. Fields, supra,* ~~(1996)~~ 13 Cal.4th at pp.~~289,~~ 309–310~~ [52 Cal.Rptr.2d 282, 914 P.2d 832]~~; *People v. Kurtzman, supra,* ~~(1988)~~ 46 Cal.3d at p.~~322,~~ 329~~ [250 Cal.Rptr. 244, 758 P.2d 572]~~.
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields, supra,* ~~(1996)~~ 13 Cal.4th at p.~~289,~~ 310~~ [52 Cal.Rptr.2d 282, 914 P.2d 832]~~.
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall, supra,* ~~(1996)~~ 13 Cal.4th at p.~~799,~~ 826~~ [55 Cal.Rptr.2d 347, 919 P.2d 1280]~~; *Stone v. Superior Court, supra,* ~~(1982)~~ 31 Cal.3d at p.~~503,~~ 519~~ [183 Cal.Rptr. 647, 646 P.2d 809]~~.
- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter. *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 713.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

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

642. Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide

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[For each count charging second degree murder,] (Y/y)ou (have been/will be) given verdict forms for guilty and not guilty of second degree murder (, /and) [voluntary manslaughter (, /and)] [involuntary manslaughter].

It is up to you to decide the order in which y~~Y~~ou ~~may~~ consider these different kinds of homicide ~~in whatever order you wish,~~and the relevant evidence. For example, you do not have to reach a verdict on the murder charge[s] before considering the (voluntary manslaughter/ [(and/or)] involuntary manslaughter) charge[s]. However, ~~but~~ I can accept a verdict of guilty or not guilty of [voluntary] [or] [involuntary] manslaughter only if all of you have found the defendant not guilty of second degree murder.

[As with all of the charges in this case,] (To/to) return a verdict of guilty or not guilty on a count, you must all agree on that decision.

Follow these directions before you give me any completed and signed final verdict form[s]. -[Return the unused verdict form[s] to me, unsigned.]

1. **If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of second degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms [for that count].**

2. **If all of you cannot agree whether the defendant is guilty of second degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].**

   <In addition to paragraphs 1–2, give the following if the jury is instructed on only one form of manslaughter (voluntary or involuntary) as a lesser included offense.>

[3. If all of you agree that the defendant is not guilty of second degree murder but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for not guilty of second degree murder and the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].

4. If all of you agree that the defendant is not guilty of second degree murder but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for not guilty of second degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

5. If all of you agree that the defendant is not guilty of second degree murder and not guilty of (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty of both.]

<In addition to paragraphs 1–2, give the following if the jury is instructed on <u>both</u> voluntary and involuntary manslaughter as lesser included offenses.>

[3. If all of you agree that the defendant is not guilty of second degree murder, complete and sign the form for not guilty of second degree murder.

4. If all of you agree on a verdict of guilty or not guilty of voluntary manslaughter or involuntary manslaughter, complete and sign the appropriate verdict form foreach charge on which you agree. Do not complete or sign any other verdict forms [for that count]. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count].

5. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]

BENCH NOTES

Instructional Duty

In all homicide cases in which second degree murder is the greatest offense charged and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)*

If the court chooses not to follow the procedure suggested in *Stone,* the court may give CALCRIM No. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses,* in place of this instruction.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court's instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the

defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra,* 13 Cal.4th at p. 307; Pen. Code, § 1023.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 330–331.)

AUTHORITY

- Lesser Included Offenses-Duty to Instruct. Pen. Code, § 1159; *People v. Breverman, supra,* ~~(1998)~~ 19 Cal.4th at p.~~142,~~ 162 ~~[77 Cal.Rptr.2d 870, 960 P.2d 1094]~~.
- Degree to Be Set by Jury. Pen. Code, § 1157; *People v. Avalos, supra,* ~~(1984)~~ 37 Cal.3d at p.~~216,~~ 228 ~~[207 Cal.Rptr. 549, 689 P.2d 121]~~; *People v. Dixon, supra,* ~~(1979)~~ 24 Cal.3d at p.~~43,~~ 52 ~~[154 Cal.Rptr. 236, 592 P.2d 752]~~.
- Reasonable Doubt as to Degree. Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry, supra,* ~~(1959)~~ 51 Cal.2d at pp.~~548,~~ 555–557 ~~[334 P.2d 852]~~.
- Conviction of Lesser Precludes Re-trial on Greater. Pen. Code, § 1023; *People v. Fields, supra,* ~~(1996)~~ 13 Cal.4th at pp.~~289,~~ 309–310 ~~[52 Cal.Rptr.2d 282, 914 P.2d 832]~~; *People v. Kurtzman, supra,* ~~(1988)~~ 46 Cal.3d at p.~~322,~~ 329 ~~[250 Cal.Rptr. 244, 758 P.2d 572]~~.
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields, supra,* ~~(1996)~~ 13 Cal.4th at p.~~289,~~ 310 ~~[52 Cal.Rptr.2d 282, 914 P.2d 832]~~.
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall, supra,* ~~(1996)~~ 13 Cal.4th at p.~~799,~~ 826 ~~[55 Cal.Rptr.2d 347, 919 P.2d 1280]~~; *Stone v. Superior Court, supra,* ~~(1982)~~ 31 Cal.3d at p.~~503,~~ 519 ~~[183 Cal.Rptr. 647, 646 P.2d 809]~~.

- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter. *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 713.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

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

643. Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses

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[For each count charging second degree murder,] (Y/y)ou (have been/will be) given verdict forms for guilty of second degree murder, guilty of (voluntary /involuntary) manslaughter and not guilty.

It is up to you to decide the order in which ~~Y~~you ~~may~~ consider these different kinds of homicide and the relevant evidence. ~~in whatever order you wish,~~ You do not have to reach a verdict on the murder charge[s] before considering the (voluntary/involuntary) manslaughter charge[s]. However, ~~but~~ I can accept a verdict of guilty of (voluntary/involuntary) manslaughter only if all of you have found the defendant not guilty of second degree murder.

[As with all the charges in this case,] (To/to) return a verdict of guilty or not guilty on a count, you must all agree on that decision.

Follow these directions before you give me any completed and signed, final verdict form. You will complete and sign only one verdict form [per count]. [Return the unused verdict forms to me, unsigned.]

1. **If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of second degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms [for that count].**

2. **If all of you cannot agree whether the defendant is guilty of second degree murder, inform me only that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].**

3. **If all of you agree that the defendant is not guilty of second degree murder, but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].**

4. If all of you agree that the defendant is not guilty of second degree murder and cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, inform me that you cannot reach agreement [on that count]. Do not complete or sign any other verdict forms [for that count].

5. If all of you agree that the defendant is not guilty of second degree murder and not guilty of (voluntary/involuntary) manslaughter, complete and sign the verdict form for not guilty. Do not complete or sign any other verdict forms [for that count].

<If the jury is instructed on both voluntary and involuntary manslaughter as lesser included offenses, this instruction may not be used. The court must give the jury guilty and not guilty verdict forms as to second degree murder and each form of manslaughter, and must instruct pursuant to CALCRIM 642.>

New August 2009; Revised September 2024

BENCH NOTES

Instructional Duty

In all homicide cases in which the greatest offense charged is second degree murder and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide.* (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give this instruction. If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must provide the jury an opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.) In such cases, the court must give CALCRIM No. 642 and must provide the jury with verdict forms of guilty/not guilty for each offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court's instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra,* 13 Cal.4th at p. 307; Pen. Code, § 1023.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to re-try the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than re-try the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 322, 330.)

AUTHORITY

- Lesser Included Offenses-Duty to Instruct. Pen. Code, § 1159; *People v. Breverman, supra,* (1998) 19 Cal.4th at p.142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Degree to Be Set by Jury. Pen. Code, § 1157; *People v. Avalos, supra,* (1984) 37 Cal.3d at p.216, 228 [207 Cal.Rptr. 549, 689 P.2d 121]; *People v. Dixon, supra,* (1979) 24 Cal.3d at p.43, 52 [154 Cal.Rptr. 236, 592 P.2d 752].
- Reasonable Doubt as to Degree. Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry, supra,* (1959) 51 Cal.2d at pp.548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Re-trial on Greater. Pen. Code, § 1023; *People v. Fields, supra,* (1996) 13 Cal.4th at pp.289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman, supra,* (1988) 46 Cal.3d at p.322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields, supra,* (1996) 13 Cal.4th at p.289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall, supra,* (1996) 13 Cal.4th at p.799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court, supra,* (1982) 31 Cal.3d at p.503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].
- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter. *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 713.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

AND

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

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

As used here, members *collectively engage in or have engaged in* a pattern of criminal gang activity when the crimes that make up the pattern of criminal gang activity can be connected to the gang as a whole. Collective engagement requires a connection between the crimes and the gang's organizational structure, manner of governance, primary activities, or common goals and principles.

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

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

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

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

New January 2006; Revised August 2006, June 2007, February 2014, February 2016, March 2022, March 2023, September 2024

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

Related Instructions

CALCRIM No. 562, *Transferred Intent.*

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

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(22).
- "Active Participation" Defined. *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- "Criminal Street Gang" Defined. Pen. Code, § 186.22(f).
- "Collectively Engage" Defined. *People v. Clark* (2024) 15 Cal.5th 743, 749 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- "Organized" Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- Transferred Intent Under Penal Code Section 190.2(a)(22). *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- "Pattern of Criminal Gang Activity" Defined. Pen. Code, § 186.22(e), (g).
- Examples of Common Benefit. Pen. Code, § 186.22(g).
- "Felonious Criminal Conduct" Defined. *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by

People v. Castenada (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].

- Separate Intent From Underlying Felony. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].
- Amendment to Penal Code Section 186.22 Definition of Criminal Street Gang Did Not Unconstitutionally Amend Penal Code Section 190.2(a)(22). *People v. Rojas* (2023) 15 Cal.5th 561, 580 [316 Cal.Rptr.3d 61, 539 P.3d 468].

RELATED ISSUES

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

The criminal street gang special circumstance applies when a participant in a criminal street gang intends to kill one person but kills someone else by mistake. *People v. Shabazz, supra,* 38 Cal.4th at p. 66; see CALCRIM No. 562, *Transferred Intent*.

SECONDARY SOURCES

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

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

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

852A. Evidence of Uncharged Domestic Violence

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 (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/ [or] child[,]/ [or] grandchild[,]/ [or] parent[,]/ [or] grandparent[,]/ [or] brother[,]/ [or] sister[,]/ [or] father-in-law[,]/ [or] mother-in-law[,]/ [or] brother-in-law[,]/ [or] sister-in-law[,]/ [or] son-in-law[,]/ [or] daughter-in-law[,]/ [or] _____<*insert relationship of consanguinity or affinity within the second degree***>**) of the defendant.]**

Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, [or] [committing sexual assault][,] [or] placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else[, or engaging in _____<insert behavior that was or could be enjoined pursuant to Fam. Code, § 6320>***].**

[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.]

<*Definition of cohabitant under Pen. Code § 13700(b)>*
[The term *cohabitant* means a person who lives with an unrelated person 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 spouses , (5)

the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.]

<*Definition of cohabitant under Fam. Code § 6209***>**
[The term *cohabitant* means a person who regularly resides in the household. *Former cohabitant* means a person who formerly regularly resided in the household.]

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, February 2014, March 2017, October 2021, September 2024**
** Denotes changes only to bench notes and other commentaries.*

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 subdivision (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. Give the bracketed portions in the definition of "abuse" if the evidence is admissible pursuant to Family Code section 6211.

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. 1191A, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 1191B, *Evidence of Charged Sex Offense*.

