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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on August 23, 2013

Title
Jury Instructions: Revisions to Criminal Jury Instructions

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

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Sandy R. Kriegler, Chair

Agenda Item Type
Action Required

Effective Date
August 23, 2013

Date of Report
July 15, 2013

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## Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approval of the proposed revisions to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. These changes will keep *CALCRIM* current with statutory and case authority.

## Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective August 23, 2013, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. Once approved by the Judicial Council, the revised instructions will be published in the official 2013 edition of the *Judicial Council of California Criminal Jury Instructions*.

A table of contents and the proposed revisions to the criminal jury instructions are attached at pages 7–179.

## Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the advisory committee and its charge.[1] In August 2005, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.*

The council approved the last *CALCRIM* release at its February 2013 meeting.

## Rationale for Recommendation

The committee recommends proposed revisions to or deletion of the following instructions: 460, 520, 540A, 540B, 540C, 541A, 541B, 541C, 549 (deletion), 600, 725, 730, 731, 732, 875, 960, 1003, 1200, 1203, 1204, 1243, 1400, 1401, 1600, 2040, 2303, 2510, 2511, 2542, 2760, 2900, 2901, 3261, 3425, 3426, 3427. The committee further recommends the adoption of two new instructions: 3223 on *Reckless Driving with Specified Injury* and 3411, *Defenses: Mistake of Law as a Defense*.

The committee drafted or revised the instructions based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant changes recommended to the council.

### Felony Murder Instructions (CALCRIM 540 Series Plus Related Special Circumstances Instructions Nos. 725, 730, 731, 732 and "One Continuous Transaction" and Escape Rule Instructions Nos. 549 and 3261)

The Chief Justice's unanimous opinion in *People v. Wilkins*[2] affected 12 criminal jury instructions. *Wilkins* held it was error to give CALCRIM No. 549 on the "One Continuous Transaction" rule in a felony murder case when the defendant had been away from the scene of the crime for hours before the homicide took place.

In discussing the "One Continuous Transaction" rule the court limited the application of *People v. Cavitt.*[3] That case found it was not error to instruct on "One Continuous Transaction" in the unusual circumstances of that case.[4] It stands to reason, however, that *Cavitt's* limited holding

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[1] Rule 10.59(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions."

[2] (2013) 56 Cal.4th 333.

[3] (2004) 33 Cal.4th 187.

[4] Three defendants plan to commit a burglary in the home of one defendant's stepmother. The stepdaughter pretends to be a crime victim. Both "victims" are bound and left on a bed. The stepmother is alive when the other two

on unusual facts was never meant to be the basis for standard jury instructions on felony murder, although the original Task Force on Criminal Jury Instructions mistakenly interpreted it that way.

The committee now proposes deleting the many inappropriate references to the "One Continuous Transaction" rule throughout the felony murder instructions. Committee members also took a close look at the extremely limited circumstances under which courts could, but need not, instruct about that rule. They concluded that the risk of giving the instruction erroneously, which resulted in reversal in *Wilkins*, was much greater than any conceivable risk posed by not giving it at all. That was particularly true in light of admonitions in both *Cavitt* and *Wilkins* that there was no sua sponte duty to instruct on the logical nexus between the felony and the homicide.[5]

Therefore the committee recommends deleting CALCRIM No. 549, *Felony Murder: One Continuous Transaction – Defined* entirely. It would be replaced by the following bench note in CALCRIM Nos. 540B & C and 541B & C:[6]

> If the defendant was a nonkiller who fled, leaving behind an accomplice who killed, see *People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7 [14 Cal.Rtpr.3d 281, 91 P.3d 222][continuous transaction] and the discussion of *Cavitt* in *People v. Wilkins* (2013) 56 Cal.4th 333, 344 [153 Cal.Rptr.3d 519, 295 P.3d 903].

Because the *Cavitt* court emphasized that "cases that raise a genuine issue as to the existence of a logical nexus between the felony and the homicide 'are few indeed,'"[7] the committee proposes deleting the superfluous elements in the felony murder series that relate to the "logical nexus" or "logical connection" requirement.

The committee also deleted a bench note in CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule,* because *Wilkins* found fault with it:[8]

> This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing. Instead, the court should give CALCRIM No. 549, *Felony Murder: One Continuous Transaction--Defined.* This instruction should only be given if it is required to explain the duration of the felony for other ancillary purposes, such as use of a weapon.

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defendants flee, but she dies later, either from suffocation due to her bonds, or due to subsequent, deliberate acts by the stepdaughter.

[5] *People v. Wilkins* (2013) 56 Cal.4th 333, 342-347, *People v.Cavitt* (2004) 33 Cal.4th 187, 203-204.

[6] These are the instructions that apply to scenarios in which the defendant is not the killer.

[7] *People v.Cavitt* (2004) 33 Cal.4th 187, 204, fn. 5.

[8] *People v. Wilkins* (2013) 56 Cal.4th 333, 342-343.

Unfortunately, the original task force mistakenly relied on language in the *Cavitt* case in formulating that note.

The committee made the necessary conforming changes in the introduction to the Felony Murder Series.

### Revisions to Human Trafficking Statute (CALCRIM No. 1243)

The committee needed to revise CALCRIM No. 1243, *Human Trafficking*, in response to changes to Penal Code section 236.1 required by the passage of Proposition 35.

Because it was not clear how best to implement some of the statutory changes, the committee chose to limit its revisions to those immediately necessary to ensure that the existing instruction is accurate. In particular, the committee wanted more time to consider how many new instructions may be required. It also wished to await further guidance from courts of review regarding whether the omission of minors as victims from the basic offense was intentional on the part of the drafters. This concern was heightened by the fact that the new statutory revisions provide a definition for a term, "great bodily injury," that does not otherwise appear in the language of the statute.

### Criminal Street Gang Instructions (CALCRIM Nos. 1400, 1401, 2542)

In *People v. Rodriguez*,[9] the Supreme Court clarified that a violation of Penal Code section 186.22(a) requires that a defendant willfully assist, further, or promote felonious criminal conduct by acting together with at least one other member of a criminal street gang. Because a total of at least two gang members must participate in that conduct and the defendant may, but need not, be a gang member, the committee proposes adding the following explanation to each of these instructions:

> **At least two gang members 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.**

### New Instruction on Reckless Driving with Specified Injury (CALCRIM No. 3223)

The committee convened a working group consisting of a law professor and two trial judges to determine appropriate new instructions to add to CALCRIM. Although CALCRIM already has a misdemeanor reckless driving instruction, CALCRIM No. 2200, working group members concluded from both personal experience as well as from polling colleagues that the felony enhancement for this instruction is charged quite often. The committee drafted the proposed new instruction to fill that need.

[9] (2012) 55 Cal.4th 1125.

### New Instruction on Mistake of Law as a Defense (CALCRIM No. 3411)

The working group concluded that it would be useful to have an instruction on mistake of law as a defense, so the committee prepared the proposed new draft.

### Unconsciousness (CALCRIM No. 3425)

In *People v. Mathson*,[10] the Court of Appeal concluded that because the instruction's standard concluding language on reasonable doubt said "if, however" instead of "unless," it was "unnecessarily ambiguous." The court also suggested adding an explanation that only involuntary intoxication is the basis for a valid defense. The committee responded to both of these suggestions with the proposed revisions in the current draft.

### Intoxication Series (CALCRIM Nos. 3426-3427)

In *People v. Mathson*,[11] the Court of Appeal suggested adding specific optional wording to CALCRIM No. 3426 on voluntary intoxication. The court's recommendation would apply when a defendant claims unconsciousness resulted from the unexpected effect of prescription drugs in a driving under the influence (DUI) case. The committee, however, cannot recommend adding new language to the existing instruction. First, the intoxication instructions are used in a broad range of cases, not just for DUI's. Second, these are standard jury instructions and were never intended to apply to every unusual fact situation, such as driving while unconscious. Trial judges understand that standard jury instructions must be adapted to suit the unique facts of each case. Finally, the recommended language is essentially a pinpoint instruction that would normally be prepared by one of the parties in a case. For policy reasons, the committee avoids providing pinpoint instructions.

Instead, after careful consideration and discussion, the committee decided to propose adding the following bench note to both of the instructions in the intoxication series to refer users to the court's suggestion should the need arise:

> 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.

The committee did follow the court's suggestion for minor editing changes to the involuntary intoxication instruction, CALCRIM No. 3427, to clarify that listed options in the second paragraph are indeed optional, as reflected in the current draft.

## Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for comment from May 17, 2013 to June 28, 2013. Comments were received from 5 different commentators, many of which

[10] (2012) 210 Cal.App.4th 1297, 1317-1324.

[11] (2012) 210 Cal.App.4th 1297, 1324-1328.

represented institutional commentators and commented on several instructions. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 180–206.

Of the comments received, most addressed the proposed changes to the felony murder series. Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CALCRIM* on a regular basis and to submit its recommendations to the council for approval. The proposed revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

## Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Administrative Office of the Courts (AOC). Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC provides a broad public license for their noncommercial use and reproduction.

## Attachments

1. Full text of new and revised *CALCRIM* instructions, at pages 7–179
2. Chart of comments, at pages 180-206

| Instruction Number | Instruction Title |
|---|---|
| 520, 600 | First or Second Degree Murder with Malice Aforethought, Attempted Murder |
| 540 ABC, 541 ABC, 549, Special Circ Instructions Citing *Cavitt*, & 3261 | Felony Murder Series, One Continuous Transaction, Escape Rule, and all other instructions citing the *Cavitt* case |
| 875 | Assault with a Deadly Weapon or Force Likely to Produce Great Bodily Injury |
| 960 | Simple Battery |
| 1003 | Rape of Unconscious Woman or Spouse |
| 1200, 1203, 1204 | Kidnapping Series |
| 1243 | Human Trafficking |
| 1400, 1401, 2542 | Criminal Street Gang Instructions |
| 1600 | Robbery |
| 2040 | Unauthorized Use of Personal Identifying Information |
| 2303 | Possession of Controlled Substance While Armed With Firearm |
| 2510, 2511 | Possession of Firearm by Person Prohibited Due to Conviction |
| 2760 & 460 | Escape and Attempt Other Than Attempted Murder |
| 2900-2901 | Vandalism Series |
| NEW 3223 | Reckless Driving with Specified Injury |
| NEW 3411 | Defenses: Mistake of Law as a Defense |
| 3425 | Unconsciousness |
| 3426-3427 | Intoxication Series |

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

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**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:**

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

**[AND]**

2. **When the defendant acted, (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 acted with *express malice* if (he/she) unlawfully intended to kill.**

**The defendant acted with *implied malice* if:**

1. **(He/She) intentionally committed an act;**

2. **The natural and probable consequences of the act were dangerous to human life;**

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

**AND**

4. **(He/She) deliberately acted 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.]**

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

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

**[(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*>**.**

**If you conclude that the defendant owed a duty to _____** <*insert name of decedent*>**, and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act.]**

<*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 [insert date of council approval]*

## 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. 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 the bracketed portion that begins, "(A/An) _____*<insert description of person owing duty>* has a legal duty to." 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 or second degree felony murder, instruct on those crimes 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].
- Causation ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- 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].
- This Instruction Upheld ▸ *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

***Secondary Sources***

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

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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).

## LESSER INCLUDED OFFENSES

- Voluntary Manslaughter ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118].) 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* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *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* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [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.)

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

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

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

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

**AND**

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

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

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

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

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

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

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

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

## BENCH NOTES

***Instructional Duty***

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

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

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

Give the next-to-last bracketed paragraph when the defendant has been charged only with attempt to commit murder, but the evidence at trial reveals that the murder was actually completed. (See Pen. Code, § 663.)

***Related Instructions***

CALCRIM Nos. 3470–3477, Defense Instructions.

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

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

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

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

## AUTHORITY

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

***Secondary Sources***

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

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

## LESSER INCLUDED OFFENSES

Attempted voluntary manslaughter is a lesser included offense. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].)

## RELATED ISSUES

***Specific Intent Required***

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

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

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

***Solicitation***

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

***Single Bullet, Two Victims***

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

***No Attempted Involuntary Manslaughter***

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

***Transferred and Concurrent Intent***

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

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

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

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

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

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

**AND**

3. **While committing [or attempting to commit] _____**, *<insert felony or felonies from Pen. Code, § 189>* **the defendant caused the death of another person.**

4.

**A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.**

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

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

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

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

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

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

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

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104

Deleted: It is not required that the person die immediately, as long as the cause of death and the (felony/felonies) are part of one continuous transaction.]¶
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Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

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

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

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

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*. ¶

***Drive-By Shooting***

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

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

***Related Instructions—Other Causes of Death***

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

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

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

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

## AUTHORITY

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

***Secondary Sources***

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

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

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**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]. ¶

**Deleted:** *People v. Cavitt (2004) 33 Cal.4th* 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]

**Deleted:** <#>Continuous *Transaction* Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

**Deleted:** <#>Logical Nexus Between Felony and Killing ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

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

## RELATED ISSUES

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

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

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

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

***Imperfect Self-Defense***
Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony murder. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753].)

## 540B. Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act (Pen. Code, § 189)

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*<Give the following introductory sentence when not giving CALCRIM No. 540A.>*
**[The defendant is charged [in Count __] with murder, under a theory of felony murder.]**

**The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.**

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

3. **If the defendant did not personally commit [or attempt to commit] _____** *<insert felony or felonies from Pen. Code, § 189>***, then a perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] _____** *<insert felony or felonies from Pen. Code, § 189>***;**

**AND**

4. **While committing [or attempting to commit] _____,** *<insert felony or felonies from Pen. Code, § 189>* **the perpetrator caused the death of another person.**

**A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.**

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**Deleted:** *<Give element 5 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>*¶
¶
**[AND**¶
¶
**<#>There was a logical connection between the cause of death and the _____** *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***]. The connection between the cause of death and the _____** *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***] must involve more than just their occurrence at the same time and place.]** ¶

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

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

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

**Deleted:** [It is not required that the person die immediately, as long as the cause of death and the (felony/felonies) are part of one continuous transaction.]¶

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

**[It is not required that the defendant be present when the act causing the death occurs.]**

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

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

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

**Deleted:** If causation is an issue,

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select

"committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if . . . ."

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

If the defendant was a nonkiller who fled, leaving behind an accomplice who killed, see *People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7 [14 Cal.Rtpr.3d 281, 91 P.3d 222][continuous transaction] and the discussion of *Cavitt* in *People v. Wilkins* (2013) 56 Cal.4th 333, 344 [153 Cal.Rptr.3d 519, 295 P.3d 903].

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

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

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7

**Deleted:** Bracketed element 5 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rtpr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." . (*Ibid.* [italics in original].) The majority in *Cavitt* concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) Give bracketed element 5 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 5. (See discussion of conspiracy liability in the Related Issues section below.)¶
¶

Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

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

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

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

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

***Related Instructions—Other Causes of Death***

This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

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

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.¶

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

***Related Instructions***

CALCRIM No. 400 et seq., *Aiding and Abetting: General Principles.*

CALCRIM No. 415 et seq., *Conspiracy*.

## AUTHORITY

- Felony Murder: First Degree ‣ Pen. Code, § 189;
- Specific Intent to Commit Felony Required ‣ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373].
- Infliction of Fatal Injury ‣ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ‣ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing ‣ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Merger Doctrine Does Not Apply to First Degree Felony Murder ‣ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Introduction to Crimes, §§ 98, 109.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 151–168, 178.

**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].

**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].

**Deleted:** <#>Continuous Transaction Requirement ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶ <#>Logical Connection Required for Liability of Nonkiller ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.10[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

## RELATED ISSUES

***Conspiracy Liability—Natural and Probable Consequences***

In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder based on aiding and abetting the underlying felony. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 [285 Cal.Rptr. 523].) The court has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy.

In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations]." In the court's two most recent opinions on felony-murder complicity, the court refers to the liability of "cofelons" or "accomplices" without reference to whether liability is based on directly committing the offense, aiding and abetting the offense, or conspiring to commit the offense. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197–205 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].) On the other hand, in both of these cases, the defendants were present at the scene of the felony and directly committed the felonious acts. (*People v. Cavitt, supra,* 33 Cal.4th at p. 194; *People v. Billa, supra,* 31 Cal.4th at p. 1067.) Thus, the court has not had occasion recently to address a situation in which the defendant was convicted of felony murder based solely on a theory of coconspirator liability.

