



Judicial Council of California

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INVITATION TO COMMENT

CALCRIM-2025-01

Title

Criminal Jury Instructions: Additions and Revisions

Action Requested

Review and submit comments by June 30, 2025

Proposed Rules, Forms, Standards, or Statutes

New and Revised Jury Instructions

Proposed Effective Date

October 24, 2025

Proposed by

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

Contact

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Summary

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

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

CALCRIM Proposed Changes:

Invitation to Comment

June 2 – June 30, 2025

Instruction Number	Instruction Title
202	Note-Taking and Reading Back of Testimony
505, 508, 511	Justifiable Homicide: Self-Defense or Defense of Another; Justifiable Homicide: Citizen Arrest (Non-Peace Officer); Excusable Homicide: Accident in the Heat of Passion
520	First or Second Degree Murder With Malice Aforethought
524 & 525	Second Degree Murder: Peace Officer; Second Degree Murder: Discharge From Motor Vehicle
526	Implied Malice Murder: Aiding and Abetting
571, 580, 581, 582	Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense; Involuntary Manslaughter: Lesser Included Offense; Involuntary Manslaughter: Murder Not Charged; Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged
590, 592, 593	Gross Vehicular Manslaughter While Intoxicated; Gross Vehicular Manslaughter; Misdemeanor Vehicular Manslaughter
600	Attempted Murder
603	Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense
604	Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense
810, 820, 830, 860, 862, 863	Torture; Assault Causing Death of Child; Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death; Assault on Firefighter or Peace Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury; Assault on Custodial Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury; Assault on Transportation Personnel or Passenger With Deadly Weapon or Force Likely to Produce Great Bodily Injury
875	Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury
970, 982, 983	Shooting Firearm or BB Device in Grossly Negligent Manner; Brandishing Firearm or Deadly Weapon to Resist Arrest; Brandishing Firearm or Deadly Weapon: Misdemeanor
1120	Continuous Sexual Abuse

Instruction Number	Instruction Title
1141, 1142, 1144, 1145	Distributing Obscene Matter Showing Sexual Conduct by a Minor; Distributing or Intending to Distribute Obscene Material; Using a Minor to Perform Prohibited Acts; Possession of Matter Depicting Minor Engaged in Sexual Conduct
1180	Incest
1215	Simple Kidnapping
1240 & 1242	Felony False Imprisonment; Misdemeanor False Imprisonment
1244	Causing Minor to Engage in Commercial Sex Act
1300 & 1301	Criminal Threat; Stalking
1402	Gang-Related Firearm Enhancement
1501, 1530, 1551	Arson: Great Bodily Injury; Unlawfully Causing a Fire: Great Bodily Injury; Arson Enhancements
1703	Shoplifting
NEW 1705	Unlawful Entry of a Vehicle
NEW 1760	Automotive Property Theft For Resale
NEW 1761	Unlawful Deprivation of Retail Business Opportunity
1800	Theft by Larceny
1801	Grand and Petty Theft
NEW 1810	Unlawful Diversion of Construction Funds
NEW 1851	Petty Theft or Shoplifting with Prior Convictions
2100, 2101, 2102	Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury; Driving With 0.08 Percent Blood Alcohol Causing Injury; Driving With 0.04 Percent Blood Alcohol Causing Injury With a Passenger for Hire
NEW 2307	Possession of Hard Drug with Prior Convictions
2501, 2503, 2514, 2578	Carrying Concealed Explosive or Dirk or Dagger; Possession of Deadly Weapon With Intent to Assault; Possession of Firearm by

Instruction Number	Instruction Title
	Person Prohibited by Statute: Self-Defense; Explosion of Explosive or Destructive Device Causing Death, Mayhem, or Great Bodily Injury
NEW 2593	Purchase, Possession, or Use of Tear Gas or Tear Gas Weapon
2670	Lawful Performance: Peace Officer
2720, 2721, 2745, 2746, 2747, 2964	Assault by Prisoner Serving Life Sentence; Assault by Prisoner; Possession or Manufacture of Weapon in Penal Institution; Possession of Firearm, Deadly Weapon, or Explosive in a Jail or County Road Camp; Bringing or Sending Firearm, Deadly Weapon, or Explosive Into Penal Institution; Purchasing Alcoholic Beverage for Person Under 21: Resulting in Death or Great Bodily Injury
3130, 3145, 3149, 3150	Personally Armed With Deadly Weapon; Personally Used Deadly Weapon; Personally Used Firearm: Intentional Discharge Causing Injury or Death; Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death—Both Charged
3160, 3161, 3162, 3163	Great Bodily Injury; Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed; Great Bodily Injury: Age of Victim; Great Bodily Injury: Domestic Violence
3177	Sex Offenses: Sentencing Factors—Torture
NEW 3218	Value of Stolen Property Sold, Exchanged, or Returned
NEW 3219	Acting in Concert to Take, Damage, or Destroy Property
RESTORED AND REVISED 3220	Amount of Loss
3470	Right to Self-Defense or Defense of Another (Non-Homicide)
3477	Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury
3516	Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited