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

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

CALCRIM No. 853B, *Evidence of Charged 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, supra,* ~~(1999)~~ 21 Cal.4th at pp.~~903,~~ 923–924 ~~[89 Cal.Rptr.2d 847, 986 P.2d 182]~~ [dictum].
- "Abuse" Defined. Pen. Code, § 13700(a); Fam. Code, § 6203; *People v. Kovacich* (2011) 201 Cal.App.4th 863, 894–895 [133 Cal.Rptr.3d 924].
- "Cohabitant" Defined. Pen. Code, § 13700(b); Fam. Code, § 6209.
- "Dating Relationship" Defined. Fam. Code, § 6210.
- Determining Degree of Consanguinity. Prob. Code, § 13.
- "Affinity" Defined.~~.~~ Fam. Code, § 6205.
- "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, supra,* ~~(2000)~~ 81 Cal.App.4th at p.~~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, supra,* ~~(2000)~~ 81 Cal.App.4th at pp.~~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].

- Charged Sex Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186-1186 [206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].
- ~~Previous Version of~~ This Instruction Upheld. ~~*People v. Johnson* (2008) 164 Cal.App.4th 731, 738 [79 Cal.Rptr.3d 568]~~*People v. Panighetti* (2023) 95 Cal.App.5th 978, 1000 [313 Cal.Rptr.3d 798].
- 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].

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*, *supra,* ~~(2000)~~ 81 Cal.App.4th at p.~~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*, *supra,* ~~(1999)~~ 21 Cal.4th at pp.~~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*, *supra,* ~~(2000)~~ 81 Cal.App.4th at pp.~~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*.

SECONDARY SOURCES

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

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 101, 102.

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).

938. Sexual Battery: Misdemeanor (Pen. Code, § 243.4(e)(1))

The defendant is charged [in Count __] with sexual battery [in violation of Penal Code section 243.4(e)(1)].

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

1. **The defendant touched an intimate part of _____** *<insert name of complaining witness>***;**

2. **The touching was done against _____'s** *<insert name of complaining witness>* **will;**

AND

3. **The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.**

An *intimate part* is a female's breast or the anus, groin, sexual organ, or buttocks of anyone.

***Touching*, as used here, means making physical contact with another person. *Touching* includes contact made through the clothing.**

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[*Sexual abuse* includes touching a person's intimate part[s] (to insult, humiliate, or intimidate that person for a sexual purpose/ [or] to physically harm the person for a sexual purpose).]

<Defense: Reasonable Belief in Consent>
[The defendant is not guilty of sexual battery if (he/she) actually and reasonably believed that the other person consented to the touching [and actually and reasonably believed that (he/she) consented throughout the act of touching]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006, Revised February 2016, September 2017, September 2024

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to instruct on the defense of mistaken but honest and 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. Andrews* (2015) 234 Cal.App.4th 590, 602 [184 Cal.Rptr.3d 183]; following *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].)

Give the bracketed definition of "against a person's will" on request.

AUTHORITY

- Elements. Pen. Code, § 243.4(e)(1).
- "Touches" Defined. Pen. Code, § 243.4(e)(2).
- "Intimate Part" Defined. Pen. Code, § 243.4(g)(1).
- "Consent" Defined. Pen. Code, §§ 261.6, 261.7.
- Specific-Intent Crime. *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Defendant Must Touch Intimate Part of Victim. *People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].
- Defendant Need Not Touch Skin. *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [40 Cal.Rptr.2d 391].
- Sexual Abuse Includes Insulting, Intimidating, or Humiliating. *In re Shannon T.* (2006) 144 Cal.App.4th 618, 622 [50 Cal.Rptr.3d 564].

LESSER INCLUDED OFFENSES

- Misdemeanor sexual battery is not a lesser included offense of sexual battery by misrepresentation of professional purpose under the statutory elements test. *People v. Robinson* (2016) 63 Cal.4th 200, 210–213 [202 Cal.Rptr.3d 485, 370 P.3d 1043].

- Attempted sexual battery is not a lesser included offense of sexual battery by fraudulent representation. *People v. Babaali* (2009) 171 Cal.App.4th 982, 1000 [90 Cal.Rptr.3d 278].

~~COMMENTARY~~

~~In a case addressing the meaning of for the "purpose of . . . sexual abuse" in the context of Penal Code section 289, one court has stated that "when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever." (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes that this reasoning applies to the crime of sexual battery and a party requests a definition of "sexual abuse," the following language may be used:~~

> ~~*Sexual abuse* means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.~~

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[2] (Matthew Bender).

939–944. Reserved for Future Use

960. Simple Battery (Pen. Code, § 242)

The defendant is charged with battery [in violation of Penal Code section 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/ [or] by touching something held by or attached to the other person).]

New January 2006; Revised August 2013, February 2014, March 2017, September 2024

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; 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].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

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.)

Related Instruction

CALCRIM No. 917, *Insulting Words Are Not a Defense.*

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).

961–964. Reserved for Future Use

1191A. Evidence of Uncharged Sex Offense

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*>].]

*New January 2006; Revised April 2008, February 2013, February 2014, March 2017, September 2019, September 2024**

** Denotes changes only to bench notes and other commentaries.*

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].)

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. 1191B, *Evidence of Charged Sex Offense*.

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

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

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

CALCRIM No. 853B, *Evidence of Charged Abuse of 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, supra,* 21 Cal.4th at pp. 923–924 [dictum].
- ~~Previous Version of 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].~~

- This Instruction Upheld. *People v. Panighetti* (2023) 95 Cal.App.5th 978, 999–1000 [313 Cal.Rptr.3d 798]; *People v. Phea* (2018) 29 Cal.App.5th 583, 614 [240 Cal.Rptr.3d 526].
- "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, supra,* 81 Cal.App.4th at p. 1359; *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, supra,* 81 Cal.App.4th at pp. 1357–1358, fn. 8 [same].
- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186-1186, 206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].

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, supra,* 81 Cal.App.4th at p. 1357, fn. 8 [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, supra,* ~~(1999)~~ 21 Cal.4th at pp.~~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*.

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 98–100.

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).

1193. Testimony on Child Sexual Abuse Accommodation Syndrome

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

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

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

You may consider this evidence only in deciding whether or not _____'s <*insert name of alleged victim of abuse*> **conduct was consistent with the conduct of someone who has been molested, and in evaluating the believability of the alleged victim.**

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*New January 2006; Revised August 2016, April 2020, March 2021, September 2022, September 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

Related Instructions

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

AUTHORITY

- Eliminate Juror Misconceptions or Rebut Attack on Victim's Credibility. *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394 [249 Cal.Rptr. 886].
- Previous Version of This Instruction Upheld. *People v. Ortiz* (2023) 96 Cal.App.5th 768, 815–816 [314 Cal.Rptr.3d 732]; *People v. Lapenias* (2021) 67 Cal.App.5th 162, 175–176 [282 Cal.Rptr.3d 79]; *People v. Munch* (2020) 52 Cal.App.5th 464, 473–474 [266 Cal.Rptr.3d 136]; *People v. Gonzales* (2017) 16 Cal.App.5th 494, 504 [224 Cal.Rptr.3d 421].

COMMENTARY

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

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

RELATED ISSUES

Expert Testimony Regarding Parent's Behavior

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

SECONDARY SOURCES

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

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

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

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

1202. Kidnapping: For Ransom, Reward, Extortion or to Exact From Another Person (Pen. Code, § 209(a))

The defendant is charged [in Count __] with kidnapping (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get from a different person money or something valuable) [that resulted in (death[,]/ [or] bodily harm[,]/ [or] exposure to a substantial likelihood of death)] [in violation of Penal Code section 209(a)].

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

1. **The defendant (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed) a person;**

<Alternative 2A—held or detained>

[2. The defendant held or detained that person;]

<Alternative 2B—intended to hold or detain that person>

[2. When the defendant acted, (he/she) intended to hold or detain that person;]

3. **The defendant did so (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get from a different person money or something valuable);**

   [AND]

4. **The person did not consent to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed)(;/.)**

<Give element 5 if instructing on reasonable belief in consent.>

   [AND

5. **The defendant did not actually and reasonably believe that the person consented to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed).]**

[It is not necessary that the person be moved for any distance.]

[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

<Defense: Good Faith Belief in Consent>
[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>
[The defendant is not guilty of kidnapping if the person consented to go with the defendant. The person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient mental capacity to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.]

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the person withdrew consent, the defendant committed the crime as I have defined it.]

[Someone intends to commit *extortion* if he or she intends to: (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone intends to commit *extortion* if he or she: (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act.] [An *official act* is an act that a person does in his or her official capacity using the authority of his or her public office.]

<Sentencing Factor>
[If you find the defendant guilty of kidnapping (for ransom [,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get from a different person money or something valuable), you must then decide whether the People have proved the additional allegation that the defendant (caused the kidnapped

person to (die/suffer bodily harm)/ [or] intentionally confined the kidnapped person in a way that created a substantial likelihood of death).

[*Bodily harm* means any substantial physical injury resulting from the use of force that is more than the force necessary to commit kidnapping.]

[The defendant caused _____'s <*insert name of allegedly kidnapped person*> **(death/bodily harm) if:**

1. **A reasonable person in the defendant's position would have foreseen that the defendant's use of force or fear could begin a chain of events likely to result in _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm);**

2. **The defendant's use of force or fear was a direct and substantial factor in causing _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm);**

AND

3. **_____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm) would not have happened if the defendant had not used force or fear to hold or detain _____** <*insert name of allegedly kidnapped person*>**.**

A *substantial factor* is more than a trivial or remote factor. However, it need not have been the only factor that caused _____'s <*insert name of allegedly kidnapped person*> **(death/bodily harm).]**

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

New January 2006; Revised April 2011, February 2015, March 2017, September 2020, March 2021, September 2024

BENCH NOTES

Instructional Duty

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

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), the court has a **sua sponte** duty to instruct on the sentencing factor. (See *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762] [bodily harm defined]); see also *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318 [76 Cal.Rptr.2d 160] [court must instruct on general principles of law relevant to issues raised by the evidence].) The court must also give the jury a verdict form on which the jury can indicate whether this allegation has been proved. If causation is an issue, the court has a **sua sponte** duty to give the bracketed section that begins "The defendant caused." (See Pen. Code, § 209(a); *People v. Monk* (1961) 56 Cal.2d 288, 296 [14 Cal.Rptr. 633, 363 P.2d 865]; *People v. Reed* (1969) 270 Cal.App.2d 37, 48–49 [75 Cal.Rptr. 430].)

Give the bracketed definition of "consent" on request.

Give alternative 2A if the evidence supports the conclusion that the defendant actually held or detained the alleged victim. Otherwise, give alternative 2B. (See Pen. Code, § 209(a).)

"Extortion" is defined in Penal Code section 518. If the kidnapping was for purposes of extortion, give one of the bracketed definitions of extortion on request. Give the second definition if the defendant is charged with intending to extort an official act. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition].) It appears that this type of extortion rarely occurs in the context of kidnapping, so it is excluded from this instruction.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The defendant's reasonable and actual belief in the victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].)

Related Instructions

For the elements of extortion, see CALCRIM No. 1830, *Extortion by Threat or Force*.