The requirement for a logical nexus between the felony and the act causing the death, articulated in *People v. Cavitt*, *supra*, 33 Cal.4th at p. 193, may be sufficient to hold a conspiring defendant liable for the resulting death under the felony-murder rule. However, *Cavitt* did not clearly answer this question. Nor has any case explicitly held that the natural and probable consequences doctrine does not apply in the context of felony murder based on conspiracy.

Thus, if the trial court is faced with a factual situation in which the defendant's liability is premised solely on being a member of a conspiracy in which another coparticipant killed an individual, the committee recommends that the court do the following: (1) give optional element on logical connection provided above; (2) request briefing and review the current law on conspiracy liability and felony murder; and (3) at the court's discretion, add as an additional element: "The act causing the death was a natural and probable consequence of the plan to commit _____ <*insert felony or felonies from Pen. Code, § 189*>."

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See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*.

## 540C. Felony Murder: First Degree—Other Acts Allegedly Caused Death (Pen. Code, § 189)

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

**The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator.***

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

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

**[3. A perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] _____** *<insert felony or felonies from Pen. Code, § 189>***;]**

**AND**

**(3/4). The commission [or attempted commission] of the _____** *<insert felony or felonies from Pen. Code, § 189>* **was a substantial factor in causing the death of another person.**

**A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.**

**To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____** *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given)**

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**Deleted:** (4/5). The cause of death and the _____ *<insert felony or felonies from Pen. Code, § 189>* **[or attempted** _____ *<insert felony or felonies from Pen. Code, § 189>***] were part of one continuous transaction;¶**
**¶**
**AND¶**
**¶**
**(4/5**

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**Deleted:** ). There was a logical connection between the cause of death and the _____ *<insert felony or felonies from Pen. Code, § 189>*. **The connection between the cause of death and the** _____ *<insert felony or felonies from Pen. Code, § 189>* **must involve more than just their occurrence at the same time and place.¶**

**you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.**

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

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

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

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

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

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

**[It is not required that the defendant be present when the act causing the death occurs.]**

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

Deleted: [It is not required that the person die immediately, as long as the cause of death and the (felony/felonies) are part of one continuous transaction.]

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## BENCH NOTES

***Instructional Duty***

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

underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

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]; see generally, *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case in which this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

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If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

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

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

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

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

Give the last bracketed sentence, stating that the defendant need not be present, on request.

If the defendant was a nonkiller who fled, leaving behind an accomplice who killed, see *People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7 [14 Cal.Rtpr.3d 281, 91 P.3d 222][continuous transaction] and the discussion of *Cavitt* in *People v. Wilkins* (2013) 56 Cal.4th 333, 344 [153 Cal.Rptr.3d 519, 295 P.3d 903].

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

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.¶ ¶

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

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

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

***Related Instructions—Other Causes of Death***

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].)

See the Bench Notes to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*, for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

## AUTHORITY

- Felony Murder: First Degree ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required ▸ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373].
- Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim ▸ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].
- Logical Nexus Between Felony and Killing ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Merger Doctrine Does Not Apply to First Degree Felony Murder ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].

**Deleted:** ; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]

**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].

**Deleted:** <#>Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶ <#>Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 118–168.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.04, 140.10[3][b], Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [2][b] (Matthew Bender).

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## RELATED ISSUES

***Accidental Death of Accomplice During Commission of Arson***

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)

See the Related Issues section to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*, and CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.

## 541A. Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act

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

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

1. **The defendant committed [or attempted to commit] _____** *<insert inherently dangerous felony or felonies>***;**

2. **The defendant intended to commit _____** *<insert inherently dangerous felony or felonies>***;**

**AND**

3. **The defendant did an act that caused the death of another person.**

**A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.**

**To decide whether the defendant committed [or attempted to commit] _____** *<insert inherently dangerous felony or felonies>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply those instructions when you decide whether the People have proved second degree murder under a theory of felony murder.**

*<Make certain that all appropriate instructions on all underlying felonies are given.>*

**[The defendant must have intended to commit the (felony/felonies) of _____** *<insert inherently dangerous felony or felonies>* **before or at the time of the act causing the death.]**

*<If the facts raise an issue whether the commission of the felony continued while a defendant was fleeing the scene, give the following sentence instead of CALCRIM No. 3261, While Committing a Felony: Defined—Escape Rule>*
**[The crime of _____** *<insert inherently dangerous felony or felonies>* **continues until a defendant has reached a place of temporary safety.]**

**Deleted:** ;

**Deleted:** AND¶
¶
<#>**There was a logical connection between the act causing the death and the _____** *<insert inherently dangerous felony or felonies>***. The connection between the fatal act and the _____** *<insert inherently dangerous felony or felonies>* **must involve more than just their occurrence at the same time and place.¶**

**Deleted:** <#>**The act causing the death and the _____** *<insert inherently dangerous felony or felonies>* **[or attempted _____** *<insert inherently dangerous felony or felonies>***] were part of one continuous transaction.¶**

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

Deleted: [It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]¶

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*New January 2006; Revised August 2009, February 2012 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

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

Insert the appropriate, nonassaultive, inherently dangerous felony or felonies in the blanks provided in accordance with the Supreme Court's ruling in *People v. Chun* (2009) 45 Cal.4th 1172, 1199 [91 Cal.Rptr.3d 106, 203 P.3d 425] [when underlying felony is assaultive in nature, felony merges with homicide and cannot be basis of a felony-murder instruction].

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

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

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

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7

Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

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

> **There must be a logical connection between the cause of death and the _____ <*insert inherently dangerous felony or felonies*> [or attempted _____ <*insert inherently dangerous felony or felonies*>]. The connection between the cause of death and the _____ <*insert inherently dangerous felony or felonies*> [or attempted _____ <*insert inherently dangerous felony or felonies*>] must involve more than just their occurrence at the same time and place.]**

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

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

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.¶
¶

***Related Instructions—Other Causes of Death***

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

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 541B, *Felony Murder: Second Degree—Coparticipant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 541C, *Felony Murder: Second Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see

*People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

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

## AUTHORITY

- Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- Specific Intent to Commit Felony Required ▸ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373].
- Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Merger Doctrine Applies if Elements of Crime Have Assaultive Aspect ▸ *People v. Chun* (2009) 45 Cal.4th 1172, 1199 [91 Cal.Rptr.3d 106, 203 P.3d 425].

***Secondary Sources***

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

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

## LESSER INCLUDED OFFENSES

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

**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]

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- Attempted Murder ‣ Pen. Code, §§ 663, 189.

## RELATED ISSUES

***Second Degree Felony Murder: Inherently Dangerous Felonies***
The second degree felony-murder doctrine is triggered when a homicide occurs during the commission of a felony that is inherently dangerous to human life. (*People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361] and *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], both overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].) In *People v. Burroughs* (1984) 35 Cal.3d 824, 833 [201 Cal.Rptr. 319, 678 P.2d 894], the court described an inherently dangerous felony as one that cannot be committed without creating a substantial risk that someone will be killed. However, in *People v. Patterson* (1989) 49 Cal.3d 615, 618, 626–627 [262 Cal.Rptr. 195, 778 P.2d 549], the court defined an inherently dangerous felony as "an offense carrying a high probability that death will result." (See *People v. Coleman* (1992) 5 Cal.App.4th 646, 649–650 [7 Cal.Rptr.2d 40] [court explicitly adopts *Patterson* definition of inherently dangerous felony].)

Whether a felony is inherently dangerous is a legal question for the court to determine. (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 900–902 [13 Cal.Rptr.3d 442] [rule not changed by *Apprendi*].) In making this determination, the court should assess "the elements of the felony in the abstract, not the particular facts of the case," and consider the statutory definition of the felony in its entirety. (*People v. Satchell, supra,* 6 Cal.3d at p. 36; *People v. Henderson, supra,* 19 Cal.3d at pp. 93–94.) If the statute at issue prohibits a diverse range of conduct, the court must analyze whether the entire statute or only the part relating to the specific conduct at issue is applicable. (See *People v. Patterson, supra,* 49 Cal.3d at pp. 622–625 [analyzing Health & Saf. Code, § 11352, which prohibits range of drug-related behavior, and holding that only conduct at issue should be considered when determining dangerousness].)

The following felonies have been found inherently dangerous for purposes of second degree felony murder (but note that since Proposition 115 amended Penal Code section 189 in 1990, that code section includes kidnapping in its list of first degree felony murder felonies):

- Attempted Escape From Prison by Force or Violence ‣ Pen. Code, § 4530; *People v. Lynn* (1971) 16 Cal.App.3d 259, 272 [94 Cal.Rptr. 16]; *People v. Snyder* (1989) 208 Cal.App.3d 1141, 1143–1146 [256 Cal.Rptr. 601].

- Furnishing Poisonous Substance ‣ Pen. Code, § 347; *People v. Mattison* (1971) 4 Cal.3d 177, 182–184 [93 Cal.Rptr. 185, 481 P.2d 193].
- Kidnapping for Ransom, Extortion, or Reward ‣ Pen. Code, § 209(a); *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227–1228 [277 Cal.Rptr. 382].
- Manufacturing Methamphetamine ‣ Health & Saf. Code, § 11379.6(a); *People v. James* (1998) 62 Cal.App.4th 244, 270–271 [74 Cal.Rptr.2d 7].
- Reckless Possession of Destructive or Explosive Device ‣ Pen. Code, § 18715; *People v. Morse* (1992) 2 Cal.App.4th 620, 646, 655 [3 Cal.Rptr.2d 343].
- Shooting Firearm in Grossly Negligent Manner ‣ Pen. Code, § 246.3; *People v. Clem* (2000) 78 Cal.App.4th 346, 351 [92 Cal.Rptr.2d 727]; *People v. Robertson* (2004) 34 Cal.4th 156, 173 [17 Cal.Rptr.3d 604, 95 P.3d 872] [merger doctrine does not apply].
- Shooting at Inhabited Dwelling ‣ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9–10 [78 Cal.Rptr.2d 753].
- Shooting at Occupied Vehicle ‣ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 10–11 [78 Cal.Rptr.2d 753].
- Shooting From Vehicle at Inhabited Dwelling ‣ *People v. Hansen* (1994) 9 Cal.4th 300, 311 [36 Cal.Rptr.2d 609, 885 P.2d 1022].

The following felonies have been found to be *not* inherently dangerous for purposes of second degree felony murder:

- Conspiracy to Possess Methedrine ‣ *People v. Williams* (1965) 63 Cal.2d 452, 458 [47 Cal.Rptr. 7, 406 P.2d 647].
- Driving With Willful or Wanton Disregard for Safety While Fleeing a Pursuing Officer ‣ *People v. Howard* (2005) 34 Cal.4th 1129, 1138 [23 Cal.Rptr.3d 306].
- Extortion ‣ Pen. Code, §§ 518, 519; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1237–1238 [72 Cal.Rptr.2d 918].
- False Imprisonment ‣ Pen. Code, § 236; *People v. Henderson* (1977) 19 Cal.3d 86, 92–96 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Felon in Possession of Firearm ‣ Pen. Code, § 29800; *People v. Satchell* (1971) 6 Cal.3d 28, 39–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Felonious Practice of Medicine Without License ‣ *People v. Burroughs* (1984) 35 Cal.3d 824, 830–833 [201 Cal.Rptr. 319, 678 P.2d 894].

- Felony Child Abuse ▸ Pen. Code, § 273a; *People v. Lee* (1991) 234 Cal.App.3d 1214, 1228 [286 Cal.Rptr. 117].
- Felony Escape From Prison Without Force or Violence ▸ Pen. Code, § 4530(b); *People v. Lopez* (1971) 6 Cal.3d 45, 51–52 [98 Cal.Rptr. 44, 489 P.2d 1372].
- Felony Evasion of Peace Officer Causing Injury or Death ▸ Veh. Code, § 2800.3; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 979–980 [103 Cal.Rptr.2d 809].
- Furnishing PCP ▸ Health & Saf. Code, § 11379.5; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1100–1101 [8 Cal.Rptr.2d 439].
- Grand Theft Under False Pretenses ▸ *People v. Phillips* (1966) 64 Cal.2d 574 [51 Cal.Rptr. 225, 414 P.2d 353], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Grand Theft From the Person ▸ Pen. Code, § 487(c); *People v. Morales* (1975) 49 Cal.App.3d 134, 142–143 [122 Cal.Rptr. 157].

See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*.

## 541B. Felony Murder: Second Degree—Coparticipant Allegedly Committed Fatal Act

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*<Give the following introductory sentence when not giving Instruction 541A.>*
**[The defendant is charged [in Count __] with murder, under a theory of felony murder.]**

**The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator.***

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert inherently dangerous felony or felonies>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert inherently dangerous felony or felonies>***;**

3. **The perpetrator committed [or attempted to commit]** _____ *<insert inherently dangerous felony or felonies>***;**

**AND**

4. **The perpetrator did an act that caused the death of another person.**

**A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.**

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

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**Deleted:** [AND]

**Deleted:** The act causing the death and the _____ *<insert inherently dangerous felony or felonies>* **[or attempted** _____ *<insert inherently dangerous felony or felonies>***] were part of one continuous transaction(;/.)**¶
¶
*<Give element*

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**Deleted:** *5 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>*¶
¶
[AND¶
¶
**<#>There was a logical connection between the act causing the death and the** _____ *<insert inherently dangerous felony or felonies>***. The connection between the fatal act and the** _____ *<insert inherently dangerous felony or felonies>* **must involve more than just their occurrence at the same time and place.]**¶

**instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved second degree murder under a theory of felony murder.**
*<Make certain that all appropriate instructions on all underlying felonies, aiding and abetting, and conspiracy are given.>*

**[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____** *<insert inherently dangerous felony or felonies>* **before or at the time of the act causing the death.]**

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

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

**[It is not required that the defendant be present when the act causing the death occurs.]**

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*New January 2006; Revised August 2009 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

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

Insert the appropriate, nonassaultive, inherently dangerous felony or felonies in the blanks provided in accordance with the Supreme Court's ruling in *People v. Chun* (2009) 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106] [when underlying felony is assaultive in nature, felony merges with homicide and cannot be basis of a felony-murder instruction].

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

**Deleted:** [It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]¶

**Deleted:** If causation is an issue,

**There must be a logical connection between the cause of death and the _____ <*insert inherently dangerous felony or felonies*> [or attempted _____ <*insert inherently dangerous felony or felonies*>]. The connection between the cause of death and the _____ <*insert inherently dangerous felony or felonies*> [or attempted _____ <*insert inherently dangerous felony or felonies*>] must involve more than just their occurrence at the same time and place.]**

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

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if . . . ."

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

If the defendant was a nonkiller who fled, leaving behind an accomplice who killed, see *People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7 [14 Cal.Rtpr.3d 281, 91 P.3d 222]{continuous transaction] and the discussion of *Cavitt* in *People v. Wilkins* (2013) 56 Cal.4th 333, 344 [153 Cal.Rptr.3d 519, 295 P.3d 903].

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony

**Deleted:** Bracketed element 6 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rptr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give the bracketed element 6 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 6. (See discussion of conspiracy liability in the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act.*)¶

until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

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

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

Give the last bracketed sentence, stating that the defendant need not be present, on request.

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

***Related Instructions—Other Causes of Death***

This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

If the prosecution alleges that the defendant committed the fatal act, give CALCRIM No. 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 541C, *Felony Murder: Second Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*. ¶

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*People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

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

***Related Instructions***

CALCRIM No. 400 et seq., *Aiding and Abetting: General Principles.*

CALCRIM No. 415 et seq., *Conspiracy*.

## AUTHORITY

- Inherently Dangerous Felonies ‣ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- Specific Intent to Commit Felony Required ‣ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373].
- Infliction of Fatal Injury ‣ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ‣ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].Merger Doctrine Applies if Elements of Crime Have Assaultive Aspect ‣ *People v. Chun* (2009) 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Introduction to Crimes, §§ 98, 109.

**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]

**Deleted:** <#>Continuous Transaction Requirement ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶ <#>Logical Connection Required for Liability of Nonkiller ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

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1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 174.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3][b], Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [2][b] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Second Degree Murder ▸ Pen. Code, § 187.
- Voluntary Manslaughter ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.

## RELATED ISSUES

See the Related Issues section of CALCRIM No. 540B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act and CALCRIM No. 541A, Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act.