202. Note-Taking and Reading Back of Testimony

[You have been given notebooks and may have taken notes during the trial. You may use your notes during deliberations.] Your notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.

If there is a disagreement about the testimony [and stipulations] at trial, you may ask that the (court reporter's record be read to/court's recording be played for) you. It is the record that must guide your deliberations, not your notes. You must accept the (court reporter's record-/court's recording) as accurate. **I Do not ask the court reporter questions during the readback and do not discuss the case in the presence of the court reporter.**

Please do not remove your notes from the jury room.

At the end of the trial, your notes will be (collected and destroyed/collected and retained by the court but not as a part of the case record/_____<specify other disposition>).

New January 2006; Revised June 2007, April 2008, August 2009, February 2012, March 2019, September 2020, March 2021, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the members of the jury that they may take notes. -California Rules of Court, **R**rule 2.1031.

The court may specify its preferred disposition of the notes after trial. No statute or rule of court requires any particular disposition.

If the jury requests transcripts, the court should remind the jury of the right to request readback and to advise the court whether there is any testimony they want read. (See *People v. Triplett* (2020) 48 Cal.App.5th 655, 662 [267 Cal.Rptr.3d 675].)

AUTHORITY

- Jurors' Use of Notes. California Rules of Court, **R**rule 2.1031.
- Juror Deliberations Must Be Private and Confidential. *People v. Oliver* (1987) 196 Cal.App.3d 423, 429 [241 Cal.Rptr. 804].

SECONDARY SOURCES

6 Witkin & Epstein, California Criminal Law (~~45~~¹²²⁴th ed. 20~~12~~²⁴) Criminal Judgment, § ~~24~~¹⁹.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.05[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[2], [3], Ch. 87, *Death Penalty*, §§ 87.20, 87.24 (Matthew Bender).

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

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

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

AND

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

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

<The following definition may be given if requested.>

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

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and

consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

Related Instructions

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

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

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

AUTHORITY

- Justifiable Homicide. Pen. Code, §§ 197–199.
- Fear. Pen. Code, § 198.
- Lawful Resistance. Pen. Code, §§ 692–694.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. *People v. Ceballos, supra*, 12 Cal.3d at pp. 478–479; *People v. Morales, supra*, 69 Cal.App.5th at pp. 992–993.
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey, supra*, 13 Cal.4th at p. 1089.
- No Duty to Retreat. *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. *People v. Humphrey, supra*, 13 Cal.4th at p. 1082; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. Pen. Code, § 198.
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

COMMENTARY

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

RELATED ISSUES

Imperfect Self-Defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant’s belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where defendant’s version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor’s version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1997) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in rape prosecution, no mistake-of-fact instruction was required when two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim’s legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357];

see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.)

Transferred Intent Applies

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

Reasonable Person Standard and Physical Limitations

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~²⁴th ed. 20~~12~~²⁴) Defenses, §§ ~~673–93~~⁸⁵.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11, 73.12 (Matthew Bender).