AUTHORITY

- Elements. Pen. Code, § 209(a).
- Requirement of Lack of Consent. *People v. Eid* (2010) 187 Cal.App.4th 859, 878 [114 Cal.Rptr.3d 520].
- Extortion. Pen. Code, § 518; *People v. Hill*, *supra*, ~~(1983)~~ 141 Cal.App.3d at p.~~661,~~ 668 ~~[190 Cal.Rptr. 628]~~; see *People v. Ordonez*, *supra*, ~~(1991)~~ 226 Cal.App.3d at pp.~~1207,~~ 1229–1230 ~~[277 Cal.Rptr. 382]~~.
- Amount of Physical Force Required. *People v. Chacon* (1995) 37 Cal.App.4th 52, 59 [43 Cal.Rptr.2d 434]; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762].
- "Bodily Injury" Defined. *People v. Chacon*, *supra*, ~~(1995)~~ 37 Cal.App.4th at p.~~52,~~ 59; *People v. Schoenfeld*, *supra*, ~~(1980)~~ 111 Cal.App.3d at pp.~~671,~~ 685–686; see *People v. Reed*, *supra*, ~~(1969)~~ 270 Cal.App.2d at pp.~~37,~~ 48–50 ~~[75 Cal.Rptr. 430]~~ [injury reasonably foreseeable from defendant's act].
- Control Over Victim When Intent Formed. *People v. Martinez* (1984) 150 Cal.App.3d 579, 600–602 [198 Cal.Rptr. 565] [disapproved on other ground in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376].]
- No Asportation Required. *People v. Macinnes* (1973) 30 Cal.App.3d 838, 844 [106 Cal.Rptr. 589]; see *People v. Rayford* (1994) 9 Cal.4th 1, 11–12, fn. 8 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Ordonez*, *supra*, ~~(1991)~~ 226 Cal.App.3d at p.~~1207,~~ 1227 ~~[277 Cal.Rptr. 382]~~.
- "Official Act" Defined. *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Norris*, *supra*, ~~(1985)~~ 40 Cal.3d at pp.~~51,~~ 55–56 ~~[219 Cal.Rptr. 7, 706 P.2d 1141]~~.
- Kidnapping To Extract From Another Person Any Money or Valuable Thing Requires That The Other Person Not Be The Person Kidnapped. *People v.*

Harper (2020) 44 Cal.App.5th 172, 192–193 [257 Cal.Rptr.3d 440]; *People v. Stringer* (2019) 41 Cal.App.5th 974, 983 [254 Cal.Rptr.3d 678].

COMMENTARY

A trial court may refuse to define "reward." There is no need to instruct a jury on the meaning of terms in common usage. Reward means something given in return for good or evil done or received, and especially something that is offered or given for some service or attainment. (*People v. Greenberger, supra,* ~~(1997)~~ 58 Cal.App.4th at pp.~~298,~~ 367–368~~ [68 Cal.Rptr.2d 61]~~.) In the absence of a request, there is also no duty to define "ransom." The word has no statutory definition and is commonly understood by those familiar with the English language. (*People v. Hill, supra,* ~~(1983)~~ 141 Cal.App.3d at p.~~661,~~ 668~~ [190 Cal.Rptr. 628]~~.)

LESSER INCLUDED OFFENSES

- False Imprisonment. Pen. Code, §§ 236, 237; *People v. Chacon, supra,* ~~(1995)~~ 37 Cal.App.4th at p.~~52,~~ 65~~ [43 Cal.Rptr.2d 434]~~; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].
- Extortion. Pen. Code, § 518.
- Attempted Extortion. Pen. Code, §§ 664, 518.
- Multiple Convictions of Lesser Included Offenses of Pen. Code, § 209(a) Possible. *People v. Eid, supra,* ~~(2014)~~ 59 Cal.4th at pp.~~650,~~ 655–658~~ [174 Cal.Rptr.3d 82, 328 P.3d 69]~~.

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), then kidnapping for ransom without death or bodily harm is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the allegation has been proved.

Simple kidnapping under section 207 of the Penal Code is not a lesser and necessarily included offense of kidnapping for ransom, reward, or extortion. (*People v. Greenberger, supra,* ~~(1997)~~ 58 Cal.App.4th at p.~~298,~~ 368, fn. 56~~ [68 Cal.Rptr.2d. 61] ~~[kidnapping for ransom can be accomplished without asportation while simple kidnapping cannot]; see *People v. Macinnes* (1973) 30 Cal.App.3d 838, 843–844 [106 Cal.Rptr. 589]; *People v. Bigelow* (1984) 37 Cal.3d 731, 755, fn. 14 [209 Cal.Rptr. 328, 691 P.2d 994].)

RELATED ISSUES

Extortion Target

The kidnapped victim may also be the person from whom the defendant wishes to extort something. (*People v. Ibrahim* (1993) 19 Cal.App.4th 1692, 1696–1698 [24 Cal.Rptr.2d 269.)

No Good-Faith Exception

A good faith exception to extortion or kidnapping for ransom does not exist. Even actual debts cannot be collected by the reprehensible and dangerous means of abducting and holding a person to be ransomed by payment of the debt. (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305].)

Kidnap for Ransom in Multiple Victim Robbery Case

In *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225], the California Supreme Court held that kidnap for robbery does not include robberies "in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." *People v. Martinez, supra,* 150 Cal.App.3d at pp. 591–594, applied the *Daniels* rationale to a kidnap for ransom case in which the defendants held two victims during a home invasion robbery. In order "to prevent the *Daniels* line of cases from being circumvented by charging what is essentially a multi-victim robbery as a kidnapping for ransom," *Martinez* held that "the movement or restraint of the purported kidnap victim … [must] substantially increase the risk of harm over and above that necessarily present in the crime of the robbery itself." (*Id.* at p. 595.) After *Martinez*, the legislature amended Penal Code section 209 and did not include the word "substantial" with respect to the increased risk. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 979–982 [146 Cal.Rptr.3d 66].) If substantial evidence supports this theory, modify the instruction to include the additional element of legally sufficient movement.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 301–302.

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

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

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]***>).]**

***Depriving or violating another person's personal liberty*, as used here, includes substantial and sustained restriction of another person's liberty accomplished through (force[,]/ [or] fear[,]/ [or] fraud[,]/ [or] deceit[,]/ [or] coercion[,]/ [or] violence[,]/ [or] duress[,]/ [or] menace[,]/ [or] threat of unlawful injury~~_____ <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].]

[*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.]

New August 2009; Revised August 2013, February 2014, October 2021, September 2024

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.

~~Give bracketed element three if the defendant is charged with a violation of Pen. Code, § 236.1(c).~~

~~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]

RELATED ISSUES

The victim's consent is irrelevant. (*People v. Oliver* (2020) 54 Cal.App.5th 1084, 1097 [269 Cal.Rptr.3d 201].)

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).

1301. Stalking (Pen. Code, § 646.9(a), (e)–(h))

The defendant is charged [in Count __] with stalking [in violation of Penal Code section 646.9].

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

1. **The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person;**

[AND]

2. **The defendant made a credible threat with the intent to place the other person in reasonable fear for (his/her) safety [or for the safety of (his/her) immediate family].**

<If a court order prohibiting defendant's contact with the threatened person was in effect at the time of the charged conduct, give the following two paragraphs>
[If you find the defendant guilty of stalking [in Count[s]], you must then decide whether the People have proved that a/an (temporary restraining order/injunction/_____ *<describe other court order>***) prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct.**

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.]

A *credible threat* is one that causes the target of the threat to reasonably fear for his or her safety [or for the safety of his or her immediate family] and one that the maker of the threat appears to be able to carry out.

A *credible threat* may be made orally, in writing, or electronically or may be implied by a pattern of conduct or a combination of statements and conduct.

***Harassing* means engaging in a knowing and willful *course of conduct* directed at a specific person that seriously annoys, alarms, torments, or terrorizes the person and that serves no legitimate purpose.**

A *course of conduct* means two or more acts occurring over a period of time, however short, demonstrating a continuous purpose.

[A person is not guilty of stalking if (his/her) conduct is constitutionally protected activity. _____ *<Describe type of activity; see Bench Notes below>* **is constitutionally protected activity.]**

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

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

[*Repeatedly* means more than once.]

[The People do not have to prove that a person who makes a threat intends to actually carry it out.]

[Someone who makes a threat while in prison or jail may still be guilty of stalking.]

[A threat may be made electronically by using a telephone, cellular telephone, pager, computer, video recorder, fax machine, or other similar electronic communication device.]

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

[The terms and conditions of (a/an) (restraining order/injunction/_____ *<describe other court order>***) remain enforceable despite the parties' actions, and may only be changed by court order.]**

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*New January 2006; Revised April 2010, March 2017, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

Give element 3 if the defendant is charged with stalking in violation of a temporary restraining order, injunction, or any other court order. (See Pen. Code, § 646.9(b).)

If there is substantial evidence that any of the defendant's conduct was constitutionally protected, instruct on the type of constitutionally protected activity involved. (See the optional bracketed paragraph regarding constitutionally protected activity.) Examples of constitutionally protected activity include speech, protest, and assembly. (See Civ. Code, § 1708.7(f) [civil stalking statute]; see also *People v. Peterson* (2023) 95 Cal.App.5th 1061, 1066–1067 [314 Cal.Rptr.3d 137] [speech about bond measure, local politics, and criticism of a politician].)

The bracketed sentence that begins with "The People do not have to prove that" may be given on request. (See Pen. Code, § 646.9(g).)

The bracketed sentence about the defendant's incarceration may be given on request if the defendant was in prison or jail when the threat was made. (See Pen. Code, § 646.9(g).)

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

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, give the bracketed paragraph defining "immediate family" on request. (See Pen. Code, § 646.9(*l*); see Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If the defendant argues that the alleged victim acquiesced to contact with the defendant contrary to a court order, the court may, on request, give the last bracketed paragraph stating that such orders may only be changed by the court. (See Pen. Code, § 13710(b); *People v. Gams* (1996) 52 Cal.App.4th 147, 151–152, 154–155 [60 Cal.Rptr.2d 423].)

AUTHORITY

- Elements. Pen. Code, § 646.9(a), (e)–(h); *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239 [89 Cal.Rptr.2d 806].
- Intent to Cause Victim Fear. *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [60 Cal.Rptr.2d 624]; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1236, 1238–1240 [44 Cal.Rptr.2d 328]; see *People v. McCray* (1997) 58 Cal.App.4th 159, 171–173 [67 Cal.Rptr.2d 872] [evidence of past violence toward victim].
- "Repeatedly" Defined. *People v. Heilman* (1994) 25 Cal.App.4th 391, 399, 400 [30 Cal.Rptr.2d 422].

- "Safety" Defined. *People v. Borrelli* (2000) 77 Cal.App.4th 703, 719–720 [91 Cal.Rptr.2d 851]; see *People v. Falck* (1997) 52 Cal.App.4th 287, 294–295 [60 Cal.Rptr.2d 624].
- "Substantial Emotional Distress" Defined. *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; see *People v. Carron* (1995) 37 Cal.App.4th 1230, 1240–1241 [44 Cal.Rptr.2d 328].
- Victim's Fear Not Contemporaneous With Stalker's Threats. *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].
- Subsections (b) & (c) of Pen. Code, § 646.9 are Alternate Penalty Provisions. *People v. Muhammad* (2007) 157 Cal.App.4th 484, 494 [68 Cal.Rptr.3d 695].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1195–1197 [67 Cal.Rptr.3d 871].
- Examples of Credible Threats. *People v. Frias* (2024) 98 Cal.App.5th 999, 1018–1019 [317 Cal.Rptr.3d 202]; *People v. Lopez* (2015) 240 Cal.App.4th 436, 452–454 [192 Cal.Rptr.3d 585]; *People v. Uecker* (2009) 172 Cal.App.4th 583, 594–595 [91 Cal.Rptr.3d 355].

LESSER INCLUDED OFFENSES

- Attempted Stalking. Pen. Code, §§ 664, 646.9.

RELATED ISSUES

Harassment Not Contemporaneous With Fear

The harassment need not be contemporaneous with the fear caused. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].)

Constitutionality of Terms

The term "credible threat" is not unconstitutionally vague. (*People v. Halgren* (1996) 52 Cal.App.4th 1223, 1230 [61 Cal.Rptr.2d 176].) The element that the objectionable conduct "serve[] no legitimate purpose" (Pen. Code, § 646.9(e) is also not unconstitutionally vague; "an ordinary person can reasonably understand what conduct is expressly prohibited." (*People v. Tran* (1996) 47 Cal.App.4th 253, 260 [54 Cal.Rptr.2d 650].)