## 541C. Felony Murder: Second Degree—Other Acts Allegedly Caused Death

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

**The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator.***

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert inherently dangerous felony or felonies>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert inherently dangerous felony or felonies>***;**

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

**[3. The perpetrator committed [or attempted to commit]** _____ *<insert inherently dangerous felony or felonies>***;]**

**[AND]**

**(3/4). The commission [or attempted commission of] the** _____ *<insert inherently dangerous felony or felonies>* **caused the death of another person.**

**A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.**

**To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit]** _____ *<insert inherently dangerous felony or felonies>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a**

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¶
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**Deleted:** 4/5). - **There was a logical connection between the act causing the death and the** _____ *<insert inherently dangerous felony or felonies>***. The connection between the fatal act and the** _____ *<insert inherently dangerous felony or felonies>* **must involve more than just their occurrence at the same time and place.**

**member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved second degree murder under a theory of felony murder.**

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

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

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

Deleted: [It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]¶

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

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

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

**[It is not required that the defendant be present when the act causing the death occurs.]**

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*New January 2006; Revised August 2009 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying felony. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

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]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

Insert the appropriate, nonassaultive, inherently dangerous felony or felonies in the blanks provided in accordance with the Supreme Court's ruling in *People v. Chun* (2009) 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106] [when underlying felony is assaultive in nature, felony merges with homicide and cannot be basis of a felony-murder instruction].

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of an instruction on the underlying felony if the defendant is not separately charged with that offense.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may [also] be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of an instruction on the underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287

P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit."

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

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

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Give the last bracketed sentence, stating that the defendant need not be present, on request.

If the defendant was a nonkiller who fled, leaving behind an accomplice who killed, see *People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7 [14 Cal.Rtpr.3d 281, 91 P.3d 222][continuous transaction] and the discussion of *Cavitt* in *People v. Wilkins* (2013) 56 Cal.4th 333, 344 [153 Cal.Rptr.3d 519, 295 P.3d 903].

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

> **There must be a logical connection between the cause of death and the _____ <*insert inherently dangerous felony or felonies*> [or attempted _____ <*insert inherently dangerous felony or felonies*>]. The connection between the cause of death and the _____ <*insert inherently dangerous felony or felonies*> [or attempted _____ <*insert inherently dangerous felony or felonies*>] must involve more than just their occurrence at the same time and place.]**

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

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

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined.*¶

***Related Instructions—Other Causes of Death***

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

See the Bench Notes to CALCRIM No. 541B, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act* for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

## AUTHORITY

- Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr.1], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- Specific Intent to Commit Felony Required ▸ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373].
- Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim ▸ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].Merger

**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]

**Deleted:** <#>Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶ <#>Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

Doctrine Applies if Elements of Crime Have Assaultive Aspect ▸ *People v. Chun (2009)* 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106].

***Secondary Sources***

1 Witkin & Epstein, Calif*ornia Criminal L*aw (4th ed. 2012) Crimes Against the Person, § 190.

6 Millman, Sevilla & Tarlow, C*alifornia Criminal* Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.04, 140.10[3][b], Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [2][b] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Voluntary Manslaughter ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.

## RELATED ISSUES

***Accidental Death of Accomplice During Commission of Arson***

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)

See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*; CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*; and 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act*.

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**542–547.Reserved for Future Use**

COMMITTEE PROPOSES DELETING THIS ENTIRE INSTRUCTION

## 549. Felony Murder: One Continuous Transaction—Defined

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**In order for the People to prove that the defendant is guilty of murder under a theory of felony murder [and that the special circumstance of murder committed while engaged in the commission of _____ <*insert felony*> is true], the People must prove that the _____ <*insert felony*> [or attempted _____ <*insert felony*>] and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time and in more than one location.**

**In deciding whether the act causing the death and the felony were part of *one continuous transaction,* you may consider the following factors:**

1. **Whether the felony and the fatal act occurred at the same place;**

2. **The time period, if any, between the felony and the fatal act;**

3. **Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony;**

4. **Whether the fatal act occurred after the felony but while [one or more of] the perpetrator[s] continued to exercise control over the person who was the target of the felony;**

5. **Whether the fatal act occurred while the perpetrator[s] (was/were) fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime;**

6. **Whether the felony was the direct cause of the death;**

**AND**

7. **Whether the death was a natural and probable consequence of the felony.**

**It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in**

**deciding whether the fatal act and the felony were part of one continuous transaction.**

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*New January 2006*

## BENCH NOTES

***Instructional Duty***

In *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222], the court stated that "there is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide without regard to whether the evidence supports such an instruction." If the evidence raises an issue of whether the felony and the homicide were part of one continuous transaction, give this instruction.

The court **must** also give the appropriate felony-murder instructions explaining the elements of the underlying offense.

## AUTHORITY

- Continuous Transaction ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Hart* (1999) 20 Cal.4th 546, 608–609 [85 Cal.Rptr.2d 132, 976 P.2d 683]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016 [248 Cal.Rptr. 568, 755 P.2d 1017]; *People v. Hernandez* (1988) 47 Cal.3d 315, 346 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 210 [82 Cal.Rptr. 598]; *People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [32 Cal.Rptr. 199, 383 P.2d 783].
- 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].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 139–142.

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

## RELATED ISSUES

It is error to remove from the jury the factual question of whether the felony and the homicide are parts of a single "continuous transaction." (*People v. Sakarias* (2000) 22 Cal.4th 596, 623–625 [94 Cal.Rptr.2d 17, 995 P.2d 152].)

## 550–559. Reserved for Future Use

## 725. Special Circumstances: Murder of Witness (Pen. Code, § 190.2(a)(10))

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**The defendant is charged with the special circumstance of murder of a witness [in violation of Penal Code section 190.2(a)(10)].**

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

1. **The defendant intended to kill** _____ <*insert name of decedent*>**;**

2. _____ <*insert name of decedent*> **was a witness to a crime;**

3. **The killing was not committed during the commission [or attempted commission] of the crime to which** _____ <*insert name of decedent*> **was a witness;**

**AND**

4. **The defendant intended that** _____ <*insert name of decedent*> **be killed (to prevent (him/her) from testifying in a (criminal/ [or] juvenile) proceeding/ [or] in retaliation for (his/her) testimony in a (criminal/ [or] juvenile) proceeding).**

**[A killing is committed during the commission [or attempted commission] of a crime if the killing and the crime are part of one continuous transaction. The continuous transaction may occur over a period of time or in more than one location.]**

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

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on 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 last bracketed paragraph should be given if there is evidence that the killing and the crime witnessed were part of one continuous transaction. The court may

choose to give further instruction on one continuous transaction on request. . (See, *People v. Silva* (1988) 45 Cal.3d 604, 631 [247 Cal.Rptr. 573, 754 P.2d 1070].)

## AUTHORITY

- Special Circumstance ▸ Pen. Code, § 190.2(a)(10).
- Continuous Transaction ▸ *People v. Clark* (2011) 52 Cal.4th 856, 1015-1016 [131 Cal.Rptr.3d 225, 261 P.3d 243]; *People v. Silva* (1988) 45 Cal.3d 604, 631 [247 Cal.Rptr. 573, 754 P.2d 1070]; *People v. Beardslee* (1991) 53 Cal.3d 68, 95 [279 Cal.Rptr. 276, 806 P.2d 1311].

***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 540.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.13[10], 87.14 (Matthew Bender).

## RELATED ISSUES

***Purpose of Killing***

In order for this special circumstance to apply, the defendant must kill the witness for the purpose of preventing him or her from testifying or in retaliation for his or her testimony. (*People v. Stanley* (1995) 10 Cal.4th 764, 800 [42 Cal.Rptr.2d 543, 897 P.2d 481].) However, this does not have to be the sole or predominant purpose of the killing. (*Ibid.; People v. Sanders* (1990) 51 Cal.3d 471, 519 [273 Cal.Rptr. 537, 797 P.2d 561].)

***Victim Does Not Have to Be An Eyewitness or Important Witness***

"[N]othing in the language of the applicable special circumstance or in our decisions applying this special circumstance supports the suggestion that the special circumstance is confined to the killing of an 'eyewitness,' as opposed to any other witness who might testify in a criminal proceeding." (*People v. Jones* (1996) 13 Cal.4th 535, 550 [54 Cal.Rptr.2d 42, 917 P.2d 1165].) "It is no defense to the special circumstance allegation that the victim was not an important witness in the criminal proceeding, so long as one of the defendant's purposes was to prevent the witness from testifying." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1018 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; see also *People v. Bolter* (2001) 90 Cal.App.4th 240, 242–243 [108 Cal.Rptr.2d 760] [special circumstance applied to retaliation for testifying where witness's actual testimony was "innocuous"].)

***Defendant Must Believe Victim Will Be Witness***

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Deleted: *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222];

Deleted: *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222];

Deleted: *People v. Benson* (1990) 52 Cal.3d 754, 785 [276 Cal.Rptr. 827, 802 P.2d 330];

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"[S]ection 190.2, subd. (a)(10) is applicable if defendant *believes* the victim will be a witness in a criminal prosecution, whether or not such a proceeding is pending or about to be initiated." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1018 [95 Cal.Rptr.2d 377] [emphasis in original]; see also *People v. Weidert* (1985) 39 Cal.3d 836, 853 [218 Cal.Rptr. 57, 705 P.2d 380] [abrogated by statutory amendment]; *People v. Sanders* (1990) 51 Cal.3d 471, 518 [273 Cal.Rptr. 537, 797 P.2d 561].)

***"Continuous Transaction" in Context of Witness Special Circumstance***

"[T]o establish one continuous criminal transaction, the time-lag between the first and second killing does not matter so much as whether the defendant shows a common criminal intent toward all the victims upon the initiation of the first criminal act. When that criminal intent toward all victims is present, the criminal transaction does not conclude until the killing of the final victim." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 655 [21 Cal.Rptr.3d 612, 101 P.3d 509].)

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

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

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

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

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

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

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

**AND**

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

*<Give element 4/5 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>*

**To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit]** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***, please refer to the separate instructions that I (will give/have**

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**¶**
**(4/5). . The act causing the death and the** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[or attempted** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***] were part of one continuous transaction(;/.)**

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**given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.**

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

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

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

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

## BENCH NOTES

***Instructional Duty***

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

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

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

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies.

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

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

In addition, the court must give the final bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Kimble* (1988) 44 Cal.3d 480, 501 [244 Cal.Rptr. 148, 749 P.2d 803]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].)

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

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**Deleted:** that the homicidal act was perpetrated during the commission of the felony.

**Deleted:** were part of one continuous transaction." (*Ibid.* [italics in original].)

**Deleted:** The majority in *Cavitt* concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give bracketed element 4/5

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**Deleted:** if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element

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¶

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined.* ¶

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 [197 Cal.Rptr. 79, 672 P.2d 862] and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127 Cal.Rptr.2d 802, 58 P.3d 931]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].) The court should then modify this instruction to specify intent to kill as an element.

## AUTHORITY

- Special Circumstance ‣ Pen. Code, § 190.2(a)(17).
- Specific Intent to Commit Felony Required ‣ *People v. Valdez* (2004) 32 Cal.4th 73, 105 [8 Cal.Rptr.3d 271, 82 P.3d 296].
- Provocative Act Murder ‣ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].
- Concurrent Intent ‣ *People v. Mendoza* (2000) 24 Cal.4th 130, 183 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Clark* (1990) 50 Cal.3d 583, 608–609 [268 Cal.Rptr. 399, 789 P.2d 127].
- Felony Cannot Be Incidental to Murder ‣ *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].
- Instruction on Felony as Incidental to Murder ‣ *People v. Kimble* (1988) 44 Cal.3d 480, 501 [244 Cal.Rptr. 148, 749 P.2d 803]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].
- Proposition 115 Amendments to Special Circumstance ‣ *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].

***Secondary Sources***

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

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

**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222];

**Deleted:** <#>Continuous Transaction Requirement ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 88 [17 Cal.Rptr.3d 710, 96 P.3d 30] [applying rule to special circumstance]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026 [248 Cal.Rptr. 568, 755 P.2d 1017].¶
<#>Logical Connection Required for Liability of Nonkiller ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

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

## RELATED ISSUES

***Applies to Felony Murder and Provocative Act Murder***

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

***Concurrent Intent to Kill and Commit Felony***

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

***Multiple Special Circumstances May Be Alleged***

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

## 731. Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill After March 8, 2000) (Pen. Code, § 190.2(a)(17)

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**The defendant is charged with the special circumstance of intentional murder while engaged in the commission of kidnapping [in violation of Penal Code section 190.2(a)(17)].**

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) kidnapping;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) kidnapping;**

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

**[3. If the defendant did not personally commit [or attempt to commit] kidnapping, then another perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] kidnapping;]**

**(3/4). (The defendant/**_____ *<insert name or description of person causing death if not defendant>***) did an act that was a substantial factor in causing the death of another person;**

**AND**

**(4/5). The defendant intended that the other person be killed.**

**To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] kidnapping, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the**

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¶
*<Give element*

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**Deleted:** *5/6 if the court concludes it must instruct on causal relationship between kidnapping and death; see Bench Notes.>*¶
[AND¶
¶
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**Deleted:** 5/6). There was a logical connection between the act causing the death and the kidnapping [or attempted kidnapping]. The connection between the fatal act and the kidnapping [or attempted kidnapping] must involve more than just their occurrence at the same time and place.]¶

**crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.**

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

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

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

**[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of kidnapping was merely part of or incidental to the commission of that murder.]**

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

## BENCH NOTES

***Instructional Duty***

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

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).*

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).*

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

**Deleted:** If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.¶

If the prosecution's theory is that the defendant committed or attempted to commit kidnapping, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with

"To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on kidnapping.

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

When giving this instruction with CALCRIM No. 730, give the final bracketed paragraph.

***Related Instructions***

CALCRIM No. 1200, *Kidnapping: For Child Molestation*.
CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*.
CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion*.
CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.
CALCRIM No. 1204, *Kidnapping During Carjacking*.
CALCRIM No. 1215, *Kidnapping*.

## AUTHORITY

- Special Circumstance ▸ Pen. Code, § 190.2(a)(17)(B), (H) & (M).

***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 532-533.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.13[17], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b], 142.14[3] (Matthew Bender).

**Deleted:** Bracketed element 5/6

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**Deleted:** is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rptr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof that the homicidal act took place during the perpetration of the underlying felony. (Penal Code section 189).

**Deleted:** the felony and the homicidal act were part of one continuous transaction."

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**Deleted:** (*Ibid.* [italics in original].)

**Deleted:** The majority in *Cavitt* concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.)

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¶
The court should give bracketed element

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**Deleted:** 5/6 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element

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**Deleted:** 5/6. (See discussion of conspiracy liability in the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act.*)¶

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causin…

**Deleted:** <#>Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; …

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## 732. Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill (Pen. Code, § 190.2(a)(17))

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**The defendant is charged with the special circumstance of intentional murder while engaged in the commission of arson that burned an inhabited structure [in violation of Penal Code section 190.2(a)(17)].**

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) arson that burned an inhabited structure;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) arson that burned an inhabited structure;**

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

**[3. If the defendant did not personally commit [or attempt to commit] arson, then another perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] arson that burned an inhabited structure;]**

**(3/4). The commission [or attempted commission] of the arson was a substantial factor in causing the death of another person;**

**AND**

**(4/5). The defendant intended that the other person be killed.**

**To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] arson that burned an inhabited structure, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.**

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¶
AND¶
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*<Make certain that all appropriate instructions on underlying arson, aiding and abetting, and conspiracy are given.>*

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

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

**[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of arson was merely part of or incidental to the commission of that murder.]**

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

## BENCH NOTES

***Instructional Duty***

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

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).*

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major

participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).*

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]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution's theory is that the defendant committed or attempted to commit arson, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on arson.

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

When giving this instruction with CALCRIM No. 730, give the final bracketed paragraph.

***Related Instructions***

CALCRIM No. 1502, *Arson: Inhabited Structure*.

**Deleted:** The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.¶

¶

## AUTHORITY

- Special Circumstance ‣ Pen. Code, § 190.2(a)(17)(B), (H) & (M).

***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 532-533.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[17], 87.14 (Matthew Bender).

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

**Deleted:** <#>Continuous Transaction Requirement ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026 [248 Cal.Rptr. 568, 755 P.2d 1017].¶ <#>Logical Connection Required for Liability of Nonkiller ‣ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].¶

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## 3261. While Committing a Felony: Defined—Escape Rule

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**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].]**

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*<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/) (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 [insert date of council approval]*

## 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* (2013) 56 Cal.4th 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].