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

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

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

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

1. The defendant committed the [attempted] killing while lawfully trying to arrest or detain _____ *<insert name of decedent>* for committing (the crime of _____ *<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>/* _____ *<insert crime decedent was suspected of committing, e.g., burglary>*), and that crime threatened the defendant or others with death or great bodily injury);
2. _____ *<insert name of decedent>* actually committed (the crime of _____ *<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>/* _____ *<insert crime decedent was suspected of committing, e.g., burglary>*), and that crime threatened the defendant or others with death or great bodily injury);
3. The defendant *had reason to believe* that _____ *<insert name of decedent>* had committed (the crime of _____ *<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>/* _____ *<insert crime decedent was suspected of committing, e.g., burglary>*), and that crime threatened the defendant or others with death or great bodily injury);
- [4. The defendant *had reason to believe* that _____ *<insert name of decedent>* posed a threat of death or great bodily injury, either to the defendant or to others];

AND

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

A person has *reason to believe* that someone [poses a threat of death or great bodily injury or] committed (the crime of _____ *<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>/* _____ *<insert crime decedent was suspected of committing, e.g.,*

burglary> , and that crime threatened the defendant or others with death or great bodily injury) when facts known to the person would persuade someone of reasonable caution to have (that/those) belief[s].

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

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

New January 2006; Revised April 2011, February 2012, September 2020, October 2025

BENCH NOTES

Instructional Duty

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

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

Ceballos (1974) 12 Cal.3d 470, 478—479 [116 Cal.Rptr. 233, 526 P.2d 241]. The court should review relevant case law before giving bracketed element 4.

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

Related Instructions

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

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

AUTHORITY

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

RELATED ISSUES

Felony Must Actually Be Committed

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

Felony Committed Must Threaten Death or Great Bodily Injury

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~⁴th ed. 20~~12~~²⁴) Defenses, §§ ~~908–96~~¹⁰⁵.

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

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

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

511. Excusable Homicide: Accident in the Heat of Passion

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

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

AND

7. The defendant did not act with criminal negligence.

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

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

In order for the killing to be excused on this basis, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote

provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

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

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

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

AND

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

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

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

New January 2006; Revised April 2011, September 2019, September 2020, March 2022, October 2025

BENCH NOTES

Instructional Duty

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

Related Instructions

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

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

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

AUTHORITY

- Excusable Homicide if Committed in Heat of Passion. Pen. Code, § 195, subd. 2.
- Burden of Proof. Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- “Deadly Weapon” Defined. See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar*, *supra*, ~~(1997)~~ 16 Cal.4th ~~1023, at pp.~~ 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*,

supra, (2018) 4 Cal.5th 1055, at p. 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

Distinguished From Voluntary Manslaughter

Under Penal Code section 195, subd. 2, a homicide is “excusable,” “in the heat of passion” if done “by accident,” or on “sudden . . . provocation . . . or . . . combat.” (Pen. Code, § 195, subd. 2.) Thus, unlike voluntary manslaughter, the killing must have been committed without criminal intent, that is, accidentally. (See *People v. Cooley* (1962) 211 Cal.App.2d 173, 204 [27 Cal.Rptr. 543], disapproved on other grounds in *People v. Lew* (1968) 68 Cal.2d 774, 778, fn. 1 [69 Cal.Rptr. 102, 441 P.2d 942]; Pen. Code, § 195, subd. 1 [act must be without criminal intent]; Pen. Code, § 26, subd. 5 [accident requires absence of “evil design [or] intent”].) The killing must also be on “sudden” provocation, eliminating the possibility of provocation over time, which may be considered in cases of voluntary manslaughter. (See Bench Notes to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.)

Distinguished From Involuntary Manslaughter

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2024) Defenses, § 27492.

1 Witkin & Epstein, California Criminal Law (45th ed. 2024) Crimes Against the Person, § 124230.

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

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

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

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

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

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

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

[OR]

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

[AND]

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

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

[AND]

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

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

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

The defendant had *implied malice* if:

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

2. The natural and probable consequences of the (act/ [or] failure to act) were dangerous to human life ~~in that the (act/ [or] failure to act) involved a high degree of probability that it would result in death;~~
3. At the time (he/she) (acted/ [or] failed to act), (he/she) knew (his/her) (act/ [or] failure to act) was dangerous to human life;

AND

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

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

An (act/[or] failure to act) is *dangerous to human life* if it involved a high degree of probability that it would result in death.

<Applicable only to driving under the influence cases.>

[If you find that the defendant drove a motor vehicle while impaired by (alcohol/ [and] drugs), you may consider that as a factor in deciding whether the defendant acted with conscious disregard for (human/[or] fetal) life.]

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

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

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

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

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

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

<Give in parental duty to protect cases.>

[A parent has a legal duty to protect (his/her) child when the parent knows to a substantial degree of certainty that a life-endangering act has occurred or is about to occur. This duty to protect does not require a parent to place (him/her)self in danger of death or great bodily harm.]