Labor Picketing

Section 646.9 does not apply to conduct that occurs during labor picketing. (Pen. Code, § 646.9(i).)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 333–336.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[2] (Matthew Bender).

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

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

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

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

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

AND

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

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

OR

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

AND

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

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

As used here, members *collectively engage in or have engaged in* a pattern of criminal gang activity when the crimes that make up the pattern of criminal gang activity can be connected to the gang as a whole. Collective engagement requires a connection between the crimes and the gang's organizational structure, manner of governance, primary activities, or common goals and principles.

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

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

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

AND

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

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

New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013, February 2014, August 2014, February 2016, March 2022, March 2023, September 2024

BENCH NOTES

Instructional Duty

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

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].) Note that a defendant's misdemeanor conduct in the charged case, which is

elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under section 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

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

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

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

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

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

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

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

AUTHORITY

- Elements. Pen. Code, § 186.22(a).
- "Active Participation" Defined. *People v. Castenada, supra,* 23 Cal.4th at p. 747.
- "Criminal Street Gang" Defined. Pen. Code, § 186.22(f).
- "Collectively Engage" Defined. *People v. Clark* (2024) 15 Cal.5th 743, 749 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- "Organized" Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- "Pattern of Criminal Gang Activity" Defined. Pen. Code, § 186.22(e), (g).Examples of Common Benefit. Pen. Code, § 186.22(g).
- "Willful" Defined. Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada, supra,* 23 Cal.4th at pp. 749–750.
- "Felonious Criminal Conduct" Defined. *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green, supra,* 227 Cal.App.3d at p. 704.

- Separate Intent From Underlying Felony. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Temporal Connection Between Active Participation and Felonious Criminal Conduct. *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran*, *supra,* 97 Cal.App.4th at p. 1458.
- Conspiracy to Commit This Crime. *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

COMMENTARY

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

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

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

RELATED ISSUES

Conspiracy

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

Labor Organizations or Mutual Aid Activities

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

Related Gang Crimes

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

Unanimity

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

SECONDARY SOURCES

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

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

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

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

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

To prove this allegation, the People must prove that:

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

   AND

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

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

AND

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

As used here, members *collectively engage in or have engaged in* a pattern of criminal gang activity when the crimes that make up the pattern of criminal gang activity can be connected to the gang as a whole. Collective engagement requires a connection between the crimes and the gang's organizational structure, manner of governance, primary activities, or common goals and principles.

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

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

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

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

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

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

New January 2006; Revised August 2006, June 2007, April 2008, December 2008, August 2012, February 2013, August 2013, February 2014, February 2016, March 2022, March 2023, September 2024

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

Related Instructions

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

AUTHORITY

- Enhancement. Pen. Code, § 186.22(b)(1).
- "Specific Intent" Defined. *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- "Criminal Street Gang" Defined. Pen. Code, § 186.22(f).
- "Collectively Engage" Defined. *People v. Clark* (2024) 15 Cal.5th 743, 749 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- "Organized" Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- "Pattern of Criminal Gang Activity" Defined. Pen. Code, § 186.22(e), (g); see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- "To Benefit, Promote, Further, or Assist" Defined. Pen. Code, § 186.22(g).
- Active or Current Participation in Gang Not Required. *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- "Primary Activities" Defined. *People v. Sengpadychith, supra,* 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member. *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 [150 Cal.Rptr.3d 533].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].
- Evidence Required for Gang Member Acting Alone. *People v. Renteria* (2022) 13 Cal.5th 951, 969 [297 Cal.Rptr.3d 344, 515 P.3d 77].

RELATED ISSUES

Commission On or Near School Grounds

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

Enhancements for Multiple Gang Crimes

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

Wobblers

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

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

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

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

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

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

SECONDARY SOURCES

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

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

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

2140. Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver (Veh. Code, §§ 20001, 20003 & 20004)

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused (death/ [or] [permanent] injury) to another person [in violation of _____ <*insert appropriate code section[s]*>].
To prove that the defendant is guilty of this crime, the People must prove that:

1. **While driving, the defendant was involved in a vehicle accident;**

2. **The accident caused (the death of/ [or] [permanent, serious] injury to) someone else;**

3. **The defendant knew that (he/she) had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

4. **The defendant willfully failed to perform one or more of the following duties:**

   (a) To immediately stop at the scene of the accident;

   (b) To provide reasonable assistance to any person injured in the accident;

   (c) To give to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident all of the following information:

   - **The defendant's name and current residence address;**

   [AND]

   - **The registration number of the vehicle (he/she) was driving(;/.)**

<Give following sentence if defendant not owner of vehicle.>
[[AND]

- **The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]**

<Give following sentence if occupants of defendant's vehicle were injured.>
[AND

- **The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident.]**

[AND]

(d) When requested, to show (his/her) driver's license if available, to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident(;/.)

<Give element 4(e) if accident caused death.>
[AND

(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

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 duty to *immediately stop* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the driver must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the driver or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The driver is not required to provide assistance that is

unnecessary or that is already being provided by someone else. However, the requirement that the driver provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

The driver of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in a vehicle accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

[When providing his or her name and address, the driver is required to identify himself or herself as the driver of a vehicle involved in the accident.]

[A *permanent, serious injury* is one that permanently impairs the function or causes the loss of any organ or body part.]

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

[There may be more than one cause of (death/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

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*New January 2006; Revised August 2006, October 2010, February 2012, March 2019, September 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant drove the vehicle. If the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control of the vehicle, give CALCRIM No. 2141, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control.*

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

If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving the scene of an accident causing injury, but not death or permanent, serious injury, delete the words "death" and "permanent, serious" from the instruction. If the defendant is charged under Vehicle Code section 20001(b)(2) with leaving the scene of an accident causing death or permanent, serious injury, use either or both of these options throughout the instruction, depending on the facts of the case. When instructing on both offenses, give this instruction using the words "death" and/or "permanent, serious injury," and give CALCRIM No. 2142, *Failure to Perform Duty Following Accident: Lesser Included Offense*.

Give bracketed element 4(e) only if the accident caused a death.

Give the bracketed portion that begins with "The driver is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues section below.)

Give the bracketed paragraph defining "involved in a vehicle accident" if that is an issue in the case.

Give the bracketed paragraph stating that "the driver is required to identify himself or herself as the driver" if there is evidence that the defendant stopped and

identified himself or herself but not in a way that made it apparent to the other parties that the defendant was the driver. (*People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].)

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

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

AUTHORITY

- Elements. Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury. Veh. Code, § 20001(b)(2).
- Sentence for Injury. Veh. Code, § 20001(b)(1).
- Knowledge of Accident and Injury. *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Neither Voluntary Intoxication Nor Unconsciousness Caused by Voluntary Intoxication Negates Knowledge Element in Vehicle Code Section 20001(a), (c). *People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident. *People v. Scofield*, *supra*, ~~(1928)~~ 203 Cal. At p.~~703,~~ 708 ~~[265 P. 914]~~.
- "Involved" Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- "Immediately Stopped" Defined. *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Duty to Render Assistance. *People v. Scofield*, *supra*, ~~(1928)~~ 203 Cal. at p.~~703,~~ 708 ~~[265 P. 914]~~; *People v. Scheer*, *supra*, ~~(1998)~~ 68 Cal.App.4th at p.~~1009,~~ 1027 ~~[80 Cal.Rptr.2d 676]~~.
- "Permanent, Serious Injury" Defined. Veh. Code, § 20001(d).
- Statute Does Not Violate Fifth Amendment Privilege. *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].

- Must Identify Self as Driver. *People v. Kroncke, supra,* ~~(1999)~~ 70 Cal.App.4th at p.~~1535,~~ 1546 ~~[83 Cal.Rptr.2d 493]~~.
- Unanimity Instruction Required. *People v. Scofield, supra,* ~~(1928)~~ 203 Cal. at p.~~703,~~ 710 ~~[265 P. 914]~~.
- Unconscious Driver Unable to Comply at Scene. *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property. *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- Duty Applies to Injured Passenger in Defendant's Vehicle. *People v. Kroncke, supra,* ~~(1999)~~ 70 Cal.App.4th at p.~~1535,~~ 1546 ~~[83 Cal.Rptr.2d 493]~~.

LESSER INCLUDED OFFENSES

- Failure to Stop Following Accident—Injury. Veh. Code, § 20001(b)(1).
- Misdemeanor Failure to Stop Following Accident—Property Damage. Veh. Code, § 20002; but see *People v. Carter, supra,* ~~(1966)~~ 243 Cal.App.2d at pp.~~239,~~ 242–243 ~~[52 Cal.Rptr. 207]~~.

RELATED ISSUES

Constructive Knowledge of Injury

"[K]nowledge may be imputed to the driver of a vehicle where the fact of personal injury is visible and obvious or where the seriousness of the collision would lead a reasonable person to assume there must have been resulting injuries." (*People v. Carter, supra,* ~~(1966)~~ 243 Cal.App.2d at p.~~239,~~ 241 ~~[52 Cal.Rptr. 207]~~ [citations omitted].)

Accusatory Pleading Alleged Property Damage

If accusatory pleading alleges property damage, Veh. Code, § 20002, see *People v. Carter, supra,* ~~(1966)~~ 243 Cal.App.2d at pp.~~239,~~ 242–243 ~~[52 Cal.Rptr. 207]~~.

Reasonable Assistance

Failure to render reasonable assistance to an injured person constitutes a violation of the statute. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].) "In this connection it must be noted that the statute requires that *necessary* assistance be rendered." (*People v. Scofield, supra,* ~~(1928)~~ 203 Cal. at p.~~703,~~ 708 ~~[265 P. 914]~~ [emphasis in original].) In ~~*People v. Scofield, supra,*~~ the court held that where other people were caring for the injured person, the defendant's "assistance was not *necessary*." (*Id.* at p. 709 [emphasis in original].) An instruction limited to the statutory language on rendering assistance "is

inappropriate where such assistance by the driver is unnecessary, as in the case where paramedics have responded within moments following the accident." (*People v. Scheer*, *supra,* ~~(1998)~~ 68 Cal.App.4th at p.~~1009,~~ 1027 ~~[80 Cal.Rptr.2d 676]~~.) However, "the driver's duty to render necessary assistance under Vehicle Code section 20003, at a minimum, requires that the driver first ascertain what assistance, if any, the injured person needs, and then the driver must make a reasonable effort to see that such assistance is provided, whether through himself or third parties." *(Ibid.)* The presence of bystanders who offer assistance is not alone sufficient to relieve the defendant of the duty to render aid. *(Ibid.)* "[T]he 'reasonable assistance' referred to in the statute might be the summoning of aid," rather than the direct provision of first aid by the defendant. (*People v. Limon*, *supra,* ~~(1967)~~ 252 Cal.App.2d at p.~~575,~~ 578 ~~[60 Cal.Rptr. 448]~~.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 313-319.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.60[2][b][ii], 91.81[1][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3A][a] (Matthew Bender).