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**Deleted:** In *People v. Cavitt* (2004) 33 Cal.4th 187, *supra*, at p. 208, the Court explained the "escape rule" and distinguished this rule from the "continuous-transaction" doctrine:¶
¶
[W]e first recognize that we are presented with two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule. The "escape rule" defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary safety. [Citation.] The continuous-transaction doctrine, on the other hand, defines the duration of *felony-murder* liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. [Citations.] . . .¶
(*Ibid.* [italics in original].)¶
**Deleted:** This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing. Instead, the court should give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*. This instruction should only be given if it is required to explain the duration of the felony for other ancillary purposes, such as use of a weapon.¶
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**Deleted:** *People v. Cavitt* (2004) 33 Cal.4th 1*87, 208–209 [14* Cal.Rptr.3d 281, 91 P.3d 222].¶
Temporary

- Robbery ▸ *People v. Salas* (1972) 7 Cal.3d 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* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857].
- Sexual Assault ▸ *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].

***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).

## 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* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].)

## 3262–3399. Reserved for Future Use

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## 875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)–(4), (b))

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

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

*<Alternative 1A—force with weapon>*

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

*<Alternative 1B—force without weapon>*

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

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

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

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

**[AND]**

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

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

**[AND**

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

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

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

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

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

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

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

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

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

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

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

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

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

**[An *assault weapon* includes _____** *<insert names of appropriate designated assault weapons listed in Pen. Code, § 30510 or as defined by Pen. Code, § 30515>***.]**

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

1. **The overall length is 5.54 inches from the base of the cartridge to the tip of the bullet;**

2. **The bullet diameter for the cartridge is from .510 to, and including, .511 inch;**

**AND**

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

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

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*New January 2006; Revised June 2007, August 2009, October 2010, February 2012, February 2013 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

If the charging document names more than one victim, modification of this instruction may be necessary to clarify that each victim must have been subject to the application of force. (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176-1177 [150 Cal.Rptr.3d 612.)

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## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon ▸ *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- This Instruction Affirmed ▸ *People v. Golde* (2008) 163 Cal.App.4th 101, 122-123 [77 Cal.Rptr.3d 120].
- Assault Weapon Defined ▸ Pen. Code, §§ 30510, 30515.
- Semiautomatic Pistol Defined ▸ Pen. Code, § 17140.
- Firearm Defined ▸ Pen. Code, § 16520.
- Machine Gun Defined ▸ Pen. Code, § 16880.
- .50 BMG Rifle Defined ▸ Pen. Code, § 30530.
- Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 41.

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

## LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

Assault with a firearm is a lesser included offense of assault with a semiautomatic firearm. (*People v. Martinez* (2012) 208 Cal.App.4th 197, 199 [145 Cal.Rptr.3d 141].)

A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 [117 Cal.Rptr. 595]; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221 [99 Cal.Rptr.2d 458].)

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

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

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

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

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

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

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

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

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

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

**Deleted:** [It is no defense to this crime that the defendant was responding to a provocative act that was not a threat or an attempt to inflict physical injury.]

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

### BENCH NOTES

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

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

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

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

## AUTHORITY

- Elements ▸ Pen. Code, §§ 242, 243(a); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Defense of Parental Discipline ▸ *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051 [12 Cal.Rptr.2d 33].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (th 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).

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## LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

## RELATED ISSUES

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

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

## 961–964. Reserved for Future Use

## 1003. Rape of Unconscious Woman or Spouse (Pen. Code, §§ 261(a)(4), 262(a)(3))

**The defendant is charged [in Count __] with raping (a woman/his wife) who was unconscious of the nature of the act [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 had sexual intercourse with a woman;**

2. **He and the woman were (not married/married) to each other at the time of the intercourse;**

3. **The woman was unable to resist because she was unconscious of the nature of the act;**

**AND**

4. **The defendant knew that the woman was unable to resist because she was unconscious of the nature of the act.**

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

**A woman is *unconscious of the nature of the act* if she is (unconscious or asleep/ [or] not aware that the act is occurring/ [or] not aware of the essential characteristics of the act because the perpetrator tricked, lied to, or concealed information from her/ [or] not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the sexual penetration served a professional purpose when it served no professional purpose).**

*New January 2006; Revised August 2012 [insert date of council approval]*

### BENCH NOTES

***Instructional Duty***

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

If spousal rape is charged, include the appropriate language throughout the instruction to indicate that the parties were married.

Select the appropriate language defining "unconscious of the nature of the act" based on the facts of the case.

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

## AUTHORITY

- Elements ▸ Pen. Code, §§ 261(a)(4), 262(a)(3).
- Penetration Defined ▸ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Unconscious of Nature of Act ▸ *People v. Howard* (1981) 117 Cal.App.3d 53, 55 [172 Cal.Rptr. 539] [total unconsciousness is not required]; see *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1229–1231 [210 Cal.Rptr. 122] [rape victim not unconscious of nature of act; fraud in the inducement].
- Assault ▸ Pen. Code, § 240.
- Battery ▸ Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].
- Perpetrator Must Impersonate Spouse of Married Woman Under Current Statute ▸ *People v. Morales* (2013) 212 Cal.App.4th 583, 594-595 [150 Cal.Rptr.3d 920].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–8, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [5] (Matthew Bender).

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

## COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, §§ 261(a)(4)(B)–(D), 262(a)(3)(B), (C).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

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

## LESSER INCLUDED OFFENSES

- Attempted Rape of Unconscious Woman ▸ Pen. Code, §§ 663, 261(a)(4).
- Attempted Rape of Unconscious Spouse ▸ Pen. Code, §§ 663, 262(a)(3).

## RELATED ISSUES

***Advance Consent***

Neither a woman's actual "advance consent" nor a man's belief in "advance consent" eliminates the wrongfulness of a man's conduct in knowingly depriving an unconscious woman of her freedom of choice both at the initiation of and during sexual intercourse. A person who commits the prohibited act necessarily acts with a wrongful intent. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 37 [124 Cal.Rptr.2d 898].)

See the Related Issues section in CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

## 1200. Kidnapping: For Child Molestation (Pen. Code, §§ 207(b), 288(a))

**The defendant is charged [in Count __] with kidnapping for the purpose of child molestation [in violation of Penal Code section 207(b)].**

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

1. **The defendant (persuaded/hired/enticed/decoyed/ [or] seduced by false promises or misrepresentations) a child younger than 14 years old to go somewhere;**

2. **When the defendant did so, (he/she) intended to commit a lewd or lascivious act on the child;**

**AND**

3. **As a result of the defendant's conduct, the child then moved or was moved a substantial distance.**

**As used here, *substantial distance* means more than a slight or trivial distance. The movement must have increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the molestation. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.**

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**As used here, a *lewd or lascivious act* is any touching of a child with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of either the perpetrator or the child. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched. [A *lewd or lascivious act* includes causing a child to touch his or her own body, the perpetrator's body, or someone else's body at the instigation of a perpetrator who has the required intent.]**

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

*New January 2006; Revised February 2012, February 2013 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

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

Give this instruction when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act. Give CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*, when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement.

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

***Related Instructions***

Kidnapping with intent to commit a rape or other specified sex crimes is a separate offense under Penal Code section 209(b). (*People v. Rayford* (1994) 9 Cal.4th 1, 8–11 [36 Cal.Rptr.2d 317, 884 P.2d 1369].) See CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions based on violations of Penal Code section 288, see CALCRIM No. 1110, *Lewd or Lascivious Acts: Child Under 14*, and the following instructions in that series.

## AUTHORITY

- Elements ▸ Pen. Code, §§ 207(b), 288(a).
- Increased Prison Term If Victim Under 14 Years of Age ▸ Pen. Code, § 208(b).
- Asportation Requirement ▸ See *People v. Robertson* (2012) 208 Cal. App. 4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 & fn. 20 [251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 & fn. 4

[83 Cal.Rptr.2d 533];*People v. Rayford* (1994) 9 Cal.4th 1, 11–14, 20 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225].

- Lewd or Lascivious Acts Defined ‣ *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; *People v. Levesque* (1995) 35 Cal.App.4th 530, 538–542 [41 Cal.Rptr.2d 439]; *People v. Marquez* (1994) 28 Cal.App.4th 1315, 1321–1326 [33 Cal.Rptr.2d 821].
- Movement of Victim Need Not Substantially Increase Risk of Harm to Victim ‣ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 & fn. 20 [251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 281-282, 291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[1][a], [3] (Matthew Bender).

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## LESSER INCLUDED OFFENSES

- Kidnapping ‣ Pen. Code, § 207.
- Attempted Kidnapping ‣ Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].

False imprisonment is a lesser included offense if there is an unlawful restraint of the child. (See Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338].)

## 1203. Kidnapping: For Robbery, Rape, or Other Sex Offenses (Pen. Code, § 209(b))

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**The defendant is charged [in Count __] with kidnapping for the purpose of (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration) [in violation of Penal Code section 209(b)].**

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

1. **The defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____**<*insert other offense specified in statute*>**;**

2. **Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear ;**

3. **Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;**

4. **The other person was moved or made to move a distance beyond that merely incidental to the commission of a (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____**<*insert other offense specified in statute*>**;**

5. **When that movement began, the defendant already intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____**<*insert other offense specified in statute*>**);**

**[AND]**

6. **The other person did not consent to the movement(;/.)**

<*Give element 7 if instructing on reasonable belief in consent.*>
**[AND**

7. **The defendant did not actually and reasonably believe that the other person consented to the movement.]**

**As used here, *substantial distance* means more than a slight or trivial distance. The movement must have increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____<*insert other offense specified in statute*>). In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.**

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

**[To be guilty of kidnapping for the purpose of (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration), the defendant does not actually have to commit the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/** [or]_____<*insert other offense specified in statute*>**.]**

**To decide whether the defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/** [or]_____<*insert other offense specified in statute*>**), please refer to the separate instructions that I (will give/have given) you on that crime.**

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

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

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

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*New January 2006; Revised June 2007, April 2008, February 2013 [insert date of council approval]*

## BENCH NOTES

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

In addition, the court has a **sua sponte** duty to instruct on the elements of the alleged underlying crime.

Give the bracketed definition of "consent" on request.

***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].)

***Timing of Necessary Intent***
No court has specifically stated whether the necessary intent must precede all movement of the victim, or only one phase of it involving an independently adequate asportation.

***Related Instructions***
Kidnapping a child for the purpose of committing a lewd or lascivious act is a separate crime under Penal Code section 207(b). See CALCRIM No. 1200, *Kidnapping: For Child Molestation*.

## AUTHORITY

- Elements ▸ Pen. Code, § 209(b)(1); *People v. Robertson* (2012) 208 Cal. App. 4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 869-870 & fn. 20 [251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533]; *People v. Rayford* (1994) 9 Cal.4th 1 [36 Cal.Rptr.2d 317]; *People v. Daniels* (1969) 71 Cal.2d. 1119 [80 Cal.Rptr. 897].Robbery Defined ▸ Pen. Code, § 211.
- Rape Defined ▸ Pen. Code, § 261.
- Other Sex Offenses Defined ▸ Pen. Code, §§ 262 [spousal rape], 264.1 [acting in concert], 286 [sodomy], 288a [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking ▸ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear ▸ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].
- Movement of Victim Need Not Substantially Increase Risk of Harm to Victim ▸ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512].

**Deleted:** ); *People v. Rayford* (1994) 9 Cal.4th 1, 12–14, 22 [36 Cal.Rptr.2d 317, 884 P.2d 1369] [following modified two-prong *Daniels* test for movement necessary for aggravated kidnapping]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 168 [112 Cal.Rptr.2d 826].¶

- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 293–300, 310, 311-313.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

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

## LESSER INCLUDED OFFENSES

- Kidnapping ▸ Pen. Code, § 207; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Jackson* (1998) 66 Cal.App.4th 182, 189 [77 Cal.Rptr.2d 564].
- Attempted Kidnapping ▸ Pen. Code, §§ 664, 207.
- False Imprisonment ▸ Pen. Code, §§ 236, 237; *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]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171 [112 Cal.Rptr.2d 826].

## RELATED ISSUES

***Psychological Harm***

Psychological harm may be sufficient to support conviction for aggravated kidnapping under Penal Code section 209(b). An increased risk of harm is not limited to a risk of bodily harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493] [substantial movement of robbery victim that posed substantial increase in risk of psychological trauma beyond that expected from stationary robbery].)

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## 1204. Kidnapping: During Carjacking (Pen. Code, §§ 207(a), 209.5(a), (b), 215(a))

**The defendant is charged [in Count __] with kidnapping during a carjacking [in violation of Penal Code section 209.5].**

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

1. **The defendant committed a carjacking;**

2. **During the carjacking, the defendant took, held, or detained another person by using force or by instilling reasonable fear;**

3. **The defendant moved the other person or made that person move a substantial distance from the vicinity of the carjacking;**

4. **The defendant moved or caused the other person to move with the intent to facilitate the carjacking [or to help (himself/herself) escape/or to prevent the other person from sounding an alarm];**

5. **The person moved was not one of the carjackers;**

**[AND]**

6. **The other person did not consent to the movement(;/)**

*<Give element 7 when instructing on reasonable belief in consent.>*
**[AND**

7. **The defendant did not actually and reasonably believe that the other person consented to the movement.]**

**As used here, *substantial distance* means more than a slight or trivial distance. The movement must have been more than merely brief and incidental to the commission of the carjacking. The movement must also have increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the carjacking. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.**

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

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

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

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

**To decide whether the defendant committed carjacking, please refer to the separate instructions that I (will give/have given) you on that crime.**

**[*Fear*, as used in this instruction, means fear of injury to the person or injury to the person's family or property.] [It also means fear of immediate injury to another person present during the incident or to that person's property.]**

**Deleted:** [As used here, *substantial distance* means more than a slight or trivial distance. The movement must have been more than merely brief and incidental to the commission of the carjacking. The movement must also have increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the carjacking. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.]¶

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

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give an instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of carjacking. Give CALCRIM No. 1650, *Carjacking*.

Give the bracketed definition of "consent" on request.

***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].) An optional paragraph is provided for this purpose, "Defense: Consent Given."

The court has a **sua sponte** duty to instruct on the defendant's reasonable and actual belief in the victim's consent to go with the defendant, if supported by the evidence. (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].) Give bracketed element 7 and the paragraph "Defense: GoodFaith Belief in Consent."

## AUTHORITY

- Elements ▸ Pen. Code, §§ 207(a), 209.5(a), (b), 215(a).
- Force or Fear Requirement ▸ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820] [fear must be reasonable].
- Incidental Movement ▸ See *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Increased Risk of Harm ▸ *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415 [124 Cal.Rptr.2d 92].
- Intent to Facilitate Commission of Carjacking ▸ *People v. Perez* (2000) 84 Cal.App.4th 856, 860–861 [101 Cal.Rptr.2d 376].

- Movement Need Not Substantially Increase Risk of Harm ‣ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Ortiz* (2002) 101 Cal.App.4th 410 [124 Cal.Rptr.2d 92]; Pen. Code, § 209.5(a).
- .
- Vicinity of Carjacking ‣ *People v. Moore* (1999) 75 Cal.App.4th 37, 43–46 [88 Cal.Rptr.2d 914].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 314-315.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10A, 142.14 (Matthew Bender).

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## LESSER INCLUDED OFFENSES

- Carjacking ‣ Pen. Code, § 215(a); *People v. Jones* (1999) 75 Cal.App.4th 616, 624–626 [89 Cal.Rptr.2d 485]; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765 [64 Cal.Rptr.2d 233] [Pen. Code, § 209.5 requires completed offense of carjacking].
- Attempted Carjacking ‣ Pen. Code, §§ 664, 215(a); *People v. Jones* (1999) 75 Cal.App.4th 616, 626 [89 Cal.Rptr.2d 485].
- False Imprisonment ‣ Pen. Code, §§ 236, 237; see *People v. Russell* (1996) 45 Cal.App.4th 1083, 1088–1089 [53 Cal.Rptr.2d 241]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

An unlawful taking or driving of a vehicle with an intent to temporarily deprive the owner of possession (Veh. Code, § 10851(a)) is not a necessarily included lesser offense or a lesser related offense of kidnapping during a carjacking. (*People v. Russell* (1996) 45 Cal.App.4th 1083, 1088–1091 [53 Cal.Rptr.2d 241] [evidence only supported finding of kidnapping by force or fear; automobile joyriding formerly governed by Pen. Code, § 499b].)

Grand theft is not a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].)