<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>.]

*New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017, March 2019, September 2019, March 2021, March 2024, September 2024, * October 2025*

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

BENCH NOTES

Instructional Duty

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

sua sponte duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 187.
- Malice. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- “Dangerous to Human Life” Defined. *People v. Reyes* (2023) 14 Cal.5th 981, 989 [309 Cal.Rptr.3d 832, 531 P.3d 357].
- Causation. *People v. Carney*, *supra*, 14 Cal.5th at pp. 1137–1139 [concurrent causation]; *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274] [successive causation].
- “Fetus” Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].

- Ill Will Not Required for Malice. *People v. Seden* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Prior Version of This Instruction Upheld. *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].
- Parental Duty to Protect. *People v. Collins* (2025) 17 Cal.5th 293, 308–310 [328 Cal.Rptr.3d 641, 561 P.3d 801].
- Implied Malice Murder Based on DUI. *People v. Watson* (1981) 30 Cal.3d 290, 300–301 [637 P.2d 279, 179 Cal.Rptr. 43].

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry*, *supra*, 37 Cal.App.4th at pp. 362–363; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: “[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant’s act”].) It is clear, however,

that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts, supra*, 2 Cal.4th at p. 315 [error to instruct a jury that when deciding causation it “[w]as immaterial that the defendant could not reasonably have foreseen the harmful result”].)

Second Degree Murder of a Fetus

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

Youth as a Factor for Implied Malice

In *People v. Pittman* (2023) 96 Cal.App.5th 400, 416–418 [314 Cal.Rptr.3d 409], the court considered the role of youth—commonly defined as 25 years of age or younger—in analyzing a resentencing petition under Penal Code section 1172.6 where the defendant was 21 years old at the time of the offense. The court concluded that youth was a relevant factor and remanded the case for the trial court to consider whether the defendant’s youth had impacted his ability to form the requisite mental state for implied malice second degree murder. (*People v. Pittman, supra*, 96 Cal.App.5th at p. 418.) In reaching this conclusion, *Pittman* relied on a series of cases that found youth relevant to reckless indifference determination in the felony murder context. That line of cases can be found in the authority section of No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~¹²²⁴th ed. 20~~12~~²⁴) Crimes Against the Person, §§ ~~196-8101~~, ~~18112-113~~¹⁹.

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).

524. Second Degree Murder: Peace Officer (Pen. Code, § 190(b), (c))

If you find the defendant guilty of second degree murder [as charged in Count __], you must then decide whether the People have proved the additional allegation that (he/she) murdered a peace officer.

To prove this allegation the People must prove that:

1. _____ *<insert officer's name, excluding title>* was a peace officer lawfully performing (his/her) duties as a peace officer;

[AND]

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

<Give element 3 when defendant charged with Pen. Code, § 190(c)>

[AND]

3. The defendant (intended to kill the peace officer/ [or] intended to inflict great bodily injury on the peace officer/ [or] personally used a (deadly or dangerous weapon/ [or] firearm) in the commission of the offense).]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[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.]

[Someone *personally uses* a (deadly weapon/ [or] firearm) if he or she intentionally does any of the following:

1. Displays the weapon in a menacing manner;
2. Hits someone with the weapon;

OR

3. Fires the weapon.]

[The People allege that the defendant _____ <insert all of the factors from element 3 when multiple factors are alleged>. You may not find the defendant guilty unless you all agree that the People have proved at least one of these alleged facts and you all agree on which fact or facts were proved. You do not need to specify the fact or facts in your verdict.]

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

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

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

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2009, February 2013, September 2019, September 2020, March 2022, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186,

193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged under Penal Code section 190(b), give only elements 1 and 2. If the defendant is charged under Penal Code section 190(c), give all three elements, specifying the appropriate factors in element 3, and give the appropriate definitions, which follow in brackets. Give the bracketed unanimity instruction if the prosecution alleges more than one factor in element 3.

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

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

“Peace officer,” as used in this statute, means “as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5.” (Pen. Code, § 190(b) & (c).)