2141. Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control (Veh. Code, §§ 20001, 20003 & 20004)

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused (death/ [or] [permanent] injury) to another person [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 [owned and] was riding as a passenger in a vehicle involved in an accident;**

2. **At the time of the accident, the defendant had full authority to direct and control the vehicle even though another person was driving the vehicle;**

3. **The accident caused (the death of/ [or] [permanent, serious] injury to) someone else;**

4. **The defendant knew that the vehicle had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

5. **The defendant willfully failed to perform one or more of the following duties:**

   (a) To cause the driver of the vehicle to immediately stop at the scene of the accident;

   (b) When requested, to show (his/her) driver's license, or any other available identification, to (the person struck/ the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident;

(c) To provide reasonable assistance to any person injured in the accident;

[OR]

(d) To give to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident all of the following information:

- **The defendant's name and current residence address;**

- **The registration number of the vehicle (he/she) (owned/ was a passenger in);**

[AND]

- **The name and current residence address of the driver of the vehicle(;/.)**

<Give following sentence if defendant not owner of vehicle.>
[[AND]

- **The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]**

<Give following sentence if occupants of defendant's vehicle were injured.>
[AND

- **The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident(;/.)]**

<Give element 5(e) if accident caused death.>
[OR

(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

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 duty to *immediately stop* means that the (owner/passenger in control) must cause the vehicle he or she is a passenger in to stop as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the (owner/passenger in control) must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the (owner/passenger in control) or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The (owner/passenger in control) is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the requirement that the (owner/passenger in control) provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

The (owner/passenger in control) of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in an accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the vehicle to collide with another vehicle or person.]

[A *permanent, serious injury* is one that permanently impairs the function or causes the loss of any organ or body part.]

[An accident causes (death/ [or] [permanent, serious] injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident and the (death/ [or] injury) would not have happened without the accident. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a

consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (death/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

[If the defendant told the driver to stop and made a reasonable effort to stop the vehicle, but the driver refused, then the defendant is not guilty of this crime.]

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*New January 2006; Revised October 2010, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control. If the prosecution alleges that the defendant drove the vehicle, give CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.

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

If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving the scene of an accident causing injury, but not death or permanent, serious injury, delete the words "death" and "permanent, serious" from the instruction. If the

defendant is charged under Vehicle Code section 20001(b)(2) with leaving the scene of an accident causing death or permanent, serious injury, use either or both of these options throughout the instruction, depending on the facts of the case. When instructing on both offenses, give this instruction using the words "death" and/or "permanent, serious injury," and give CALCRIM No. 2142, *Failure to Perform Duty Following Accident: Lesser Included Offense*.

Give bracketed element 5(e) only if the accident caused a death.

Give the bracketed portion that begins with "The (owner/passenger in control) is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues section of CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.)

Give the bracketed paragraph defining "involved in an accident" if that is an issue in the case.

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

Give the bracketed paragraph that begins with "If the defendant told the driver to stop" if there is sufficient evidence that the defendant attempted to cause the vehicle to be stopped.

AUTHORITY

- Elements. Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury. Veh. Code, § 20001(b)(2).
- Knowledge of Accident and Injury. *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Neither Voluntary Intoxication Nor Unconsciousness Caused by Voluntary Intoxication Negates Knowledge Element in Vehicle Code Section 20001(a), (c). *People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].

- Duty Applies Regardless of Fault for Accident. *People v. Scofield, supra,* ~~(1928)~~ 203 Cal. at p.~~703,~~ 708 ~~[265 P. 914]~~.
- "Involved" Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- "Immediately Stopped" Defined. *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Duty to Render Assistance. *People v. Scofield, supra,* ~~(1928)~~ 203 Cal. at p.~~703,~~ 708 ~~[265 P. 914]~~; *People v. Scheer, supra,* ~~(1998)~~ 68 Cal.App.4th at p.~~1009,~~ 1027 ~~[80 Cal.Rptr.2d 676]~~.
- "Permanent, Serious Injury" Defined. Veh. Code, § 20001(d).
- Nondriving Owner. *People v. Rallo* (1931) 119 Cal.App. 393, 397 [6 P.2d 516].
- Statute Does Not Violate Fifth Amendment Privilege. *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Unanimity Instruction Required. *People v. Scofield, supra,* ~~(1928)~~ 203 Cal. at p.~~703,~~ 710 ~~[265 P. 914]~~.
- Unconscious Driver Unable to Comply at Scene. *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property. *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- Duty Applies to Injured Passenger in Defendant's Vehicle. *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

LESSER INCLUDED OFFENSES

- Failure to Stop Following Accident—Injury. Veh. Code, § 20001(b)(1).
- Misdemeanor Failure to Stop Following Accident—Property Damage. Veh. Code, § 20002; but see *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 313–319.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

2142. Failure to Perform Duty Following Accident: Lesser Included Offense (Veh. Code, §§ 20001, 20003 & 20004)

The crime[s] of (failing to perform a legal duty following a vehicle accident that caused injury/ [and] failing to perform a legal duty following a vehicle accident that caused property damage) (is a/are) lesser crime[s] than failing to perform a legal duty following a vehicle accident that caused (death/ [or] permanent, serious injury).

The People have the burden of proving beyond a reasonable doubt that the defendant committed the crime of failing to perform a legal duty following a vehicle accident that caused (death/ [or] permanent, serious injury) rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of failing to perform a legal duty following a vehicle accident that caused (death/ [or] permanent, serious injury). You must consider whether the defendant is guilty of the lesser crime[s] of [failing to perform a legal duty following a vehicle accident that caused injury] [or] [failing to perform a legal duty following a vehicle accident that caused property damage].

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*New January 2006; Revised September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

Give this instruction when: (1) the defendant is charged with leaving the scene of an accident resulting in death or permanent, serious injury and the court is instructing on the lesser offense of leaving the scene of an accident resulting in injury, and/or leaving the scene of an accident resulting in property damage; or (2) when the defendant is charged with leaving the scene of an accident resulting in injury and the court is instructing on the lesser offense of leaving the scene of an accident resulting in property damage.

AUTHORITY

- Elements. Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury. Veh. Code, § 20001(b)(2).
- Sentence for Injury. Veh. Code, § 20001(b)(1).

- "Permanent, Serious Injury" Defined. Veh. Code, § 20001(d).
- Neither Voluntary Intoxication Nor Unconsciousness Caused by Voluntary Intoxication Negates Knowledge Element in Vehicle Code Section 20001(a), (c). *People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 313–319.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

2160. Fleeing the Scene Following Accident: Enhancement for Vehicular Manslaughter (Veh. Code, § 20001(c))

If you find the defendant guilty of vehicular manslaughter [as a felony] [under Count __], you must then decide whether the People have proved the additional allegation that the defendant fled the scene of the accident after committing vehicular manslaughter [in violation of Vehicle Code section 20001(c)].

To prove this allegation, the People must prove that:

1. **The defendant knew that (he/she) had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

2. **The defendant willfully fled the scene of the accident.**

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.

[To be *involved in an accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

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; Revised February 2013, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (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 with an enhancement under Vehicle Code section 20001(c). This enhancement only applies to felony vehicular manslaughter convictions (Pen. Code, §§ 191.5, 192(c)(1) & (3), and 192.5(a) & (c)) and must be pleaded and proved. (Veh. Code, § 20001(c).) Give the bracketed "felony" in the introductory paragraph if the jury is also being instructed on misdemeanor vehicular manslaughter.

Give the bracketed paragraph defining "involved in an accident" if that is an issue in the case.

AUTHORITY

- Enhancement. Veh. Code, § 20001(c).
- Knowledge of Accident and Injury. *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Neither Voluntary Intoxication Nor Unconsciousness Caused by Voluntary Intoxication Negates Knowledge Element in Vehicle Code Section 20001(a), (c). *People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- "Involved" Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Fleeing Scene of Accident. *People v. Vela* (2012) 205 Cal.App.4th 942, 950 [140 Cal.Rptr.3d 755].
- First Element of This Instruction Cited With Approval. *People v. Nordberg* (2010) 189 Cal.App.4th 1228, 1238 [117 Cal.Rptr.3d 558].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 312.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.02, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.03[4][a] (Matthew Bender).

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 paragraph 4A.>

4A. The controlled substance was _____ *<insert type of controlled substance>***;**

4B. The controlled substance was an analog of _____ *<insert type of controlled substance>***;**

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]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

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.]

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*New January 2006; Revised August 2006, October 2010, August 2013, February 2014, September 2017, September 2024**

** Denotes changes only to bench notes and other commentaries.*

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. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis, supra,* 57 Cal.4th at p. 362, fn. 5.
- Statute Constitutional. *People v. Allen* (2023) 96 Cal.App.5th 573, 581–582 [314 Cal.Rptr.3d 474].

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*, *supra,* ~~(1996)~~ 45 Cal.App.4th at p.~~1147,~~ 1153 ~~[53 Cal.Rptr.2d 99]~~.)

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).

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

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

To prove this allegation, the People must prove that:

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

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

AND

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

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

    OR

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

AND

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

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

As used here, members *collectively engage in or have engaged in* a pattern of criminal gang activity when the crimes that make up the pattern of criminal gang activity can be connected to the gang as a whole. Collective engagement requires a connection between the crimes and the gang's organizational structure, manner of governance, primary activities, or common goals and principles.

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

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

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

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

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were

committed, but you do not have to all agree on which crimes were committed.]

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

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

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

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

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

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

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

AND

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

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

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

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is

present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

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

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

AND

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

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

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

New January 2006; Revised August 2006, June 2007, December 2008, February 2012, August 2013, February 2014, February 2016, March 2022, March 2023, September 2024

BENCH NOTES

Instructional Duty

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

Give this instruction if the defendant is charged under Penal Code section 25400(c)(3) or 25850(c)(3) and the defendant does not stipulate to being an active

gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

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

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

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

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

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

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

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

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

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

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

AUTHORITY

- Factors. Pen. Code, §§ 25400(c)(3), 25850(c)(3)
- Sentencing Factors, Not Elements. *People v. Hall, supra,* 67 Cal.App.4th at p. 135.
- Elements of Gang Factor. Pen. Code, § 186.22(a); *People v. Robles, supra,* 23 Cal.4th at p. 1115.
- "Active Participation" Defined. *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- "Criminal Street Gang" Defined. Pen. Code, § 186.22(f).
- "Collectively Engage" Defined. *People v. Clark* (2024) 15 Cal.5th 743, 749 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- "Organized" Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- "Pattern of Criminal Gang Activity" Defined. Pen. Code, §§ 186.22(e), (g).
- Examples of Common Benefit. Pen. Code, § 186.22(g).

- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. *People v. Prunty* (2015) 62 Cal.4th 59, 81–85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent

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

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

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

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

SECONDARY SOURCES

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

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

2600. Giving or Offering a Bribe to an Executive Officer (Pen. Code, § 67)

The defendant is charged [in Count __] with (giving/ [or] offering) a bribe to an executive officer [in violation of Penal Code section 67].

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

1. **The defendant (gave/ [or] offered) a bribe to an executive officer in this state [or someone acting on the officer's behalf];**

AND

2. **The defendant acted with the corrupt intent to unlawfully influence that officer's official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] _____ <*insert description of alleged conduct in other proceeding*>).**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the public or official action, vote, decision, [or] opinion, [or _____ <*insert description of alleged conduct at other proceeding*>] of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

The official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] proceeding) the defendant sought to influence must have related to an existing subject that could have been brought before the public officer in his or her official capacity. It does not have to relate to a duty specifically given by statute to that officer.

An *executive officer* is a government official within the executive branch who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <*insert title, e.g., police officer, commissioner, etc.*> is an executive officer.]

[The executive officer does not need to have (accepted the bribe[,]/ [or] performed the requested act[,]/ [or] deliberately failed to perform a duty).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe. [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

New January 2006; Revised September 2024

BENCH NOTES

Instructional Duty

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

The statute applies to giving or offering a bribe to "any executive officer . . . with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer . . . ." It is unclear what "other proceeding" refers to and there are no cases defining the phrase. If the evidence presents an issue about attempting to influence an officer in any "other proceeding," the court may insert a description of the proceeding where indicated.