## RELATED ISSUES

***Dominion and Control***

Carjacking can occur when a defendant forcibly takes a victim's car keys, not just when a defendant takes a car from the victim's presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [victim was not physically present when defendant drove car away].)

## 1205–1214. Reserved for Future Use

## 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 paragraph 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 paragraph 2B if the defendant is charged with a violation of subsection (b)>*

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

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

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

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3. When the defendant did so, the other person was under 18 years of age.¶
¶
[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]¶
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**[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]**

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

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

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

*New August 2009 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

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

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

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

The court is not required to instruct sua sponte on the definition of "menace," or "violence" and Penal Code section 236.1 does not define these terms. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion.

## AUTHORITY

- Elements and Definitions ▸ Pen. Code, § 236.1.

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**Deleted:** The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] in the context of lewd acts on a child, and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. In *People v. Leal*, *supra*, 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. ¶
¶

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

***Secondary Sources***

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

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

**Deleted:** <#>Duress Defined [in context of lewd acts on child] ‣ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].¶

**Deleted:** <#>Calculating Age ‣ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].¶

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## 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 gang members 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.]**

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

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

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

**AND**

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

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

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

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

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

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

   *<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33).>*
   **1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)** _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

**[OR]**

*<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30).>*
**1B. [at least one of the following crimes:]**_____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;*
**AND**
**[at least one of the following crimes:]** _____*<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>*;

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

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

**AND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

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

**AND**

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

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

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

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## AUTHORITY

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

- Separate Intent From Underlying Felony ‣ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ‣ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143]; *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].Temporal Connection Between Active Participation and Felonious Criminal Conduct ‣ *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].

***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).

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## COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran, supra,* 97 Cal.App.4th at 1458 [original italics].) The "felonious criminal conduct" need not be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062].)

## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

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

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

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

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

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

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

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

**To prove this allegation, the People must prove that:**

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

**AND**

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

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

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

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

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

**AND**

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

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

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

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

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

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

   *<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)-(25), (31)–(33).>*
   **1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)** _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25), (31)–(33)>;*

   **[OR]**

   *<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30).>*
   **1B. [at least one of the following crimes:]**_____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)-(25), (31)–(33)>;*
   **AND**

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

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

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

**AND**

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

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

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

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

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

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

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

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

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*New January 2006; Revised August 2006, June 2007, April 2008, December 2008, February 2013*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

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

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

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

## AUTHORITY

- Enhancement ▸ Pen. Code, § 186.22(b)(1).
- Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required ▸ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▸ *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].
- Defendant Need Not Act With Another Gang Member *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 [150 Cal.Rptr.3d 533, 290 P.3d 1143];

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***Secondary Sources***

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

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

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

## RELATED ISSUES

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

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

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

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

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

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

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

**To prove this allegation, the People must prove that:**

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

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

**AND**

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

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

    **OR**

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

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

   *<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33).>*
   **1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)** _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>***;**

   **[OR]**

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

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

**AND**

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

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

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

**AND**

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

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

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

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

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

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

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

**AND**

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

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

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

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

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

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

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

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

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

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

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

***Defenses—Instructional Duty***

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

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

***Related Instructions***

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

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

## AUTHORITY

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

***Secondary Sources***

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

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

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## 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*.

## 1600. Robbery (Pen. Code, § 211)

**The defendant is charged [in Count _____] with robbery [in violation of Penal Code section 211].**

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

1. **The defendant took property that was not (his/her) own;**

2. **The property was in the possession of another person;**

3. **The property was taken from the other person or (his/her) immediate presence;**

4. **The property was taken against that person's will;**

5. **The defendant used force or fear to take the property or to prevent the person from resisting;**

**AND**

6. **When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

**The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.**

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

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

**[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]**

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**[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]**

**[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]**

**[A (store/ [or] business) (employee/ _____** <*insert description*>**) who is on duty has possession of the (store/ [or] business) owner's property.]**

**[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]**

**[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]**

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

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*New January 2006; Revised August 2009, October 2010, April 2011 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

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

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d

1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees*.

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

If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*.

## AUTHORITY

- Elements ▸ Pen. Code, § 211.
- Fear Defined ▸ Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined ▸ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent ▸ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value ▸ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee ▸ *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].
- Constructive Possession by Subcontractor/Janitor ▸ *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].
- Constructive Possession by Person With Special Relationship ▸ *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369-1370 [109 Cal.Rptr.3d 479].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 85.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

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## COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] ["force is a factual question to be determined by the jury using its own common sense"].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

## LESSER INCLUDED OFFENSES

- Attempted Robbery ‣ Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft ‣ Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile ‣ Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft ‣ Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior ‣ Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

## RELATED ISSUES

***Asportation—Felonious Taking***

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

***Claim of Right***
If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

***Fear***
A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

***Force—Amount***
The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that force employed by pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

***Force—When Applied***
The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

***Immediate Presence***
Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away

from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

***Multiple Victims***

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

***Value***

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

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

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

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

1. **The defendant willfully obtained someone else's personal identifying information;**

2. **The defendant willfully used that information for an unlawful purpose;**

**AND**

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

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

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

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

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

**It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.**

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*New January 2006; Revised August 2006, June 2007, August 2009, April 2010, August 2012 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

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

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

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

## AUTHORITY

- Elements ▸ Pen. Code, § 530.5(a).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(a).
- No Personation Requirement ▸ *People v. Barba* (2012) 211 Cal.App.4th 214, 223-224 [149 Cal.Rptr.3d 371].

***Secondary Sources***

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

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

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## 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;**

4. **The controlled substance was _____** *<insert type of controlled substance specified in Health & Saf. Code, § 11370.1>***;**

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

6. **While possessing that controlled substance, the defendant had a loaded, operable firearm available for immediate offensive or defensive use;**

**AND**

7. **The defendant knew that (he/she) had the firearm available for immediate offensive or defensive use.**

**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 [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

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

## AUTHORITY

- Elements ▸ Health & Saf. Code, § 11370.1; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge of Controlled Substance ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount ▸ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Loaded Firearm ▸ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Knowledge of Presence of Firearm ▸ *People v. Singh* (2004) 119 Cal.App.4th 905, 912–913 [14 Cal.Rptr.3d 769].

- Knowledge That Firearm is Loaded or Operable Not Required ▸ *People v. Heath* (2005) 134 Cal.App.4th 490, 498 [36 Cal.Rptr.3d 66]

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][f]; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][b] (Matthew Bender).

## LESSER INCLUDED OFFENSES

Simple Possession of a Controlled Substance Not a Lesser Included Offense ▸ *People v. Sosa* (2012) 210 Cal.App.4th 946, 949-950 [148 Cal.Rptr.3d 826], Health & Saf. Code, §§ 11350, 11377.

See also Firearm Possession instructions, CALCRIM Nos. 2510 to 2530.

## RELATED ISSUES

**Loaded Firearm**

"Under the commonly understood meaning of the term 'loaded,' a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position." (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

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**Deleted:** Simple Possession of a Controlled Substance ▸ Health & Saf. Code, §§ 11350, 11377.¶

## 2510. Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction (Pen. Code, §§ 29800, 29805, 29820, 29900)

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**The defendant is charged [in Count __] with unlawfully possessing 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 (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/ possessed) the firearm;**

**[AND]**

3. **The defendant had previously been convicted of (a felony/two offenses of brandishing a firearm/the crime of _____** *<insert misdemeanor offense from Pen. Code, § 29805 or Pen. Code, § 23515 (a), (b), or (d), or a juvenile finding from Pen. Code, § 29820>***(;/.)**

**[AND]**

*<Alternative 4A—give only if the defendant is charged under Pen. Code, § 29805 .>*

**[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]**

*<Alternative 4B—give only if the defendant is charged under Pen. Code, § 29820.>*

**[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]**

**[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. [The frame or receiver of such a *firearm* is also a *firearm* for the purpose of this instruction.]]**

*<Do not use the language below unless the other instruction defines firearm in the context of a crime charged pursuant to Pen. Code, § 29800.>*

**[The term *firearm* is defined in another instruction.]**

**[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

**[A *juvenile court finding* is the same as a conviction.]**

**[A conviction of _____** <*insert name of other-state or federal offense*> **is the same as a conviction for a felony.]**

**[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.]**

**[You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____** <*insert other permitted purpose, e.g., assessing defendant's credibility*>]**. Do not consider such evidence for any other purpose.]**

**[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____** <*insert description of each firearm when multiple firearms alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<*Defense: Momentary Possession*>
**[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:**

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

**AND**

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

**The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.]**

*<Defense: Justifiable Possession>*
**[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:**

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

**[AND]**

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

**[AND**

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

**The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.**

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

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant does not stipulate to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant stipulates, use CALCRIM No. 2511, *Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction*. (*People v. Sapp, supra*, 31 Cal.4th at p. 261; *People v. Valentine, supra*, 42 Cal.3d at p. 173.)

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) Therefore, because of the knowledge requirement in element 2 of this instruction, the court **must give** CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, together with this instruction. Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."

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

Element 4 should be given only if the defendant is charged under Penal Code section 29805, possession within 10 years of a specified misdemeanor conviction, or Penal Code section 29820, possession by someone under 30 years old with a specified juvenile finding.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions on crimes based on Penal Code section 29800. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

***Defenses—Instructional Duty***

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating now-repealed Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 29850 states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

## AUTHORITY

- Elements ▸ Pen. Code, §§ 23515, 29800, 29805, 29820, 29900; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession ▸ Pen. Code, § 29850.
- Presenting Evidence of Prior Conviction to Jury ▸ *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Lack of Knowledge of Nature of Conviction Not a Defense ▸ *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].

- Momentary Possession Defense ‣ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession ‣ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Possession of Frame or Receiver Sufficient but not Necessary For Crimes Charged Under [Now-Superseded] Section 12021 ‣ *People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414 [52 Cal.Rptr.3d 545].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 233-237.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.06 (Matthew Bender).

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

## LESSER INCLUDED OFFENSES

Neither possessing firearm after conviction of felony nor possessing firearm after conviction of specified violent offense is a lesser included offense of the other. (*People v. Sanders* (2012) 55 Cal.4th 731, 739-740 [149 Cal.Rptr.3d 26, 288 P.3d 83].

## RELATED ISSUES

***Proof of Prior Conviction***

The trial court "has two options when a prior conviction is a substantive element of a current charge: Either the prosecution proves each element of the offense to the jury, or the defendant stipulates to the conviction and the court 'sanitizes' the prior by telling the jury that the defendant has a prior felony conviction, without specifying the nature of the felony committed." (*People v. Sapp* (2003) 31 Cal.4th

240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].)

***Lack of Knowledge of Status of Conviction Not a Defense***

"[R]egardless of what she reasonably believed, or what her attorney may have told her, defendant was deemed to know under the law that she was a convicted felon forbidden to possess concealable firearms. Her asserted mistake regarding her correct legal status was a mistake of law, not fact. It does not constitute a defense to [now-superseded] section 12021." (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].)

***Out-of-State Convictions***

For an out-of-state conviction, it is sufficient if the offense is a felony under the laws of the "convicting jurisdiction." (*People v. Shear* (1999) 71 Cal.App.4th 278, 283 [83 Cal.Rptr.2d 707].) The prosecution does not have to establish that the offense would be a felony under the laws of California. *(Ibid.)* Even if the convicting jurisdiction has restored the defendant's right to possess a firearm, the defendant may still be convicted of violating [now-superseded] Penal Code section 12021. *(Ibid.)*

***Pardons and Penal Code Section 1203.4 Motions***

A pardon pursuant to Penal Code section 4852.17 restores a person's right to possess a firearm unless the person was convicted of a "felony involving the use of a dangerous weapon." (Pen. Code, § 4852.17.) The granting of a Penal Code section 1203.4 motion, however, does not restore the person's right to possess any type of firearm. (Pen. Code, § 1203.4(a); *People v. Frawley* (2000) 82 Cal.App.4th 784, 796 [98 Cal.Rptr.2d 555].)

***Submitting False Application for Firearm***

A defendant who submitted a false application to purchase a firearm may not be prosecuted for "attempted possession of a firearm by a felon." (*People v. Duran* (2004) 124 Cal.App.4th 666, 673 [21 Cal.Rptr.3d 495].) "Instead, the felon may only be prosecuted pursuant to the special statute, [ now-repealed Penal Code section] 12076 , which expressly proscribes such false application." *(Ibid.)* [see now Pen. Code, § 28215].

## 2511. Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction (Pen. Code, §§ 29800, 29805, 29820, 29900)

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**The defendant is charged [in Count __] with unlawfully possessing 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 (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;**

**[AND]**

3. **The defendant had previously been convicted of (a/two) (felony/misdemeanor[s])(;/.)**

**[AND]**

*<Alternative 4A—give only if the defendant is charged under Pen. Code, § 29805.>*

**[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]**

*<Alternative 4B—give only if the defendant is charged under Pen. Code, § 29820.>*

**[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]**

**[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. [The frame or receiver of such a *firearm* is also a *firearm* for the purpose of this instruction.]]**

*<Do not use the language below unless the other instruction defines firearm in the context of a crime charged pursuant to Pen. Code, § 29800.>*

**[The term *firearm* is defined in another instruction.]**

**[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

**[Two or more people may possess something at the same time.]**

**[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person).]**

**The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of (a/two) (felony/misdemeanor[s]). This stipulation means that you must accept this fact as proved.**

**[Do not consider this fact for any other purpose [except for the limited purpose of _____** *<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about or discuss the nature of the conviction.]**

**[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____** *<insert description of each firearm when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

*<Defense: Momentary Possession>*
**[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:**

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

**AND**

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

**The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]**

*<Defense: Justifiable Possession>*
**[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:**

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

**[AND]**

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

**[AND**

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

**The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.**

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

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant stipulates to the prior

conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant does not stipulate, use CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

If the defendant has stipulated to the fact of the conviction, the court should sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.) If the defendant agrees, the court should not read the portion of the information describing the nature of the conviction. Likewise, the court should ensure that the verdict forms do not reveal the nature of the conviction.

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) Therefore, because of the knowledge requirement in element 2 of this instruction, the court **must give** CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, together with this instruction. Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."

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

Element 4 should be given only if the defendant is charged under Penal Code section 29805, possession within 10 years of a specified misdemeanor conviction, or Penal Code section 29820, possession by someone under 30 years old with a specified juvenile finding.

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

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "Do not consider this fact for any other purpose. . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the

defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

***Defenses—Instructional Duty***

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating now-repealed Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 29850 states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

## AUTHORITY

- Elements ▸ Pen. Code, §§ 23515, 29800, 29805, 29820, 29900; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession ▸ Pen. Code, § 29850.
- Presenting Evidence of Prior Conviction to Jury ▸ *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].

- Lack of Knowledge of Nature of Conviction Not a Defense ▸ *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Possession of Frame or Receiver Sufficient but not Necessary For Crimes Charged Under [Now-Superseded] Section 12021 ▸ *People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414 [52 Cal.Rptr.3d 545].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 233-237.

Deleted: 3d

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.06 (Matthew Bender).

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

## RELATED ISSUES

See CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

## LESSER INCLUDED OFFENSES

Neither possessing firearm after conviction of felony nor possessing firearm after conviction of specified violent offense is a lesser included offense of the other. (*People v. Sanders* (2012) 55 Cal.4th 731, 739-740 [149 Cal.Rptr.3d 26, 288 P.3d 83].