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

Give the bracketed phrase “that is inherently deadly or one” and give the

bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

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

AUTHORITY

- Second Degree Murder of a Peace Officer. Pen. Code, § 190(b) & (c).
- Personally Used Deadly or Dangerous Weapon. Pen. Code, § 12022.
- Personally Used Firearm. Pen. Code, § 12022.5.
- Personal Use. Pen. Code, § 1203.06(b)(2).
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (45th ed. 2012~~24~~) Crimes Against the Person, § 186~~91~~.
- 3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.15[2] (Matthew Bender).
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.13[7] (Matthew Bender).
- 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.01[4][c] (Matthew Bender).

525. Second Degree Murder: Discharge From Motor Vehicle (Pen. Code, § 190(d))

If you find the defendant guilty of second degree murder [as charged in Count __], you must then decide whether the People have proved the additional allegation that the murder was committed by shooting a firearm from a motor vehicle.

To prove this allegation, the People must prove that:

1. (The defendant/_____ <insert name or description of principal if not defendant>) killed a person by shooting a firearm from a motor vehicle;
2. (The defendant/_____ <insert name or description of principal if not defendant>) intentionally shot at a person who was outside the vehicle;

AND

3. When (the defendant/_____ <insert name or description of principal if not defendant>) shot a firearm, (the defendant/_____ <insert name or description of principal if not defendant>) intended to inflict great bodily injury on the person outside the vehicle.

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

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

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

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

[The People must prove that the defendant intended that the person shot at suffer great bodily injury when (he/she/_____ <insert name or description of principal if not defendant>) shot from the vehicle. However, the People do not have to prove that the defendant intended to injure the specific person who was actually killed.]

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.

New January 2006; Revised September 2020, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed. 2d. 435].)

The statute does not specify whether the defendant must personally intend to inflict great bodily injury or whether accomplice liability may be based on a principal who intended to inflict great bodily injury even if the defendant did not. The instruction has been drafted to provide the court with both alternatives in element 3.

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.

Give the bracketed paragraph that begins with “The People must prove that the defendant intended,” if the evidence shows that the person killed was not the person the defendant intended to harm when shooting from the vehicle. (*People v. Sanchez* (2001) 26 Cal.4th 834, 851, fn. 10 [111 Cal.Rptr.2d 129, 29 P.3d 209].)

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

AUTHORITY

- Second Degree Murder, Discharge From Vehicle. Pen. Code, § 190(d).

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~45~~⁴th ed. 20~~12~~²⁴) Crimes Against the Person, § ~~49~~¹⁸⁶.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.01[1][a], [2][a][vii], [4][c] (Matthew Bender).

526–539. Reserved for Future Use

526. Implied Malice Murder: Aiding and Abetting

To prove that the defendant is guilty of aiding and abetting murder by acting with implied malice, the People must prove that:

1. The perpetrator committed [an] act[s] that (was/were) dangerous to human life;
2. The perpetrator's act[s] caused the death of (another person/ [or] a fetus);
3. The defendant knew that the perpetrator intended to commit the act[s] that (was/were) dangerous to human life;
4. Before or during the commission of the perpetrator's act[s], the defendant intended to aid and abet the perpetrator in committing the act[s] that (was/were) dangerous to human life;
5. Before or during the commission of the perpetrator's act[s], the defendant knew the perpetrator's act[s] (was/were) dangerous to human life, and the defendant deliberately acted with conscious disregard for human life;

AND

6. By words or conduct, the defendant did in fact aid and abet the perpetrator's commission of the act[s].

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.

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.

An act is *dangerous to human life* if there is a high degree of probability that the act will result in death.

[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.]

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

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

[An act 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.]

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

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

AND

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

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

*New September 2023; Revised October 2025**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

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 evidence that the defendant withdrew from participation in the crime, the court has a **sua sponte** duty to give the bracketed portion regarding withdrawal. (*People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].)

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 modify this instruction, consistent with the language in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.

Related Instructions

Give CALCRIM No. 520, *Murder: First or Second Degree Murder With Malice Aforethought* and CALCRIM No. 400, *Aiding and Abetting: General Principles*, before this instruction. Note that Penal Code section 30 uses “principal” but that CALCRIM Nos. 400 and 526 substitute “perpetrator” for clarity.