Give the bracketed sentence that begins with "The executive officer does not" if the evidence shows that the executive officer did not accept the bribe or follow through on the action sought.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

- Elements. Pen. Code, § 67.
- "Bribe" Defined. Pen. Code, § 7(6).
- "Corruptly" Defined. Pen. Code, § 7(3).
- "Executive Officer" Defined. *People v. Hupp* (2023) 96 Cal.App.5th 946, 950 [314 Cal.Rptr.3d 842]; *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 351 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].

- Subject Matter of Bribe. *People v. Megladdery* (1940) 40 Cal.App.2d 748, 782 [106 P.2d 84], disapproved on other grounds in *People v. Posey* (2004) 32 Cal.4th 193, 214–215 [8 Cal.Rptr.3d 551, 82 P.3d 755] and *People v. Simon* (2001) 25 Cal.4th 1082, 1108 [108 Cal.Rptr.2d 385, 25 P.3d 598]; *People v. Diedrich* (1982) 31 Cal.3d 263, 276 [182 Cal.Rptr. 354, 643 P.2d 971].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].
- No Bilateral Agreement Necessary. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 350–351 [144 Cal.Rptr. 451].
- Promised Payment May Be to Third Party or Target of Bribe. *People v. Moyer* (2023) 94 Cal.App.5th 999, 1011–1012 [312 Cal.Rptr.3d 773].

RELATED ISSUES

Entrapment

The crime is complete once an offer is made. Accordingly, subsequent efforts to procure corroborative evidence do not constitute entrapment. (*People v. Finkelstin* (1950) 98 Cal.App.2d 545, 553 [220 P.2d 934]; *People v. Bunkers* (1905) 2 Cal.App. 197, 209 [84 P. 364].)

Accomplice Liability and Conspiracy

The giver and the recipient of a bribe are not accomplices of one another, nor are they coconspirators, because they are guilty of distinct crimes that require different mental states. (*People v. Wolden* (1967) 255 Cal.App.2d 798, 804 [63 Cal.Rptr. 467].)

Extortion Distinguished

Extortion is bribery with the additional element of coercion. Accordingly, the defendant cannot be guilty of receiving a bribe and extortion in the same transaction. (*People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 33–56.

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

2603. Requesting or Taking a Bribe (Pen. Code, §§ 68, 86, 93)

The defendant is charged [in Count __] with (requesting[,]/ taking[,]/ [or] agreeing to take) a bribe [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 was (a/an) (executive officer/ministerial officer/employee/appointee/legislative officer/judicial officer) of the (State of California/City of** _____ *<insert name of city>*/**County of** _____ *<insert name of county>*/_____ *<insert name of political subdivision from Pen. Code, § 68>***);**

2. **The defendant (requested[,]/ took[,]/ [or] agreed to take) a bribe;**

3. **When the defendant (requested[,]/ took[,]/ [or] agreed to take) the bribe, (he/she) represented that the bribe would unlawfully influence (his/her) official (act[,]/ decision[,]/ vote[,]/ [or] opinion). The representation may have been express or implied;**

AND

4. **The defendant acted with the corrupt intent that (his/her) public or official duty would be unlawfully influenced.**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is requested or taken with the corrupt intent that the public or official action, vote, decision, or opinion of the person to who is requesting, taking, or agreeing to take the bribe, will be unlawfully influenced.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[An *executive officer* is a government official within the executive branch who may use his or her own discretion in performing his or her job duties. [A _____ *<insert title, e.g., police officer, commissioner, etc.>* **is an executive officer.]]**

[A *ministerial officer* is an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion.]

[A *legislative officer* is a member of the (Assembly/Senate/ *<insert name of other legislative body specified in Penal Code, § 86>*) **of this state.]**

[A *judicial officer* includes a (juror[,]/ [or] judge [,]/ [or] referee[,]/ [or] commissioner[,]/ [or] arbitrator [,]/ [or] umpire[,]/ [or] [other] person authorized by law to hear or determine any question or controversy).]

[*Requesting or agreeing to take a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show that the person is seeking a bribe from someone else. [The People do not need to prove that the other person actually consented to give a bribe.]]

[The People do not need to prove that the defendant made any effort to follow through on the purpose for which the bribe was sought.]

New January 2006; Revised June 2007, September 2024

BENCH NOTES

Instructional Duty

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

Give the bracketed definition of "requesting or agreeing to take a bribe" if the prosecution is pursuing this theory.

Give the bracketed sentence that begins with "The People do not need to prove that the defendant made any effort to follow through" if there is no evidence that the defendant took any action based on the alleged bribe.

AUTHORITY

- Elements. Pen. Code, §§ 68, 86, 93.
- "Bribe" Defined. Pen. Code, § 7, subd. 6.
- "Corruptly" Defined. Pen. Code, § 7, subd. 3.
- "Executive Officer" Defined. *People v. Hupp* (2023) 96 Cal.App.5th 946, 950 [314 Cal.Rptr.3d 842]; *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].

- "Ministerial Officer" Defined. Gov. Code, § 820.25(b); *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Legislative Member. Pen. Code, § 86.
- Judicial Officer. Pen. Code, § 93.
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2600, *Giving or Offering a Bribe to an Executive Officer*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 33–56.

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

2604–2609. Reserved for Future Use

2651. Trying to Prevent an Executive Officer From Performing Duty (Pen. Code, § 69)

The defendant is charged [in Count __] with trying to (prevent/ [or] deter) an executive officer from performing that officer's duty [in violation of Penal Code section 69].

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

1. **The defendant willfully and unlawfully used (violence/ [or] a threat of violence) to try to (prevent/ [or] deter) an executive officer from performing the officer's lawful duty;**

2. **When the defendant acted, (he/she) intended to (prevent/ [or] deter) the executive officer from performing the officer's lawful duty;**

<Give the following language if the violation is based on a threat>

[3. A reasonable person~~listener~~ in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful force or violence;]

AND

(3/4). When the defendant acted, (he/she) knew that the person was an executive officer.

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

An *executive officer* is a government official within the executive branch who may use his or her own discretion in performing his or her job duties. [(A/An) _____ *<insert title, e.g., peace officer, commissioner, etc.>* is an *executive officer.*]

The executive officer does not need to be performing his or her job duties at the time the threat is communicated.

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

[Photographing or recording an *executive officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else. The defendant must, however, intend that (his/her) statement be taken as a threat by the intended victim.]

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

[A sworn member of _____ *<insert name of agency that employs peace officer>*, **authorized by** _____ *<insert appropriate section from Pen. Code, § 830 et seq.>* **to** _____ *<describe statutory authority>*, **is a *peace officer*.]**

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

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>
[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2014, August 2016, September 2019, March 2021, September 2024

BENCH NOTES

Instructional Duty

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

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to

instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

For this offense, "the relevant factor is simply the lawfulness of the official conduct that the defendant (through threat or violence) has attempted to deter, and not the lawfulness (or official nature) of the conduct in which the officer is engaged at the time the threat is made." (*In re Manuel G., supra,* 16 Cal.4th at p. 817.) Thus, if the evidence supports the conclusion that the defendant attempted to deter the officer's current performance of a duty, the court should instruct on the lawfulness of that duty. *(Ibid.)* Where the evidence supports the conclusion that the defendant attempted to deter the officer from performing a duty in the future, the court should only instruct on the lawfulness of that future duty. *(Ibid.)*

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69; *People v. Atkins* (2019) 31 Cal.App.5th 963, 979 [243 Cal.Rptr.3d 283] [statute requires actual knowledge that person was an executive officer].
- Specific Intent Required. *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Immediate Ability to Carry Out Threat Not Required. *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Lawful Performance Element to Attempting to Deter. *In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Statute Constitutional. *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 69(b).
- Reasonable Person~~Listener~~ Standard. *People v. Lowery* (2011) 52 Cal.4th 419, 427 [128 Cal.Rptr.3d 648, 257 P.3d 72]; *People v. Smolkin* (2020) 49 Cal.App.5th 183, 188 [262 Cal.Rptr.3d 696].

- "Executive Officer" Defined. *People v. Hupp* (2023) 96 Cal.App.5th 946, 950 [314 Cal.Rptr.3d 842]; *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].

RELATED ISSUES

Resisting an Officer Not Lesser Included Offense

Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting by force or violence to deter an officer. (*People v. Smith* (2013) 57 Cal.4th 232, 240-245 [159 Cal.Rptr.3d 57, 303 P.3d 368].)

Statute as Written Is Overbroad

The statute as written would prohibit lawful threatening conduct. To avoid overbreadth, this instruction requires that the defendant act both "willfully" and "unlawfully." (*People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 895–896 [199 Cal.Rptr. 150].)

State of Mind of Victim Irrelevant

Unlike other threat crimes, the state of mind of the intended victim is irrelevant. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Hines* (1997) 15 Cal.4th 997, 1061, fn. 15 [64 Cal.Rptr.2d 594, 938 P.2d 388].)

Immediate Ability to Carry Out Threat Not Required

"As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. Thus, threats may be constitutionally prohibited even when there is no *immediate* danger that they will be carried out." (*People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388] [quoting *In re M.S.* (1995) 10 Cal.4th 698, 714 [42 Cal.Rptr.2d 355, 896 P.2d 1365], citation and internal quotation marks removed, emphasis in original]; see also *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

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

2652. Resisting an Executive Officer in Performance of Duty (Pen. Code, § 69)

The defendant is charged [in Count __] with resisting an executive officer in the performance of that officer's duty [in violation of Penal Code section 69].

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

1. **The defendant [unlawfully] used force [or violence] to resist an executive officer;**

2. **When the defendant acted, the officer was performing (his/her) lawful duty;**

3. When the defendant acted, the defendant knew that the person (he/she) resisted was an executive officer;

AND

4. When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.

An *executive officer* is a government official within the executive branch who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <*insert title, e.g., peace officer, commissioner, etc.*> is an *executive officer.*]

[A sworn member of _____ <*insert name of agency that employs peace officer*>, authorized by _____ <*insert appropriate section from Pen. Code, § 830 et seq.*> to _____ <*describe statutory authority*>, is a *peace officer.*]

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

[Taking a photograph or making an audio or video recording of an *executive officer* while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

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

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

New January 2006; Revised August 2014, February 2015, August 2016, September 2019, September 2024

BENCH NOTES

Instructional Duty

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

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69.
- General Intent Offense. *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer. *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 69(b).

- "Executive Officer" Defined. *People v. Hupp* (2023) 96 Cal.App.5th 946, 950 [314 Cal.Rptr.3d 842]; *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].

LESSER INCLUDED OFFENSES

Penal Code section 148(a) is not a lesser included offense of this crime under the statutory elements test, but may be one under the accusatory pleading test. (*People v. Smith* (2013) 57 Cal.4th 232, 241-242 [159 Cal.Rptr.3d 57, 303 P.3d 368]; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].

Assault may be a lesser included offense of this crime under the accusatory pleading test. See *People v. Brown* (2016) 245 Cal.App.4th 140, 153 [199 Cal.Rptr.3d 303].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3] (Matthew Bender).

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

2701. Violation of Court Order: Protective Order or Stay Away (Pen. Code, §§ 166(c)(1), 273.6)

The defendant is charged [in Count __] with violating a court order [in violation of _____ *<insert appropriate code section[s]>*].