## 2760. Escape (Pen. Code, § 4532(a)(1) & (b)(1))

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**The defendant is charged [in Count __] with (escape/ [or] attempting to escape) [in violation of Penal Code section 4532].**

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

1. **The defendant was a prisoner who had been ((arrested and booked for[,]/ [or] charged with[,]/ [or] convicted of) a (misdemeanor/felony)/committed by order of the juvenile court to an adult facility);**

*<Alternative 2A—confined in penal institution>*

**[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp);]**

*<Alternative 2B—engaged in county work>*

**[2. The defendant was working on (a county road/ [or other] county work) as an inmate;]**

*<Alternative 2C—lawful custody>*

**[2. The defendant was in the lawful custody of (an officer/ [or] a person);]**

*<Alternative 2D—work furlough>*

**[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was authorized to be away from the place of confinement in connection with a work furlough program;]**

*<Alternative 2E—temporary release>*

**[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was away from the place of confinement in connection with an authorized temporary release;]**

*<Alternative 2F—home detention>*

**[2. The defendant was a participant in a home detention program;]**

*<Alternative 2G—confined under Pen. Code, § 4011.9>*

**[2. The defendant was confined as an inmate in a hospital for treatment even though no guard was present to detain the defendant;]**

**AND**

*<Alternative 3A—confined in penal institution>*

**[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp).]**

*<Alternative 3B—engaged in county work>*

**[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person in charge of (him/her)) while engaged in work at, or going to or returning from, the county work site.]**

*<Alternative 3C—lawful custody>*

**[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person) who had lawful custody of the defendant.]**

*<Alternative 3D—work furlough>*

**[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement.]**

*<Alternative 3E—temporary release>*

**[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement.]**

*<Alternative 3F—home detention>*

**[3. The defendant (escaped/ [or] attempted to escape) from the place of confinement in the home detention program.]**

*<Alternative 3G—confined under Pen. Code, § 4011.9>*

**[3. The defendant (escaped/ [or] attempted to escape) from the place of hospital confinement.]**

**[A person has been *booked* for a (misdemeanor/felony) if he or she has been taken to a law enforcement office where an officer or employee has recorded the arrest and taken the person's fingerprints and photograph.]**

**[A person has been *charged* with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime.]**

***Escape* means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must breach a wall or fence marking the security perimeter of the correctional facility. It is not sufficient for the prisoner to be merely outside the particular area within the facility where he is permitted to be.]**

**[A prisoner also *escapes* if he or she willfully fails to return to his or her place of confinement within the period that he or she was authorized to be away from that place of confinement. Someone commits an act *willfully* when he or she does it willingly or on purpose.]**

**[A prisoner is in the *lawful custody* of (an officer/ [or] a person) if the (officer/ [or] person), acting under legal authority, physically restrains or confines the prisoner so that the prisoner is significantly deprived of his or her freedom of movement or the prisoner reasonably believes that he or she is significantly deprived of his or her freedom of movement.]**

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

## BENCH NOTES

***Instructional Duty***

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

In elements 2 and 3, select the location where the defendant was allegedly confined or the program that the defendant allegedly escaped from.

In the definition of escape, give the bracketed sentence if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].)

Give the bracketed paragraph on willful failure to return if appropriate based on the evidence.

Give the bracketed paragraph defining lawful custody if there is an issue as to whether the defendant was in lawful custody. (*People v. Nicholson* (2004) 123 Cal.App.4th 823 [20 Cal.Rptr.3d 476].)

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If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].)

If the prosecution alleges escape with force or violence (Pen. Code, § 4532(a)(2) or (b)(2)), give CALCRIM No. 2761, *Escape By Force or Violence*. (*People v. Gallegos*, *supra*, 39 Cal.App.3d at pp. 518–519.)

***Defenses—Instructional Duty***

If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give CALCRIM No. 2764, *Escape: Necessity Defense*. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

## AUTHORITY

- Elements ▸ Pen. Code, § 4532(a)(1) & (b)(1).
- Specific Intent Not an Element of Completed Escape ▸ *People v. George* (1980) 109 Cal.App.3d 814, 819 [167 Cal.Rptr. 603].
- Attempt to Escape—Must Instruct on Direct Act and Specific Intent ▸ *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].
- Escape Defined ▸ *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].
- Arrested Defendant Must Be Booked Before Statute Applies ▸ *People v. Diaz* (1978) 22 Cal.3d 712, 716–717 [150 Cal.Rptr. 471, 586 P.2d 952]; see also *People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971 [76 Cal.Rptr.2d 898].
- Arrest of Probationer—Booking Not Required ▸ *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123 [224 Cal.Rptr. 452].
- Arrest of Parolee—Booking Not Required ▸ *People v. Nicholson* (2004) 123 Cal.App.4th 823, 830 [20 Cal.Rptr.3d 476].
- Must Be Confined in Adult Penal Institution ▸ *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1668 [40 Cal.Rptr.2d 49].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 86–102.

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1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.02, 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.05 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights*, § 94.20[2] (Matthew Bender).

## LESSER INCLUDED OFFENSES

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Attempted escape is not a lesser included offense of escape. (*People v. Bailey* (2012) 54 Cal.4th 740, 748-752 [143 Cal.Rptr.3d 647, 279 P.3d 1120).

## RELATED ISSUES

***Violating Work Furlough Conditions***

In order for an inmate assigned to work furlough to violate Penal Code section 4532, the inmate must "willfully" fail to return on time. (*Yost v. Superior Court* (1975) 52 Cal.App.3d 289, 292 [125 Cal.Rptr. 74] [defendant who was arrested on other charges on his way back to camp did not willfully fail to return].) If the defendant merely violates conditions of the work furlough release, that conduct falls under Penal Code section 1208, not section 4532. (*Id.* at p. 295.)

***Defendant Illegally Detained***

If a person is detained in custody "without any process, . . . wholly without authority of law," or "where the judgment was void on its face," the detention is illegal and the defendant may "depart" without committing the crime of escape. (*People v. Teung* (1891) 92 Cal. 421, 421–422, 426 [28 P. 577]; *In re Estrada* (1965) 63 Cal.2d 740, 749 [48 Cal.Rptr. 172, 408 P.2d 948].) "But where the imprisonment is made under authority of law and the process is simply irregular in form, or the statute under which he is confined is unconstitutional, the escape is unlawful." (*In re Estrada*, *supra*, 63 Cal.2d at p. 749.) Note that this is a narrow exception, one that has not been applied by the courts since the case of *People v. Clark* (1924) 69 Cal.App. 520, 523 [231 P. 590].

## 460. Attempt Other Than Attempted Murder (Pen. Code, § 21a)

**[The defendant is charged [in Count __] with attempted _____** <*insert target offense*>**.]**

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

1. **The defendant took a direct but ineffective step toward committing _____** <*insert target offense*>**;**

**AND**

2. **The defendant intended to commit _____** <*insert target offense*>**.**

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

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

**To decide whether the defendant intended to commit _____**<*insert target offense*>**, please refer to the separate instructions that I (will give/have given) you on that crime.**

**[The defendant may be guilty of attempt even if you conclude that _____ <*insert target offense*> was actually completed.]**

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

## BENCH NOTES

***Instructional Duty***

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

If an attempted crime is charged, give the first bracketed paragraph and choose the phrase "this crime" in the opening line of the second paragraph. If an attempted crime is not charged but is a lesser included offense, omit the first bracketed paragraph and insert the attempted target offense in the opening line of the second paragraph.

Give the bracketed paragraph that begins with "A person who attempts to commit" if abandonment is an issue.

If the attempted crime is murder, do not give this instruction; instead give the specific instruction on attempted murder. (*People v. Santascoy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709]; see CALCRIM No. 600, *Attempted Murder*.)

Do not give this instruction if the crime charged is assault. There can be no attempt to commit assault, since an assault is by definition an attempted battery. (*In re James M.* (1973) 9 Cal.3d 517, 522 [108 Cal.Rptr. 89, 510 P.2d 33].)

If instructing on attempt to escape, *see People v. Bailey* (2012) 54 Cal.4th 740, 748-752 [143 Cal.Rptr.3d 647, 279 P.3d 1120][specific intent to escape and intent to avoid further confinement required].

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## AUTHORITY

- Attempt Defined ▸ Pen. Code, §§ 21a, 664; *People v. Toledo* (2001) 26 Cal.4th 221, 229–230 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Conviction for Charged Attempt Even If Crime Is Completed ▸ Pen. Code, § 663.

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 56-71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.20 (Matthew Bender).

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## RELATED ISSUES

***Insufficient Evidence of Attempt***

The court is not required to instruct on attempt as a lesser-included offense unless there is sufficient evidence that the crime charged was not completed. (*People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1436 [263 Cal.Rptr. 314]; *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1743–1744 [60 Cal.Rptr.2d 357]; *People v. Strunk* (1995) 31 Cal.App.4th 265, 271–272 [36 Cal.Rptr.2d 868].)

***Legal or Factual Impossibility***

Although legal impossibility is a defense to attempt, factual impossibility is not. (*People v. Cecil* (1982) 127 Cal.App.3d 769, 775–777 [179 Cal.Rptr. 736]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 504–505 [215 Cal.Rptr. 352].)

***Solicitation***

Some courts have concluded that a mere solicitation is not an attempt. (*People v. Adami* (1973) 36 Cal.App.3d 452, 457 [111 Cal.Rptr. 544]; *People v. La Fontaine* (1978) 79 Cal.App.3d 176, 183 [144 Cal.Rptr. 729], overruled on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292-293 [79 Cal.Rptr.2d 195, 965 P.2d 713].) At least one court disagrees, stating that simply because "an invitation to participate in the defendant's commission of a crime consists only of words does not mean it cannot constitute an 'act' toward the completion of the crime, particularly where the offense by its nature consists of or requires the requested type of participation." (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1387 [119 Cal.Rptr.2d 199] [attempted lewd acts on a child under Pen. Code, § 288(c)(1)]; see *People v. Delvalle* (1994) 26 Cal.App.4th 869, 877 [31 Cal.Rptr.2d 725].)

***Specific Intent Crime***

An attempted offense is a specific intent crime, even if the underlying crime requires only general intent. (See *People v. Martinez* (1980) 105 Cal.App.3d 938, 942 [165 Cal.Rptr. 11].) However, an attempt is not possible if the underlying crime can only be committed unintentionally. (See *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798] [no attempted involuntary manslaughter].)

**461–499. Reserved for Future Use**

## 2900. Vandalism (Pen. Code, § 594)

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**The defendant is charged [in Count __] with vandalism [in violation of Penal Code section 594].**

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

1. **The defendant maliciously (defaced with graffiti or with other inscribed material[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property;**

**[AND]**

2. **The defendant (did not own the property/owned the property with someone else)(;/.)**

*<See Bench Notes regarding when to give element 3.>*
**[AND**

3. **The amount of damage caused by the vandalism was $400 or more.]**

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

***Graffiti or other inscribed material* includes an unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.**

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*New January 2006; Revised June 2007, February 2013[insert date of council approval]*

## BENCH NOTES

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

If the defendant is charged with a felony for causing $400 or more in damage and the court is *not* instructing on the misdemeanor offense, give element 3. If the

court *is* instructing on both the felony and the misdemeanor offenses, give CALCRIM No. 2901, *Vandalism: Amount of Damage*, with this instruction. (Pen. Code, § 594(b)(1).) The court should also give CALCRIM No. 2901 if the defendant is charged with causing more than $10,000 in damage under Penal Code section 594(b)(1).

In element 2, give the alternative language "owned the property with someone else" if there is evidence that the property was owned by the defendant jointly with someone else. (*People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722] [Pen. Code, § 594 includes damage by spouse to spousal community property].)

## AUTHORITY

- Elements ▸ Pen. Code, § 594.
- Malicious Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Damage to Jointly Owned Property ▸ *People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722].
- Wrongful Act Need Not Be Directed at Victim ▸ *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1282 [139 Cal.Rptr.3d 637].
- This Instruction Upheld ▸ *People v. Carrasco* (2012) 209 Cal.App.4th 715, 722-723 [147 Cal.Rptr.3d 383].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 277-285.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[2], Ch. 144, *Crimes Against Order*, § 144.03[2] (Matthew Bender).

## LESSER INCLUDED OFFENSES

This offense is a misdemeanor unless the amount of damage is $400 or more. (Pen. Code, § 594(b)(1) & (2)(A).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. When instructing on both the felony and misdemeanor, the court must provide the jury with a verdict form

on which the jury will indicate if the amount of damage has or has not been proved to be $400 or more. If the jury finds that the damage has not been proved to be $400 or more, then the offense should be set at a misdemeanor.

## RELATED ISSUES

***Lack of Permission Not an Element***
The property owner's lack of permission is not an element of vandalism. (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1014 [34 Cal.Rptr.2d 864].)

***Damage Need Not Be Permanent***
To "deface" under Penal Code section 594 does not require that the defacement be permanent. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 944 [102 Cal.Rptr.2d 511] [writing on a glass window with a marker pen was defacement under the statute].)

## 2901. Vandalism: Amount of Damage (Pen. Code, § 594(b)(1))

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**If you find the defendant guilty of vandalism [in Count[s] __], you must then decide whether the People have proved that the amount of damage caused by the vandalism [(in each count/in Count[s]__)] was $400 or more. [If you decide that the amount of damage was $400 or more, you must then decide whether the People have proved that the damage [(in each count/in Count[s]__)] was also $10,000 or more.]**

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

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

### BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on these sentencing factors.

This instruction **must** be given with CALCRIM No. 2900, *Vandalism.*

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved that the damage was $400 or more and, if appropriate, $10,000 or more.

### AUTHORITY

- Enhancement ▸ Pen. Code, § 594(b)(1).
- This Instruction Upheld ▸ *People v. Carrasco* (2012) 209 Cal.App.4th 715, 722-723 [147 Cal.Rptr.3d 383].

***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 277-285.

Deleted: 243–245

### RELATED ISSUES

***Damage Cannot Be Aggregated***

The prosecution cannot charge a felony for vandalism based on the aggregate damage done to property owned by multiple victims. (*In re David* (1997) 52 Cal.App.4th 304, 310–311 [60 Cal.Rptr.2d 552].)

Vehicle Offenses

NEW

## 3223. Reckless Driving With Specified Injury (Veh. Code, § 23105(b))

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**If you find the defendant guilty of reckless driving, you must then decide whether the People have proved the additional allegation that when the defendant committed that crime, (he/she) caused someone else to suffer** _____*<insert injury or injuries specified in Vehicle Code section 23105(b)>*.**]**

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

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*New [insert date of council approval]*

### BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction. See, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435][any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt.]

The court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*, if the issue of whether the defendant's act caused injury goes to the jury. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 591 [35 Cal.Rptr. 401].

### AUTHORITY

- Elements ▸ Veh. Code, § 23105(b).

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***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 271.

### RELATED INSTRUCTION

CALCRIM No. 2200, *Reckless Driving*

## 3411. Defenses: Mistake of Law As a Defense

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**[I have already explained that it is not a defense to the crime[s] of _____ <*insert crime[s]*> that the defendant did not know (he/she) was breaking the law or that (he/she) believed (his/her) act was lawful. But when you consider the crime[s] of _____ <*insert crime[s]*>, a different rule applies.]**

**_____ <*insert crime[s]*> require[s] that a defendant act with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for (that/those) crime[s].**

**The defendant is not guilty of _____<*insert crime[s]*> if (he/she) made an honest or good faith mistake about the law, if that mistake shows that (he/she) did not have the specific (intent/ [and/or] mental state) required for the crime[s] of _____<*insert crime[s]*>.**

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

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*New [insert date of council approval]*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction if a defendant charged with a specific intent crime is appropriately relying on this defense or there is substantial evidence that a defendant's good faith mistake of law provides a valid defense to a specific intent crime and the defense is not inconsistent with the defendant's theory of the case. *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774-780 [33 Cal.Rptr.3d 859]).

Many defendants seek to rely on the defense of mistake of law, but few are successful, because it is limited to crimes in which a specific intent or mental state is negated by the mistake. (*People v. Cole* (2007) 156 Cal.App.4th 452, 483-484 [67 Cal.Rptr.3d 526][no error in instructing jury that mistake of law is no defense when defendant was charged with a general intent crime]; *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819] [defendants' belief that they had a legal right to use clients' gold reserves to buy future contracts could be a

defense if held in good faith]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317] [defendant's good faith belief that he was legally authorized to use property could be defense to embezzlement]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17] [defendant's belief, if held in good faith, that out-of-state custody order was not enforceable in California could have been basis for defense to violating a child custody order]).

Although concerned with knowledge of the law, a mistake about legal status or rights is a mistake of fact, not a mistake of law. (See CALCRIM No. 3406, *Mistake of Fact*.) If the defendant is charged with a general intent crime and raises a mistake of law defense, give instead CALCRIM No. 3407, *Defenses: Mistake of Law*. If both general and specific intent crimes are charged, use the bracketed first paragraph of this instruction as necessary.

## AUTHORITY

- Instructional Requirements ▸ *People v. Cole* (2007) 156 Cal.App.4th 452, 483-484 [67 Cal.Rptr.3d 526]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 585-587, 592 [35 Cal.Rptr. 401].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (4th Ed. 2012) Defenses, §§ 44-45.

## RELATED ISSUES

### *Good Faith Reliance on Statute or Regulation*

Good faith reliance on a facially valid statute or administrative regulation (which turns out to be void) may be considered an excusable mistake of law. Additionally, a good faith mistake-of-law defense may be established by special statute. (See 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 46.)