AUTHORITY

- Instructional Requirements. *People v. Reyes* (2023) 14 Cal.5th 981, 992 [309 Cal.Rptr.3d 832, 531 P.3d 357].
- Aiding and Abetting Liability for Implied Malice Murder. *People v. Reyes, supra*, 14 Cal.5th at pp. 990–991; *People v. Gentile* (2020) 10 Cal.5th 830, 850–851 [272 Cal.Rptr.3d 814, 477 P.3d 539].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T., supra*, 84 Cal.App.3d at p. 911.
- “Dangerous to Human Life” Defined. *People v. Reyes, supra*, 14 Cal.5th at p. 989.
- “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].
- Withdrawal. *People v. Norton, supra*, 161 Cal.App.2d at p. 403; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].
- Parental Duty to Protect. *People v. Collins* (2025) 17 Cal.5th 293, 308–310 [328 Cal.Rptr.3d 641, 561 P.3d 801].

COMMENTARY

In recognizing that Penal Code section 188(a)(3) bars imputed malice, and therefore bars conviction of second degree murder under a natural and probable consequences theory, the California Supreme Court further held that: “an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life.” (*People v. Gentile, supra*, 10 Cal.5th at pp. 850–851.) Unlike imputed malice, which involves vicarious liability, implied malice involves the concept of natural and probable consequences, which is still permissible because implied malice “is based upon the natural and probable consequences of a defendant’s *own* act committed with knowledge of and disregard for the risk of death the act carries.” (*People v. Vargas, supra*, 84 Cal.App.5th at p. 953 fn. 6.) Therefore, aiding and abetting implied malice murder remains a valid theory of liability, notwithstanding the statutory changes effected by Senate Bill 1437 (Stats. 2018, ch. 1015) and Senate Bill 775 (Stats. 2021, ch. 551). (See *People v. Reyes, supra*, 14 Cal.5th at pp. 990–991.)

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

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

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

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

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

AND

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

BUT

3. At least one of those beliefs was unreasonable.

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

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

<The following definition may be given if requested.>

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

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

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

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

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

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

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

*New January 2006; Revised August 2012, February 2015, September 2020, March 2022, September 2022, March 2024, * February 2025, October 2025*

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

BENCH NOTES

Instructional Duty

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

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

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than~~

~~minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

Related Instructions

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 192(a).
- “Imperfect Self-Defense” Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton*, *supra*, 12 Cal.4th at p. 201; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. *People v. Randle* (2005) 35 Cal.4th 987, 995–1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- Availability of Imperfect Self-Defense. *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543] [not available]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433] [available].
- Imperfect Self-Defense Does Not Apply When Defendant’s Belief in Need for Self-Defense Is Entirely Delusional. *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].
- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim. *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337] [in dicta].

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Intimate Partner Battering and Its Effects

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

Blakeley Not Retroactive

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

Inapplicable to Felony Murder

Imperfect self-defense does not apply to felony murder. “Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant.” (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753]; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1666 [285 Cal.Rptr. 523]; *People v. Loustau* (1986) 181 Cal.App.3d 163, 170 [226 Cal.Rptr. 216].)

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under

Penal Code section 187, it has “left untouched the provisions of section 192, defining manslaughter [as] the ‘unlawful killing of a human being.’ ” (37 Cal.App.3d at p. 355.)

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

Reasonable Person Standard and Physical Limitations

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2012) Crimes Against the Person, §§ 1242–1244.

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

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

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

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

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

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

The defendant committed involuntary manslaughter if:

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

AND

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction

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

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

AUTHORITY

- “Involuntary Manslaughter” Defined. Pen. Code, § 192(b).
- Due Caution and Circumspection. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Criminal Negligence Requirement; This Instruction Upheld. *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Not Amounting to a Felony. *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez, supra*, 186 Cal.App.2d at p. 440.
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].
- Inherently Dangerous Assaultive Felonies. *People v. Bryant, supra*, 56 Cal.4th at p. 964; *People v. Brothers, supra*, 236 Cal.App.4th at pp. 33–34.

LESSER INCLUDED OFFENSES

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

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

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

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

Imperfect self-defense is a “mitigating circumstance” that “reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide.” (*People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal.Rptr.2d 512, 2 P.3d 1066] [citations omitted, emphasis in original].) However, evidence of imperfect self-defense may support a finding of *involuntary* manslaughter, where the evidence demonstrates *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley, supra*, 23 Cal.4th at p. 91 [discussing dissenting opinion of Mosk, J.].)

Nevertheless, a court should not instruct on involuntary manslaughter unless there is evidence supporting the statutory elements of that crime.