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

1. **A court ~~[lawfully]~~ issued a written order that the defendant** _____ *<insert description of content of order>*;

2. **The court order was a (protective order/stay-away court order/**_____*<insert description of other type of order>*~~),~~ **[issued under]** _____ *<insert code section under which order made or applicable language from Pen. Code, § 166(c)(1)(C), (c)(3)(B) or (c)(3)(C), or § 273.6(c)(2) or (c)(3)>* ~~[in a pending criminal proceeding involving domestic violence/as a condition of probation after a conviction for (domestic violence/elder abuse/dependent adult abuse)].;~~

3. **The defendant knew of the court order;**

4. **The defendant had the ability to follow the court order;**

AND

<For violations of Pen. Code, § 166(c)(3), choose "willfully"; ~~-~~for violations of Pen. Code § 273.6~~(c)~~, choose "intentionally" for the scienter requirement.>

5. **The defendant (willfully/intentionally) violated the court order.**

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

[The People must prove that the defendant knew of the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

~~[*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).~~

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

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

~~[*(Elder/(D/d)ependent adult) abuse* means that under circumstances or conditions likely to produce great bodily harm or death, the defendant:~~

~~Willfully caused or permitted any (elder/dependent adult) to suffer;~~

~~OR~~

~~Inflicted on any (elder/dependent adult) unjustifiable physical pain or mental suffering;~~

~~OR~~

~~Having the care or custody of any (elder/dependent adult), willfully caused or permitted the person or health of the (elder/dependent adult) to be injured;~~

~~OR~~

~~4. Willfully caused or permitted the (elder/dependent adult) to be placed in a situation in which (his/her) person or health was endangered.~~

~~[An *elder* is someone who is at least 65 years old.]~~

~~[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights.] [This definition includes an adult who has physical or developmental disabilities or whose physical or~~

~~**mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a (health facility/psychiatric health facility/ [or] chemical dependency recovery hospital).]]**~~

New January 2006; Revised June 2007, April 2008, August 2009, September 2024

BENCH NOTES

Instructional Duty

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

~~In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be "lawfully issued." (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 821, 824; *In re Berry, supra,* 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–820; *In re Berry, supra,* 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word "lawfully" in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.In element 2, give the bracketed phrase"in a criminal case involving domestic violence" if the defendant is charged with a violation of Penal Code section 166(c)(1). In such cases, also give the bracketed definition of "domestic violence" and the associated terms.~~

In element 2, in all cases, insert the statutory authority or applicable language under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).) I~~n element 2, i~~f the order was not a ~~"protective order" or "stay away order" but another type of~~ qualifying order listed in Penal Code section 166(c)(1~~3~~) or 273.6(c)(1), insert a description of the type of order from the statute.

~~In element 2, in all cases, insert the statutory authority under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).)~~

Give the bracketed paragraph that begins with "The People must prove that the defendant knew" on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925,

927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

If the prosecution alleges that physical injury resulted from the defendant's conduct, in addition to this instruction, give CALCRIM No. 2702, *Violation of Court Order: Protective Order or Stay Away—Physical Injury*. (Pen. Code, §§ 166(c)(2), 273.6(b).)

If the prosecution charges the defendant with a felony based on a prior conviction and a current offense involving an act of violence or credible threat of violence, in addition to this instruction, give CALCRIM No. 2703, *Violation of Court Order: Protective Order or Stay Away—Act of Violence*. (Pen. Code, §§ 166(c)(4), 273.6(d).) The jury also must determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

~~***Related Instruction***~~

~~CALCRIM No. 831, *Abuse of Elder or Dependent Adult (Pen. Code, § 368(c)).*~~

AUTHORITY

- Elements. Pen. Code, §§ 166(c)(1), 273.6.
- "Willfully" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- ~~Order Must Be Lawfully Issued. Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366]; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].~~
- Knowledge of Order Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Proof of Service Not Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Must Have Opportunity to Read but Need Not Actually Read Order. *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- General-Intent Offense. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].

- "Abuse" Defined. Pen. Code, § 13700(a); Fam. Code, § 6203.
- "Cohabitant" Defined. Pen. Code, § 13700(b); Fam. Code, § 6209.
- "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].
- "Abuse of Elder or Dependent Adult" Defined. Pen. Code, § 368.

~~COMMENTARY~~

~~Penal Code section 166(c)(1) also includes protective orders and stay aways "issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence . . . ." However, in *People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628], the court held that a defendant cannot be prosecuted for contempt of court under Penal Code section 166 for violating a condition of probation. Thus, the committee has not included this option in the instruction.~~

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on a prior conviction and the allegation that the current offense involved an act of violence or credible threat of violence (Pen. Code, §§ 166(c)(4), 273.6(d)), then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the additional allegations have or have not been proved. If the jury finds that the either allegation was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2700, *Violation of Court Order*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 31.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 64, 66-68.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4] (Matthew Bender).

3261. While Committing a Felony: Defined—Escape Rule

The People must prove that _____ *<insert allegation, e.g., the defendant personally used a firearm>* **while committing [or attempting to commit] _____** *<insert felony or felonies>***.**

<Give one or more bracketed paragraphs below depending on crime[s] alleged.>

<Robbery>
[The crime of robbery [or attempted robbery] continues until the perpetrator[s] (has/have) actually reached a place of temporary safety.

The perpetrator[s] (has/have) reached a place of temporary safety if:

- **(He/She/They) (has/have) successfully escaped from the scene; [and]**
- **(He/She/They) (is/are) not or (is/are) no longer being chased(; [and]/.)**
- **[(He/She/They) (has/have) unchallenged possession of the property(; [and]/.)]**
- **[(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]**

<Burglary>
[The crime of burglary [or attempted burglary] continues until the perpetrator[s] (has/have) actually reached a place of temporary safety. The perpetrator[s] (has/have) reached a place of temporary safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[, and (has/have) unchallenged possession of the property].]

<Sexual Assault>
[The crime of _____ *<insert sexual assault alleged>* **[or attempted _____** *<insert sexual assault alleged>***] continues until the perpetrator[s] (has/have) actually reached a place of temporary safety. The perpetrator[s] (has/have) reached a place of temporary safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[,and (is/are) no longer in continuous physical control of the person who was the target of the crime].]**

<Kidnapping>
[The crime of kidnapping [or attempted kidnapping] continues until the perpetrator[s] (has/have) actually reached a place of temporary safety. The perpetrator[s] (has/have) reached a place of temporary safety if (he/she/they) (has/have) successfully escaped from the scene, (is/are) no longer being chased, and (is/are) no longer in continuous physical control of the person kidnapped.]

<Other Felony>
[The crime of _____ *<insert felony alleged>* **[or attempted** _____ *<insert felony alleged>***] continues until the perpetrator[s] (has/have) actually reached a place of temporary safety. The perpetrator[s] (has/have) reached a place of temporary safety if (he/she/they) (has/have) successfully escaped from the scene and (is/are) no longer being chased.]**

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*New January 2006; Revised August 2006, August 2013, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

Give this instruction whenever the evidence raises an issue over the duration of the felony and another instruction given to the jury has required some act "during the commission or attempted commission" of the felony. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 347-348 [153 Cal.Rptr.3d 519, 295 P.3d 903].)

This instruction should **not** be given if the issue is when the defendant formed the intent to aid and abet a robbery or a burglary. For robbery, give CALCRIM No. 1603, *Robbery: Intent of Aider and Abettor*. For burglary, give CALCRIM No. 1702, *Burglary: Intent of Aider and Abettor*.

AUTHORITY

- Escape Rule. *People v. Wilkins, supra,* ~~(2013)~~ 56 Cal.4th at pp.~~333,~~ 347-348 ~~[153 Cal.Rptr.3d 519, 295 P.3d 903]~~.
- Place of Temporary Safety. *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7]; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].
- Continuous Control of Victim. *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857] [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [23 Cal.Rptr.2d 888] [robbery].

- Robbery. *People v. Salas, supra,* ~~(1972)~~ 7 Cal.3d at p.~~812,~~ 823 ~~[103 Cal.Rptr. 431, 500 P.2d 7]~~; *People v. Cooper* (1991) 53 Cal.3d 1158, 1170 [282 Cal.Rptr. 450, 811 P.2d 742].
- Burglary. *People v. Bodely* (1995) 32 Cal.App.4th 311, 313–314 [38 Cal.Rptr.2d 72].
- Lewd Acts on Child. *People v. Thompson, supra,* ~~(1990)~~ 50 Cal.3d at pp.~~134,~~ 171–172 ~~[266 Cal.Rptr. 309, 785 P.2d 857]~~.
- Sexual Assault. *People v. Portillo* (2003) 107 Cal.App.4th 834, 841–846 [132 Cal.Rptr.2d 435]; *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289].
- Kidnapping. *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [280 Cal.Rptr. 584]; *People v. Silva* (1988) 45 Cal.3d 604, 632 [247 Cal.Rptr. 573, 754 P.2d 1070].

RELATED ISSUES

Place of Temporary Safety Based on Objective Standard

Whether the defendant had reached a place of temporary safety is judged on an objective standard. The "issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location." (*People v. Johnson, supra,* ~~(1992)~~ 5 Cal.App.4th at p.~~552,~~ 560 ~~[7 Cal.Rptr.2d 23]~~.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 156, 157, 160, 162.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[2][b][v], 142.10[1][b] (Matthew Bender).

3262–3399. Reserved for Future Use

3425. Unconsciousness

The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted while unconscious. Someone is unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.]

Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] _____ <*insert a similar condition*>).

[The defense of unconsciousness may not be based on voluntary intoxication.]

The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious, unless based on all the evidence, you have a reasonable doubt that (he/she) was conscious, in which case you must find (him/her) not guilty.

*New January 2006; Revised April 2008, August 2013, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

Because there is a presumption that a person who appears conscious is conscious (*People v. Hardy* (1948) 33 Cal.2d 52, 63–64 [198 P.2d 865]), the defendant must

produce sufficient evidence raising a reasonable doubt that he or she was conscious before an instruction on unconsciousness may be given. (*Ibid.*; *People v. Kitt* (1978) 83 Cal.App.3d 834, 842 [148 Cal.Rptr. 447], disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865] [presumption of consciousness goes to the defendant's burden of producing evidence].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(4); *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317-1323 [149 Cal.Rptr.3d 167]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].
- Burden of Proof. Evid. Code, § 607; *People v. Hardy, supra,* ~~(1948)~~ 33 Cal.2d at p.~~52,~~ 64 ~~[198 P.2d 865]~~; *People v. Cruz* (1978) 83 Cal.App.3d 308, 330–331 [147 Cal.Rptr. 740].
- "Unconsciousness" Defined. *People v. Newton* (1970) 8 Cal.App.3d 359, 376 [87 Cal.Rptr. 394]; *People v. Heffington* (1973) 32 Cal.App.3d 1, 9 [107 Cal.Rptr. 859].
- Unconscious State: Blackouts. *People v. Cox* (1944) 67 Cal.App.2d 166, 172 [153 P.2d 362].
- Unconscious State: Epileptic Seizures. *People v. Freeman* (1943) 61 Cal.App.2d 110, 115–116 [142 P.2d 435].
- Unconscious State: Involuntary Intoxication. *People v. Heffington, supra,* ~~(1973)~~ 32 Cal.App.3d at p.~~1,~~ 8 ~~[107 Cal.Rptr. 859]~~; see *People v. Hughes* (2002) 27 Cal.4th 287, 343–344 [116 Cal.Rptr.2d 401, 39 P.3d 432] [jury was adequately informed that unconsciousness does not require that person be incapable of movement].
- Unconscious State: Somnambulism, Sleepwalking, or Delirium. *People v. Mathson, supra,* ~~(2012)~~ 210 Cal.App.4th at pp.~~1297,~~ 1317-1323 ~~[149 Cal.Rptr.3d 167]~~; *People v. Methever* (1901) 132 Cal. 326, 329 [64 P. 481], overruled on other grounds in *People v. Gorshen* (1953) 51 Cal.2d 716 [336 P.2d 492].

COMMENTARY

The committee did not include an instruction on the presumption of consciousness. There is a judicially created presumption that a person who acts conscious is conscious. (*People v. Hardy, supra,* ~~(1948)~~ 33 Cal.2d at pp.~~52,~~ 63–64 ~~[198 P.2d 865]~~.) Although an instruction on this presumption has been approved, it has been highly criticized. (See *People v. Kitt, supra,* ~~(1978)~~ 83 Cal.App.3d at pp.~~834,~~ 842–

843 [148 Cal.Rptr. 447], disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865] [acknowledging instruction and suggesting modification]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 332 [147 Cal.Rptr. 740] [criticizing instruction for failing to adequately explain the presumption].)