## 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 [insert date of council approval]*

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## 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 ▸ Pen. Code, § 607; *People v. Hardy* (1948) 33 Cal.2d 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* (1973) 32 Cal.App.3d 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* (2012) 210 Cal.App.4th 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].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th Ed. 2012) Defenses, §§ 32-39.

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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).

## 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* (1948) 33 Cal.2d 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* (1978) 83 Cal.App.3d 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* (1973) 32 Cal.App.3d 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* (1973) 32 Cal.App.3d 1 [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* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness due to voluntary intoxication is governed by Penal Code section 22, rather than section 26, and is not a defense to a general intent crime. (*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 (3d ed. 2000) 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.)

## 3426. Voluntary Intoxication (Pen. Code, § 22)

**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.**

**[Do not consider evidence of intoxication in deciding whether _____** <*insert non-target offense*> **was a natural and probable consequence of _____** <*insert target offense*>**.]**

**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]*>**.]**

*New January 2006; Revised August 2012[insert date of council approval]*

### 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, § 22; *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* (1998) 18 Cal.4th 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 v. general intent analysis and holding that assault type crimes are general intent; subsequently superceded by amendments to Penal Code Section 22 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.

Give the bracketed paragraph beginning, "Do not consider evidence of intoxication," when instructing on aiding and abetting liability for a non-target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

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],)

***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, § 22; *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].
- Effect of Prescription Drugs ▸ (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1328, fn 32. [149 Cal.Rptr.3d 167].)

***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).

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## 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* (1997) 52 Cal.App.4th 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* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see *People v. Castillo* (1997) 16 Cal.4th 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 Penal Code section 22, rather than by section 26 and is only a partial defense to a crime. (*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]."].)

## 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 [insert date of council approval]*

## 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.

***Related Instructions***

See CALCRIM No. 3426, *Voluntary Intoxication*.

## AUTHORITY

- Instructional Requirements ▸ See Pen. Code, § 26(3).

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- Burden of Proof ‣ See *People v. Saille* (1991) 54 Cal.3d 1103, 1106 [2 Cal.Rptr.2d 364, 820 P.2d 588] [in context of voluntary intoxication].
- Involuntary Intoxication Defined ‣ *People v. Velez* (1985) 175 Cal.App.3d 785, 796 [221 Cal.Rptr. 631].

***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (4th Ed. 2012) Defenses, §§ 32-39.

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3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[4], 73.04 (Matthew Bender).

## 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 Penal Code section 22, rather than by section 26, and is only a partial defense to a crime. (*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].)

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
|---|---|---|---|
| 1243 | First District Appellate Project, the California Appellate Project, Appellate Defenders, Inc., and the Sixth District Appellate Program (The Appellate Projects) | Proposition 35, enacted in November 2012, made substantial revisions to the California human trafficking statute. The proposed changes to CALCRIM No. 1243 partially address the Proposition 35 amendments to Penal Code section 236.1. The proposal amends CALCRIM No. 1243 to cover the new subdivisions (a) and (b) of section 236.1, which respectively penalize depriving a person of liberty with the intent to obtain forced labor or services (§ 236.1(a)) and depriving a person of liberty with the intent to commit specified felonies (§ 236.1(b)). The proposed changes properly set out the elements of the subdivision (a) and (b) offenses. The proposed changes also properly revise the definitions of "deprivation of personal liberty" and "duress" to conform to the new statutory language.<br><br>We note that the revised instruction does not cover prosecutions under subdivision (c) of section 236.1, which penalizes inducing a minor to engage in a commercial sex act with the intent to commit certain other offenses:<br><br>(c) Any person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with | This comment proposes new drafting for the next round of revisions. The committee agrees to consider a draft to cover subdivision (c) of Penal Code section 236.1 at its next meeting.<br><br>The comment also suggests changes to CALCRIM No. 3160 that fall outside the scope of these proposals. The committee will consider them at its next meeting as well. |

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
|---|---|---|---|
| | | the intent to effect or maintain a violation of Section 266, 266h, 266i, 266j, 267, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, or 518 is guilty of human trafficking. A violation of this subdivision is punishable by imprisonment in the state prison as follows . . . .<br><br>We recommend that in the next round of amendments the committee draft a new instruction covering a subdivision (c) offense. In that regard, we address whether subdivision (c) is a penalty provision or whether it states a stand alone offense. Subdivision (c) does not expressly include the element of "deprives or violates the personal liberty of another" found in (a) and (b). On one hand, that element might be the gravamen of human trafficking, and one interpretation would be that the reference in (c) to "at the time of the commission of the offense" essentially incorporates an (a) or (b) violation by referring to "the offense." On the other hand, a violation of subdivision (c) is punishable by 5, 8 or 12 years, which is identical to the triad that applies to a subdivision (a) violation and less than the triad for a subdivision (b) violation (8, 14, or 20 years). If subdivision (c) were to state an alternative sentence for a subdivision (a) or (b) offense when the *additional* facts— | |

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
|---|---|---|---|
| | | inducing a minor to participate in a commercial sex act—are proven, then it would be expected that punishment under (c) would exceed that under either (a) and (b). Because the punishment under (c) is equal to that under (a) and less than that under (b), subdivision does not appear to merely state an alternative sentence and, instead, it appears to state an offense unto itself which does not include the element of "deprives or violates the personal liberty of another," which is found in (a) and (b).<br><br>Finally, the initiative moved a great bodily injury (GBI) provision from 236.1 to a new statute, 236.4. We recommend that CALCRIM No. 3160 be amended to add 236.4(b) to the title. Section 236.4, unlike other GBI provisions, does not require that the defendant "personally" inflict GBI. If CALCRIM No. 3160 is amended to apply to section 236.4 GBI allegations, the word "personally" might need to be bracketed in CALCRIM No. 3160 and a use note added to explain that the bracketed language is not to be given when GBI is alleged under section 236.4. | |
| 1400, 1401, 2542 | The Appellate Projects, by Dallas Sacher, Executive Director, Sixth District Appellate Program | In *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138, the California Supreme Court held that the "active participation" element of a Penal Code section 186.22(a) gang offense requires proof of participation of at least two gang members. Accordingly, the committee has proposed adding two new | The committee appreciates this comment, but believes that the proposed language is clear as drafted. |

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
|---|---|---|---|
| | | sentences to CALCRIM No. 1400 (186.22(a); active participant in a gang) and No. 2542 (carrying a firearm while being active participant in a gang) to effectuate the holding of *Rodriguez*:<br><br>At least two gang members 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.<br><br>We support adding the first sentence, as proposed. However, we have a minor suggestion regarding the second sentence. The Supreme Court observed, regarding a hypothetical shooting involving a gang leader and the defendant: "If the active participant is not a gang member, he would be no more guilty of violating section 186.22(a) than the gang leader because only one member of the gang—the gang leader—committed the shootings." (*Rodriguez*, at 1138.) The second sentenced of the proposed amendment, in principle, adopts this point. We agree the defendant can count as of one of the two gang members if the jury finds the defendant was a member of the gang. However, we recommend that sentence be rephrased a little more directly and strongly, as modified below:<br><br>The defendant may count as one of ~~those~~ **the two or more gang** members **only** if you find that the defendant was a member of the gang. | |

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
|---|---|---|---|
| | | In *Rodriguez*, the Court also explained that its requirement of two or more participating gang members for the subdivision (a) gang offense does not leave gang offenders off the hook because the subdivision (b) gang enhancement, unlike subdivision (a), contains no requirement of two or more gang members participating. While the gang enhancement was not at issue in *Rodriguez* and this is arguably dicta, it constitutes a clear statement of law that supports the proposed modification to the authority section of the gang enhancement instruction (1401), citing *Rodriguez* and stating "Defendant need not act with another gang member."<br><br>We also support the unrelated additions to the aiding and abetting sections of CALCRIM Nos1400 and 2542, which add the statement that "the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor." This makes the aiding and abetting section of the gang instruction consistent with the general instruction on aiding and abetting, CALCRIM 401. | |
| 2760 | The Appellate Projects, by Dallas Sacher, Executive Director, Sixth District Appellate Program | ***Proposed Change***<br><br>Escape means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not | The committee agrees with this comment and has made the suggested change. |

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
|---|---|---|---|
| | | necessary for the prisoner to have left the outer limits of the institution's property. ~~However, the prisoner must pass beyond some barrier, such as a fence or a wall, intended to keep the prisoner within a designated area.~~]<br><br>***Comment and Suggestion for Modification with Additional Language***<br><br>The proposed change is apparently intended to comply with Justice Werdegar's suggestion, in her concurrence in *People v. Bailey* (2012) 54 Cal.4th 740, that CALCRIM No. 2760 be revised "so that it no longer erroneously implies a inmate commits an escape merely by breaching a barrier enclosing 'a designated area' of a prison or jail" (*Id.*, at p. 757, conc. opin. of Werdegar, J.) The proposed change accomplishes this purpose in part by removing the references to breaching of barriers. However, the change leaves the term "escape" defined in terms of "the physical limits of [a prisoner's] custody," a phrase whose meaning is not apparent or obvious. The two sentences in the bracketed section following that phrase were intended to clarify that phrase by drawing a distinction between "the outer limits of the institution's property and" "some barrier . . . intended to keep the prisoner within a designated area." The problem with the portion of the instruction which Justice | |

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
|---|---|---|---|
| | | Werdegar identified is that the nature of the barrier beyond which the prisoner must pass is unclear from the wording of the instruction. But removing that sentence does not solve the problem; it merely leaves the 'clarification' of the phrase "physical limits of custody" cast only in terms of what that phrase *does not* mean, but not in terms of what *it does* mean. The first sentence of the bracketed passage is intended to instruct the jury that a prisoner can complete an escape even if he has not crossed the institution's *property line.* This is an important point because many prisons consist of a walled compound surrounded by a large amount of property belonging to the state, and it has come up in a number of cases in which a defendant asserted that he had not completed an escape because he never got off the prison's property. (*People v. Temple* (1962) 203 Cal. App. 2d 654, 656, 658-659; *People v. Sharp* (1959) 174 Cal. App. 2d 520, 522-523; *People v. Quijada* (1921) 53 Cal.App. 39, 41.) These cases hold that a prisoner can escape even if he never gets far enough to be off the parcel of real estate surrounding the prison. The point of the first sentence of the bracketed passage of CALCRIM No. 2760 is to so instruct the jury.<br><br>The point of the second sentence, the one removed by the proposed change, is that in order to complete an escape, a prisoner *does* have to get outside the walled area of the prison, or the camp or prison barriers; it is not sufficient to be merely "outside the particular | |

# CALCRIM May/June 2013 Invitation to Comment

## Revised CALCRIM Instructions

All comments are verbatim.

| Instruction | Commentator | Comment | Committee Response |
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| | | area within the camp or prison where he is permitted to be." (*People v. Lavaie* (1999) 70 Cal.App.4th 456, 461 ("*Lavaie*").) What Justice Werdegar was observing in her concurrence in *Bailey* was that the second sentence does not convey this point effectively, because it does not adequately capture the idea of the *outermost* barrier, and is open to the incorrect interpretation that a prisoner escapes by breaching *any* barrier. That potential misinterpretation is the problem that needs to be solved.<br><br>Justice Werdegar's concurrence provides a suggested resolution to this problem. After surveying several cases which held that the prisoner did not need to pass beyond the *property* line, the concurrence notes as follows:<br><br>> In all these cases, however, the defendant had breached a wall or fence marking the security perimeter of the correctional facility. (See *People v. Temple*, *supra*, 203 Cal. App. 2d at pp. 655–656 [defendant climbed over "the security fence" and was apprehended in a field before reaching the "northern boundary of the prison property"]; *People v. Sharp*, *supra*, 174 Cal. App. 2d at p. 522 [defendant scaled a fence that "marked the outer limits of the security area"]; *People v. Quijada*, | |

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| | | *supra,* 53 Cal.App. at p. 40 [defendant and accomplices drove locomotive through prison's gate, "across the track and beyond the wall of the prison"].) None of these decisions, and none other I have found construing Penal Code section 4530, stands for the proposition that a prisoner commits a completed escape merely by breaching the bars of his or her cell or another such internal barrier. Such unauthorized internal movement may constitute an attempt to escape, assuming the prisoner harbors the specific intent to escape (maj. opn., ante, at p. 749), and may also violate prison rules (*Lavaie, supra*, 70 Cal.App.4th at p. 462), but by itself it is insufficient to show a completed escape.<br>(*Bailey*, *supra*, at pp. 756-757, conc. opin. of Werdegar, J.)<br><br>Based on a proper reading of *Lavaie* and Justice Werdegar's concurrence in *Bailey*, we propose that the paragraph in CALCRIM defining the term "escape" be amended to read as follows:<br><br>Escape means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not necessary for the prisoner to have crossed the institution's property line. | |

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| | | ~~However, the prisoner must pass beyond some barrier, such as a fence or a wall, intended to keep the prisoner within a designated area.]~~ However, the prisoner must breach a wall or fence marking the security perimeter of the correctional facility. It is not sufficient for the prisoner to be merely outside the particular area within the facility where he is permitted to be.]<br><br>[1] Panel attorney Jonathan Berger made significant contributions to this comment on the proposed amendment to CALCRIM No. 2760. | |
| 3411 | The Appellate Projects, by Dallas Sacher, Executive Director, Sixth District Appellate Program | As CALCRIM No. 3407 instructs, mistake of law is generally not a defense to a crime. There is, however, an exception to this general rule, which is stated in proposed CALCRIM No. 3411. When the crime is one of specific intent, and the intent required may be negated by a good faith mistake of law, such a mistake has been recognized as a defense in California at least "since the turn of the [20th] century." (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.) A good, contemporary example of this principle is *People v. Urziceanu* (2005) 132 Cal.App.4th 747, in which the court held defendant was entitled to a *sua sponte* instruction on mistake of law as a defense to the crime of conspiracy to sell marijuana, where he presented evidence he thought he could legally distribute the drug to holders of | The committee appreciates this comment, but prefers the proposed language.<br><br>The committee will consider deleting the referenced bench note language in CALCRIM Nos. 3407 and 3411 at its next meeting because the two instructions should be considered together. |

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| | | medical marijuana cards. The *Urziceanu* court held that, while mistake of law was not a defense to sale, it was a defense to conspiracy, which requires a specific intent to do an unlawful act.<br><br>The new instruction fills the need for a standard instruction to be given when mistake of law is a defense. CALJIC promulgated a concomitant instruction, No. 4.36.1, in 2006. Compared to CALJIC, the new CALCRIM instruction is generally clearer and easier to follow. Notably, the portion of the instruction stating the general rule to which this instruction states the exception is bracketed in the CALCRIM instruction (as intended to be given only when other offenses are charged to which the defense does not apply), and not in CALJIC. Bracketing seems a good choice, as jurors dealing only with offenses to which the defense *does* apply do not need to be informed of the general rule.<br><br>We have only a few suggestions on the wording of the instruction and its bench notes. First, as to the instruction itself, the final two paragraphs currently read as follows:<br><br>The defendant is not guilty of [*insert crime(s)*] if (he/she) made an honest or good faith mistake about the law, if that mistake shows that (he/she) did not have the specific | |

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| | | (intent/ [and/or] mental state) required for the crime[s] of [*insert crime(s)*].<br>If you have a reasonable doubt about whether the defendant had the specific (intent/ [and/or] mental state) required for [*insert crime(s)*], you must find (him/her) not guilty of (that/those) crime[s].<br><br>We suggest the following modification to emphasize that the function of the defense is to raise a reasonable doubt as to specific intent (deletions from the proposed draft language are struck-through; additions are in bold):<br><br>The defendant is not guilty of [*insert crime(s)*] if (he/she) made an honest or good faith mistake about the law, **and** if that mistake shows that **there is a reasonable doubt whether** (he/she) **had** ~~did not have~~ the specific (intent [and/or] mental state) required for the crime[s] of [*insert crime(s)*].<br>If **for that or any other reason,** you have a reasonable doubt about whether the defendant had the specific (intent/ [and/or] mental state) required for [*insert crime(s)*}, | |