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

SECONDARY SOURCES

4-1 Witkin & Epstein, California Criminal Law (**45**th ed. 20**12**~~24~~) Crimes Against the Person, §§ **246**~~147~~–**260**~~161~~.

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

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

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

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

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

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

AND

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

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

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

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

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

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

AND

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

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

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

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

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

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

New January 2006; Revised April 2011, September 2020, October 2025

BENCH NOTES

Instructional Duty

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

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

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

Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

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

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

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

AUTHORITY

- “Involuntary Manslaughter” Defined. Pen. Code, § 192(b).
- Due Caution and Circumspection. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unlawful Act Not Amounting to a Felony. *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Criminal Negligence Requirement. *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].

- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Due Caution and Circumspection

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

Felonies as Predicate “Unlawful Act”

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

No Inherently Dangerous Requirement for Predicate Misdemeanor/Infraction

“[T]he offense which constitutes the ‘unlawful act’ need not be an inherently dangerous misdemeanor or infraction. Rather, to be an ‘unlawful act’ within the

meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.” (*People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].)

Fetus

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Crimes Against the Person, §§ ~~225~~¹⁵³, ~~214746~~¹⁶¹²⁶⁰.

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

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

**582. Involuntary Manslaughter: Failure to Perform
Legal Duty—Murder Not Charged (Pen. Code, § 192(b))**

The defendant is charged [in Count ____] with involuntary manslaughter [in violation of Penal Code section 192(b)] based on failure to perform a legal duty.

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

1. The defendant had a legal duty to _____ *<insert name of decedent>;*
2. The defendant failed to perform that legal duty;
3. The defendant's failure was criminally negligent;

AND

4. The defendant's failure caused the death of _____ *<insert name of decedent>.*

(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, not name>.***

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

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

AND

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

In other words, a person acts with criminal negligence when the way he or she acts is so different from how an ordinarily careful person would act in the

same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

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

[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.]

New January 2006; Revised September 2020, October 2021, October 2025

BENCH NOTES

Instructional Duty

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

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

Legal Duty

The existence of a legal duty is a matter of law to be decided by the judge. (*Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124 [211 Cal.Rptr. 356, 695 P.2d 653].) The court should instruct the jury if a legal duty exists. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 614 [140 Cal.Rptr. 282] [proper instruction that parent has legal duty to furnish necessary clothing, food, and medical attention for his or her minor child].) In the

instruction on legal duty, the court should use generic terms to describe the relationship and duty owed. For example:

A parent has a legal duty to care for a child.

A paid caretaker has a legal duty to care for the person he or she was hired to care for.

A person who has assumed responsibility for another person has a legal duty to care for that other person.

The court should not state “the defendant had a legal duty to the decedent.” (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135] [correct to state “a Garden Grove Regular Police Officer [is a] peace officer”]; would be error to state “Officer Reed was a peace officer”].)

However, in a small number of cases where the legal duty to act is based on the defendant having created or increased risk to the victim, the existence of the legal duty may depend on facts in dispute. (See *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].) If there is a conflict in testimony over the facts necessary to establish that the defendant owed a legal duty to the victim, then the issue must be submitted to the jury. In such cases, the court should insert a section similar to the following:

The People must prove that the defendant had a legal duty to (help/rescue/warn/_____ <insert other required action[s]>) _____ <insert name of decedent>.

In order to prove that the defendant had this legal duty, the People must prove that the defendant _____ <insert facts that establish legal duty>.

If you decide that the People have proved that the defendant _____ <insert facts that establish legal duty>, then the defendant had a legal duty to (help/rescue/warn/_____ <insert other required action[s]>) _____ <insert name of decedent>.

If you have a reasonable doubt whether the defendant _____ <insert facts that establish legal duty>, then you must find (him/her) not guilty.