The effect of this presumption is to place on the defendant a burden of producing evidence to dispel the presumption. (*People v. Cruz, supra,* 83 Cal.App.3d at pp. 330–331; *People v. Kitt, supra,* 83 Cal.App.3d at p. 842, disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865]; and see *People v. Babbitt* (1988) 45 Cal.3d 660, 689–696 [248 Cal.Rptr. 69, 755 P.2d 253] [an instruction on this presumption "did little more than guide the jury as to how to evaluate evidence bearing on the defendant's consciousness and apply it to the issue."].) However, if the defendant produces enough evidence to warrant an instruction on unconsciousness, the rebuttable presumption of consciousness has been dispelled and no instruction on its effect is necessary. The committee, therefore, concluded that no instruction on the presumption of consciousness was needed.

RELATED ISSUES

Inability to Remember

Generally, a defendant's inability to remember or his hazy recollection does not supply an evidentiary foundation for a jury instruction on unconsciousness. (*People v. Heffington, supra,* (1973) 32 Cal.App.3d at p. 1, 10 [107 Cal.Rptr. 859]); *People v. Sameniego* (1931) 118 Cal.App. 165, 173 [4 P.2d 809] ["The inability of a defendant . . . to remember . . . is of such common occurrence and so naturally accountable for upon the normal defects of memory, or, what is more likely, the intentional denial of recollection, as to raise not even a suspicion of declarations having been made while in an unconscious condition."].) In *People v. Coston* (1947) 82 Cal.App.2d 23, 40–41 [185 P.2d 632], the court stated that forgetfulness may be a factor in unconsciousness; however, "there must be something more than [the defendant's] mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act."

Two cases have held that a defendant's inability to remember warrants an instruction on unconsciousness. (*People v. Bridgehouse* (1956) 47 Cal.2d 406, 414 [303 P.2d 1018] and *People v. Wilson* (1967) 66 Cal.2d 749, 761–762 [59 Cal.Rptr. 156, 427 P.2d 820].) Both cases were discussed in *People v. Heffington, supra,* (1973) 32 Cal.App.3d at p. 10 [107 Cal.Rptr. 859], but the court declined to hold that *Bridgehouse* and *Wilson* announced an "ineluctable rule of law" that "a defendant's inability to remember or his 'hazy' recollection supplies an evidentiary foundation for a jury instruction on unconsciousness." (*Id.* at p. 10.)

The court stated that, "[b]oth [cases] were individualized decisions in which the court examined the record and found evidence, no matter how incredible, warranting the instruction." (*Ibid*.)

Intoxication—Involuntary versus Voluntary

Unconsciousness due to involuntary intoxication is a complete defense to a criminal charge under Penal Code section 26, subdivision (4). (*People v. Heffington*, *supra,* ~~(1973)~~ 32 Cal.App.3d at p.~~1,~~ 8 ~~[107 Cal.Rptr. 859]~~.) Unconsciousness due to voluntary intoxication is governed by ~~former Penal Code section 22 [now~~ Penal Code section 29.4~~]~~, rather than section 26, and is not a defense to a general intent crime. (*People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649]; *People v. Chaffey* (1994) 25 Cal.App.4th 852, 855 [30 Cal.Rptr.2d 757]; see CALCRIM No. 3426, *Voluntary Intoxication*.)

Mental Condition

A number of authorities have stated that a conflict exists in California over whether an unsound mental condition can form the basis of a defense of unconsciousness. (See *People v. Lisnow* (1978) 88 Cal.App.3d Supp. 21, 23 [151 Cal.Rptr. 621]; 1 Witkin California Criminal Law (4th ed. 2012) Defenses, § 32 [noting the split and concluding that the more recent cases permit the defense for defendants of unsound mind]; Annot., Automatism or Unconsciousness as a Defense or Criminal Charge (1984) 27 A.L.R.4th 1067, § 3(b) fn. 7.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 32-39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.01[4] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

3426. Voluntary Intoxication (Pen. Code, § 29.4)

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <*insert specific intent or mental state required, e.g.,"the intent to permanently deprive the owner of his or her property" or "knowledge that . . . " or "the intent to do the act required"***>.**

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

In connection with the charge of _____ *<insert first charged offense requiring specific intent or mental state>* **the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with _____<***insert specific intent or mental state required, e.g.,"the intent to permanently deprive the owner of his or her property" or "knowledge that . . ."***>. If the People have not met this burden, you must find the defendant not guilty of _____** *<insert first charged offense requiring specific intent or mental state>***.**

<Repeat this paragraph for each offense requiring specific intent or a specific mental state.>

You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to _____ *<insert general intent offense[s]>***.]**

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*New January 2006; Revised August 2012, August 2013, February 2015, March 2019, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (*People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d

1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary intoxication and its effect on the defendant's required mental state. (Pen. Code, § 29.4; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [relevant to mental state in aiding and abetting].)

Voluntary intoxication may not be considered for general intent crimes. (*People v. Mendoza, supra,* ~~(1998)~~ 18 Cal.4th at pp.~~1114,~~ 1127–1128~~ [77 Cal.Rptr.2d 428, 959 P.2d 735]~~; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [104 Cal.Rptr.2d 738, 18 P.3d 660]; see also *People v. Hood* (1969) 1 Cal.3d 444, 451 [82 Cal.Rptr. 618, 462 P.2d 370] [applying specific vs. general intent analysis and holding that assault type crimes are general intent; subsequently superseded by amendments to former Penal Code Section 22 [now Penal Code section 29.4] on a different point].)

If both specific and general intent crimes are charged, the court must specify the general intent crimes in the bracketed portion of the last sentence and instruct the jury that voluntary intoxication is not a defense to those crimes. (*People v. Aguirre* (1995) 31 Cal.App.4th 391, 399–402 [37 Cal.Rptr.2d 48]; *People v. Rivera* (1984) 162 Cal.App.3d 141, 145–146 [207 Cal.Rptr. 756].)

If the defendant claims unconsciousness due to involuntary intoxication as a defense to driving under the influence, see *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317-1323 [149 Cal.Rptr.3d 167].

The court may need to modify this instruction if given with CALCRIM No. 362, *Consciousness of Guilt*. (*People v. Wiidanen* (2011) 201 Cal.App.4th 526, 528, 533 [135 Cal.Rptr.3d 736].)

Evidence of voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3rd 732, 415 P.3d 789].)

Related Instructions

CALCRIM No. 3427, *Involuntary Intoxication*.

CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.

CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

AUTHORITY

- Instructional Requirements. Pen. Code, § 29.4; *People v. Castillo, supra,* ~~(1997)~~ 16 Cal.4th at p.~~1009,~~ 1014~~ [68 Cal.Rptr.2d 648, 945 P.2d 1197]~~; *People*

v. Saille, *supra*, ~~(1991)~~ 54 Cal.3d at p.~~1103,~~ 1119 ~~[2 Cal.Rptr.2d 364, 820 P.2d 588]~~.

- Effect of Prescription Drugs. *People v. Mathson*, *supra*, ~~(2012)~~ 210 Cal.App.4th at p.~~1297,~~ 1328, fn. 32 ~~[149 Cal.Rptr.3d 167]~~.

RELATED ISSUES

Implied Malice

"[E]vidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433], quoting *People v. Reyes*, *supra*, ~~(1997)~~ 52 Cal.App.4th at p.~~975,~~ 984, fn. 6 ~~[61 Cal.Rptr.2d 39]~~.)

Intoxication Based on Mistake of Fact Is Involuntary

Intoxication resulting from trickery is not "voluntary." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [194 Cal.Rptr. 633] [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Premeditation and Deliberation

"[T]he trial court has no sua sponte duty to instruct that voluntary intoxication may be considered in determining the existence of premeditation and deliberation." (*People v. Hughes* (2002) 27 Cal.4th 287, 342 [116 Cal.Rptr.2d 401, 39 P.3d 432], citing *People v. Saille*, *supra*, ~~(1991)~~ 54 Cal.3d at p.~~1103,~~ 1120 ~~[2 Cal.Rptr.2d 364, 820 P.2d 588]~~; see *People v. Castillo*, *supra*, ~~(1997)~~ 16 Cal.4th at p.~~1009,~~ 1018 ~~[68 Cal.Rptr.2d 648, 945 P.2d 1197]~~ [counsel not ineffective for failing to request instruction specifically relating voluntary intoxication to premeditation and deliberation].)

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense

Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by ~~former Penal Code section 22 [now~~ Penal Code section 29.4~~]~~, rather than by section 26 and is only a partial defense to a crime. (*People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649] [no error in refusing to instruct on unconsciousness resulting from voluntary intoxication in gross vehicular manslaughter and fleeing-the-scene allegations]; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 [79 Cal.Rptr.2d 408, 966 P.2d 442] ["if the intoxication is voluntarily

induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication [citation].”].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 32-39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

3427. Involuntary Intoxication

Consider any evidence that the defendant was involuntarily intoxicated in deciding whether the defendant had the required (intent/ [or] mental state) when (he/she) acted.

A person is *involuntarily intoxicated* if he or she unknowingly ingested some intoxicating liquor, drug, or other substance, or if his or her intoxication is caused by the (force/[, [or] duress/, [or] fraud/, [or] trickery of someone else), for whatever purpose [, without any fault on the part of the intoxicated person].

*New January 2006; Revised August 2013, September 2024**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

It appears that the court has no sua sponte duty to instruct on involuntary intoxication, unless the intoxication results in unconsciousness. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [no sua sponte duty when evidence of voluntary intoxication presented to negate element of offense].) If the defendant is relying on the defense of unconsciousness caused by involuntary intoxication, see CALCRIM No. 3425, *Unconsciousness*.

In the definition of "involuntarily intoxicated," the phrase "without any fault on the part of the intoxicated person" is taken from *People v. Velez* (1985) 175 Cal.App.3d 785, 796 [221 Cal.Rptr. 631]. It is unclear when this concept of "fault" would apply if the person has no knowledge of the presence of the intoxicating substance. The committee has included the language in brackets for the court to use at its discretion.

If the defendant claims unconsciousness due to involuntary intoxication as a defense to driving under the influence, see *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317-1323 [149 Cal.Rptr.3d 167].

Related Instructions

See CALCRIM No. 3426, *Voluntary Intoxication*.

AUTHORITY

- Instructional Requirements. See Pen. Code, § 26(3).

- Burden of Proof. See *People v. Saille*, *supra,* ~~(1991)~~ 54 Cal.3d at p.~~1103,~~ 1106 ~~[2 Cal.Rptr.2d 364, 820 P.2d 588]~~ [in context of voluntary intoxication].
- "Involuntary Intoxication" Defined. *People v. Velez*, *supra,* ~~(1985)~~ 175 Cal.App.3d at p.~~785,~~ 796 ~~[221 Cal.Rptr. 631]~~.

COMMENTARY

One court has held that a mistake of fact defense (see Pen. Code, § 26(3)) can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–832 [194 Cal.Rptr. 633].) For further discussion, see CALCRIM No. 3406, *Mistake of Fact*.

RELATED ISSUES

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense

Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by ~~former Penal Code section 22 [now~~ Penal Code section 29.4~~]~~, rather than by section 26, and is only a partial defense to a crime. (*People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649] [no error in refusing to instruct on unconsciousness resulting from voluntary intoxication in gross vehicular manslaughter and fleeing-the-scene allegations]; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]~~.~~)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 32-39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[4], 73.04 (Matthew Bender).