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| | | you must find (him/her) not guilty of (that/those) crime[s].<br><br>With this modification, the instruction it is still somewhat cumbersome, and we alternatively suggest that the proposed instruction could be altered to more closely parallel the mistake of fact instruction, CALCRIM 3406 if the penultimate paragraph of the instruction read as follows:<br><br>If you find that the defendant believed in good faith that the law permitted him/her to _____ <*insert act defendant believed was legally permitted*>, he/she did not have the specific intent or mental state required for the crime[s] of [*insert crime*].<br><br>Finally, the last paragraph of the bench notes to proposed CALCRIM No. 3411 states in part, "Although concerned with knowledge of the law, a mistake about legal status or rights is a mistake of fact, not a mistake of law." This sentence is taken directly from the bench notes to CALCRIM 3407, Mistake of Law, which states the general rule that such a mistake is not a defense. However, the statement, made without qualification, is potentially misleading and inaccurate, and should be eliminated from the bench notes to both instructions, or at least modified to reflect | |

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| | | some uncertainty. No cases have been found to support an unqualified statement that a mistake about legal status is always a mistake of fact. Indeed, "[t]he distinction between mistakes of fact and mistakes of law is an 'often difficult distinction.' (*People v. Young* (2001) 92 Cal.App.4th 229, 234, 111 Cal.Rptr.2d 726.) The difficulty is acute where a defendant has a mistaken belief about legal status or rights." (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1662.) For instance, in *People v. Hagen* (1998) 19 Cal.4th 652, 660, fn.4, the Court characterized a mistake about the "nonpenal legal status of a person, thing, or action" as a mistake of law. And in *People v. Snyder* (1982) 32 Cal.3d 590, 593, the Court treated a mistake regarding legal status as a felon as a mistake of law, not a mistake of fact, in a prosecution for possession of a firearm by a felon.<br><br>Accordingly, consideration should be given to omitting the bench note from the proposed new CALCRIM No. 3411 and deleting from CALCRIM No. 3407. | |
| 3425 | Hon. W. Kent Hamlin<br>Superior Court of Fresno County | The proposed change in language to the last paragraph of CALCRIM 3425 does not make the instruction more clear. In fact, it makes the instruction misleading and confusing. As I read the highlights and strikeouts in the draft version of the instruction, the proposed language of that last paragraph is as follows:<br><br>The People must prove beyond a reasonable | The original language comports with the provisions of Penal Code section 26(4), which explains that persons who commit an act while not being conscious of it are not capable of committing crimes.<br><br>The committee had concerns about the proposed changes, but felt compelled to follow Justice Murray's admonition in |

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| | | 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, you must find (him/her) not guilty.<br><br>I believe the original language was clear and specific; this proposed language is confusing. If the committee is wedded to the idea that this language must be changed, language needs to be added to the last sentence to make the sentence make sense, "…**in which case** you must find (him/her) not guilty."<br><br>Again, I would argue that this proposed change is awkward and confusing, even if those three words are added. I believe the present language of the instruction accurately states the law, is far more concise, and does not require any change from its present form. As I can see no authority cited for the change, I trust the committee will agree and leave this instruction unchanged.<br><br>I have no other comments, objections or suggestions regarding the other proposed revisions to CALCRIM. Thank you for the opportunity to comment. | *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1323, because that case said the language was "unnecessarily ambiguous."<br><br>The committee agrees that the new language is a bit awkward, and has no objection to adding the new suggested language to improve the flow. |
| ***CALCRIM INSTRUCTIONS AFFECTED BY PEOPLE V. WILKINS*** | | | |

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| 540A, 540B, 540C, 541A, 541B, 541C, 549, 725, 730, 731, 732, 3261 | The Appellate Projects, by Dallas Sacher, Executive Director, Sixth District Appellate Program | These comments primarily address a few conceptual issues with the CALCRIM interpretation of *People v. Wilkins* (2013) 56 Cal.4th 333 and the scope of felony murder liability. We are especially concerned about the proposed CALCRIM modifications on the "one continuous transaction" and "logical nexus" aspects of the felony murder rule:<br><br>· The revisions avoid the "one continuous transaction" phrase altogether in the instructional language, except for No. 725. They also delete No. 549 on that concept. Instead, Nos. 540A and 541A substitute a single sentence - the escape rule: "The crime of _____ <*felony*> continues until a defendant has reached a place of temporary safety."[1] Nos. 540B, 540C, 541B, and 540C do not have that substitute language, nor do the special circumstance instructions.<br>· The "logical nexus" requirement is omitted from the text of Nos. 540B and 541B. In most of the instructions a bench note states, "There is **no** sua sponte duty to clarify the logical nexus between the felony and the homicidal act. If an issue about the logical nexus requirement arises, the court may give the following language . . . ." (Emphasis original.) | |

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| | | While we agree with some aspects of the modifications, in other situations the changes remove or omit helpful and in some cases essential language from the instructions. They potentially could lead to reversible error in cases with contested issues concerning the one continuous transaction and/or logical nexus requirements.<br><br>***Wilkins Does Not Alter the Dual Logical Nexus and Temporal Relationship Requirements for Felony Murder.***<br><br>To begin with, nothing in *Wilkins* changes the law of felony murder as laid out in *People v. Cavitt* (2004) 33 Cal.4th 187 and other Supreme Court cases. The case does not suggest the one continuous transaction and logical nexus requirements no longer apply or need not be instructed on. To the contrary, *Wilkins* rejected the respondent's argument that only a logical nexus is required and reaffirmed *Cavitt*'s analysis that a temporal relationship (the one continuous transaction rule) also is required:<br><br>Our opinion in *Cavitt* made clear . . . that "the felony-murder rule requires **both** a causal relationship and a temporal relationship between the underlying felony and the act resulting in death." . . . The causal relationship is | |

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| | | established by a "logical nexus" between the felony and the homicidal act, and "[t]he temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." . . . [R]espondent provides no rationale or authority for eliminating the required "temporal relationship" in cases involving the liability of a sole perpetrator.<br>(*People v. Wilkins*, *supra*, 56 Cal.4th at pp. 346-347, emphasis added.)<br><br>*Cavitt*, on the other hand, rejected the respondent's argument that only the temporal prong, one continuous transaction, applies:<br><br>The Attorney General . . . contends that the requisite intent, combined with a killing by a cofelon that occurs while the felony is ongoing, is sufficient to establish the nonkiller's liability for felony murder. His formulation, in other words, would require only a temporal connection between the homicidal act and the underlying felony. This description of the relationship between the killing and the felony is incomplete. We have<br><br>often required more than mere coincidence in time and place | |

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| | | between the felony and the act resulting in death to establish a nonkiller's liability for felony murder. . . . A confederate who performs a homicidal act that is completely unrelated to the felony for which the parties have combined cannot be said to have been "jointly engaged" in the perpetration or attempt to perpetrate the felony at the time of the killing.<br><br>(*Cavitt*, 33 Cal.4th at 200.) Since both a causal and a temporal relationship are still required for felony murder, the trial court not only should but *must* instruct on them when the evidence raises an issue as to their existence. The proposed CALCRIM language, however, apparently would require neither in some circumstances, instead leaving it up to the discretion of the trial court as to how to instruct. CALCRIM's ambivalence on these requirements is unwarranted, because the Supreme Court already has articulated the standards that apply. Now we will address specific instructions and situations.<br><br>[1] The language "a" defendant is confusing. Other parts of the instruction refer to "the" defendant. If the intent is to suggest the crime ceases when any one of several accomplices reaches a place of temporary safety, that | |

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| | | meaning is contrary to the holding of *People v. Cavitt* (2004) 33 Cal.4th 187. | |
| 540A and 541A | The Appellate Projects, by Dallas Sacher, Executive Director, Sixth District Appellate Program | In the invitation to comment, the "one continuous transaction" requirement is eliminated from most of the instructions, and only Nos. 540A and 541A insert substitute language about the escape rule. We support this change to instructions 540A and 541A because the escape rule "establishes the 'outer limits of the "continuous transaction" theory'" when the defendant kills during flight from a felony. (*People v. Wilkins* (2013) 56 Cal.4th 333, 344-345.)<br><br>***Nos. 540B, 540C, 541B and 541C - Non-Killer Flees, Leaving Behind Accomplice Who Commits Fatal Act***<br><br>For the other felony-murder instructions (Nos. 540B, 540C, 541B and 541C) the committee proposes a revision to the bench notes referring the reader to *Cavitt* and its more expansive definition of the continuous transaction test to be applied when the defendant was a non-killer who fled, leaving behind an accomplice who killed. We agree that for this limited fact pattern, *Cavitt* and its broad one-continuous transaction test apply. As discussed below, however, the substitute escape rule language should be included in these other felony murder instructions, as well. | No further response necessary, but other points raised here will be discussed as appropriate below. |

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| 540B and 541B | The Appellate Projects, by Dallas Sacher, Executive Director, Sixth District Appellate Program | The escape rule applies beyond the factual scenario of 540A and 541A (defendant's act caused death) and includes accomplice liability, accident, and other variations. Although *Wilkins* observed that the case at hand involved "a single perpetrator," it appears that the distinction between the *Wilkins* and *Cavitt* scenarios does not turn on the number of participants but on the fact that at least one participant – the one who committed the fatal act – had not yet reached a place of temporary safety. Thus, where defendant and his accomplice remain together in flight during which the accomplice commits the fatal act, the escape rule should apply to both. The Supreme Court has indeed applied the escape rule to both the killer and his accomplice in such circumstances. For example, the escape rule applied to both defendant and his accomplice even assuming that it was the accomplice who killed the kidnapping victim during the joint flight. (*In re Malone* (1996) 12 Cal.4th 935, 967 ("Petitioner and Crenshaw [the accomplice] could not reasonably be regarded as having reached a place of temporary safety with the cash taken at the gas station while they still had the kidnapped victim under their control in a public place") (emphasis added).) (Although this was a pre-*Cavitt* case, *Wilkins* made it clear that it was reaffirming existing law. (See *Wilkins* at p. 344 ("Rather, when the killing occurs during the flight from a felony, this court and the intermediate appellate courts | When the defendant is the killer, the brief reference to the escape rule in 540A and 541A is sufficient. When someone or something else causes the death, instructing on the escape rule is more complicated. The court may need to instruct on accomplice liability and may want to tailor the escape rule instruction, CALCRIM No. 3261, to the facts of the case. Therefore the committee chose not to include the short escape rule in the text of the other felony murder instructions. The committee expects judges will continue to use CALCRIM No. 3261 on the escape rule as necessary. |

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| | | have, both before and after the decision in *Cavitt*, consistently applied the escape rule to test the sufficiency of the evidence that a killing occurred in the commission of the felony").))<br><br>The Courts of Appeal have applied this principle where two felons escaped in a car and the driver crashed, killing someone else. In that circumstance, the liability of both the driver (who committed the fatal act) and the passive passenger was determined on the basis of the escape rule. (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 76.) *Wilkins* cited *Thongvilay* with approval, and its parenthetical summary of the case recognized that the holding applied to both "defendants" (plural). (*Wilkins, supra,* 56 Cal.4th at p. 344 (summarizing *Thongvilay* as follows: "evidence sufficient to support a finding that defendants failed to reach a place of temporary safety before they caused the accident that took the victim's life").) Similarly, in *People v. Fuller* (1978) 86 Cal.App.3d 618, 622-624, both the driver and his passenger-accomplice were properly charged with first degree felony murder where the driver, while fleeing the police crashed into another car and killed an occupant. The court applied the escape rule to defendants, driver and passenger. (*See id.* at p. 624.) These two car cases appear to recognize that it would be incongruous to allow a jury to determine that the killer (such as the reckless driver who was in control of the car and who | |

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| | | committed the direct act of force) was not guilty of felony murder because he had reached a place of temporary safety at the moment of the crash, but the passive accomplice (such as the passenger of the car) was guilty because there was a logical and temporal nexus between the homicide and the prior crime that the two defendants were escaping from.<br><br>Accordingly, the escape test should be used in CALCRIM Nos. 540B and 541B when the defendant and the accomplice flee simultaneously and the accomplice commits the fatal act during flight. | |
| 540C and 541C | The Appellate Projects, by Dallas Sacher, Executive Director, Sixth District Appellate Program | CALCRIM Nos. 540C and 541C should also be modified to incorporate the escape rule where defendant's own acts were a substantial factor in causing the death. The C-version instructions apply where neither defendant nor an accomplice directly inflicted force. (See CALCRIM No. 540A, Bench Notes ("When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C"). That is precisely the posture of *Wilkins*: Defendant did not lay a hand on the victim, and even the box did not come in contact; rather, the victim swerved to avoid the box, lost control of his car, and crashed into a truck. (*Wilkins*, 56 Cal.4th at p. | For the main points raised here, see the response above. The committee agrees with the technical corrections and has made corresponding changes.<br><br>The committee proposes deleting the "logical connection" language from the elements of these instructions and replacing it with a bench note reference, because it is unnecessary in most cases.<br><br>The committee concluded that unnecessarily giving the "logical connection" language could generate confusion and do more harm than good. That is why it is now provided in the bench notes. The committee believes that the proposed explanation in the bench notes about when to instruct with that |

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| | | 339.) *Wilkins* is directly on point as to that scenario, for it was a 540C, not a 540A, case.[1]<br><br>The same rationale for inserting the escape rule into CALCRIM No. 540A/541A thus applies to CALCRIM No. 540C/541C where defendant's own act satisfies the causation element but he does not directly use force against the victim.<br><br>***The Logical Nexus Requirement Applies and must Be Instructed on When There Is an Evidentiary Dispute about the Connection Between the Felony and the Death.***<br><br>For the most part, the proposed CALCRIM revisions mention a logical nexus only in the bench notes, along with the statement, "There is **no** sua sponte duty to clarify the logical nexus between the felony and the homicidal act." (Emphasis original.) This treatment is misleading, because it implies there is no sua sponte to instruct at all on the requirement of a logical nexus. That is not what the Supreme Court has said.<br>The statement is excerpted from *Cavitt*, which more completely said:<br><br>*[I]f the requisite nexus between the felony and the homicidal act is not at issue* and the trial court has | language is sufficient. |

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| | | otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, "it is the defendant's obligation to request any clarifying or amplifying instructions on the subject." . . . [T]here is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide *without regard to whether the evidence supports such an instruction*.<br>(*People v. Cavitt*, *supra*, 33 Cal.4th at p. 204, emphasis added.)<br><br>*Wilkins* echoes this qualification: "If the court has properly instructed on the required relationship between the felony and the murder, which relationship is an element of the crime, the trial court has no sua sponte duty to clarify or amplify the scope of that element *if the evidence does not raise an issue as to whether that relationship exists*." (*People v. Wilkins*, *supra*, 56 Cal.4th at p. 347, emphasis added.) It observed that in *Cavitt* "*because the evidence did not raise an issue as to the existence of a logical nexus* between the felony and the homicide, the trial court had no duty to clarify this requirement sua sponte." | |

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| | | (*Ibid*., emphasis added.)<br><br>Trial courts should not be told there is "**no"** duty to instruct sua sponte on logical nexus. Rather, they should be advised there is no duty to instruct sua sponte *if* such an issue is not raised in the evidence. We would suggest moving the two sentences about the rule from the bench notes into the instructional text as a bracketed paragraph, with an introductory direction, "*Give this paragraph if the evidence raises a factual issue whether there was a logical nexus between the felony and the death.*"<br><br>***Technical Corrections***<br><br>In No. 541A and the bench notes to the other second degree felony murder instructions, the paragraph about a causal nexus instructs the trial court to insert "felony or felonies from Penal Code section 189." Section 189 specifies the felonies that give rise to *first* degree murder liability. For second degree murder, the felony must be an "inherently dangerous" one.<br><br>The final paragraph of the bench notes to No. 540B recommends the trial court give "bracketed element 5," requiring a logical nexus between the felony and the death. If the committee does not adopt our suggestion to restore that paragraph to the instructional text, there is no element 5. | |

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| | | We hope that these comments are useful to the committee.<br><br>[1] Although it is not so-stated in the Supreme Court's opinion in *Wilkins*, the Court of Appeal's opinion and the Respondent's Brief on the Merits filed in the Supreme Court shows that the trial court in that case recognized that Wilkins did not directly inflict force, and accordingly instructed with a modified version of CALCRIM No. 540C, rather than 540A. (*People v. Wilkins* (2011) 191 Cal.App.4th 780, 796, judgment reversed by *Wilkins*, 56 Cal.4th 333; *People v. Wilkins* No. S190713, Respondent's Brief on the Merits, 2011 WL 6841149, *11-*12 (filed Dec. 6, 2011).) (We recognize that the Court of Appeal's decision was depublished by the grant of review, but we cite it here only to demonstrate the procedural history of that case, and not to suggest it has any precedential value.) | |