AUTHORITY

- Elements. Pen. Code, § 192(b); *People v. Oliver*, *supra*, (1989) 210 Cal.App.3d 138, at p. 146 ~~[258 Cal.Rptr. 138]~~.
- Criminal Negligence. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Duty. *People v. Heitzman* (1994) 9 Cal.4th 189, 198–199 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].
- Causation. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- This Instruction Upheld. *People v. Skiff* (2021) 59 Cal.App.5th 571, 579–580 [273 Cal.Rptr.3d 572].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Legal Duty to Aid

In *People v. Oliver*, *supra*, (1989) 210 Cal.App.3d 138, at p. 147 ~~[258 Cal.Rptr. 138]~~, the court explained the requirement of a legal duty to act as follows:

A necessary element of negligence, whether criminal or civil, is a duty owed to the person injured and a breach of that duty. . . . Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty. . . . In California civil cases, courts have found a special relationship giving rise to an affirmative duty to act where some act or omission on the part of the defendant either created or increased the risk of injury to the plaintiff, or created a dependency relationship inducing reliance or preventing assistance from others. . . . Where, however, the defendant took no affirmative action which contributed to, increased, or changed the risk which would otherwise have existed, and did not voluntarily assume any responsibility to protect the person or induce a false sense of security, courts have refused to find a special relationship giving rise to a duty to act.

Duty Based on Dependency/Voluntary Assumption of Responsibility

A legal duty to act exists when the defendant is a caretaker or has voluntarily assumed responsibility for the victim. (*Walker v. Superior Court* (1988) 47 Cal.3d 112,134–138 [253 Cal.Rptr. 1, 763 P.2d 852] [parent to child]; *People v. Montecino* (1944) 66 Cal.App.2d 85, 100 [152 P.2d 5] [contracted caretaker to dependent].)

Duty Based on Conduct Creating or Increasing Risk

A legal duty to act may also exist where the defendant's behavior created or substantially increased the risk of harm to the victim, either by creating the dangerous situation or by preventing others from rendering aid. (*People v. Oliver*, *supra*, ~~(1989)~~ 210 Cal.App.3d ~~138~~, at pp. 147–148 ~~[258 Cal.Rptr. 138]~~ [defendant had duty to act where she drove victim to her home knowing he was drunk, knowingly allowed him to use her bathroom to ingest additional drugs, and watched him collapse on the floor]; *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456 [30 Cal.Rptr. 2d 681] [defendant had duty to prevent horses from running onto adjacent freeway creating risk].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 20~~12~~24) Crimes Against the Person, §§ ~~258~~159–260161.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.03, 140.04, Ch. 142, *Crimes Against the Person*, § 142.02[2][b] (Matthew Bender).

583–589. Reserved for Future Use

590. Gross Vehicular Manslaughter While Intoxicated (Pen. Code, § 191.5(a))

The defendant is charged [in Count __] with gross vehicular manslaughter while intoxicated [in violation of Penal Code section 191.5(a)].

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

1. The defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21);
2. While driving that vehicle under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug], the defendant also committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);
3. The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence;

AND

4. The defendant's grossly negligent conduct caused the death of another person.

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

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

[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: _____ <insert act[s] alleged>.]

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21).

Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:

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

AND

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

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

The combination of driving a vehicle while under the influence of (an alcoholic beverage/ [and/or] a drug) and violating a traffic law is not enough by itself to establish gross negligence. In evaluating whether the defendant acted with gross negligence, consider the level of the defendant's intoxication, if any; the way the defendant drove; and any other relevant aspects of the defendant's conduct.

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

[A person facing a sudden and unexpected emergency situation not caused by

that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

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

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

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

[The People have the burden of proving beyond a reasonable doubt that the defendant committed gross vehicular manslaughter while intoxicated. If the People have not met this burden, you must find the defendant not guilty of that crime. You must consider whether the defendant is guilty of the lesser crime[s] of _____ *<insert lesser offense[s]>*.]

New January 2006; Revised June 2007, September 2020, October 2025

BENCH NOTES

Instructional Duty

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

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

Ellis (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 1, instruct on the particular “under the influence” offense charged. In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infracton or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the driving under the influence offense and the predicate misdemeanor or infracton.

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

~~The court has~~There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count predicate offenses, ~~are alleged if the prosecution has not elected the specific act relied upon to prove the charge and if the continuous course of conduct exception does not apply.~~ (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 [114 Cal.Rptr.3d 133, 188, 237 P.3d 474, 520–521]; *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) See the Bench Notes to CALCRIM No. 3500, Unanimity, for an extensive discussion of the sua sponte duty to instruct on unanimity. A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

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

If the defendant is charged with one or more prior conviction (see Pen. Code, § 191.5(d)), the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial. (See Bench Notes to CALCRIM No. 3100.)

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

AUTHORITY

- Gross Vehicular Manslaughter While Intoxicated. Pen. Code, § 191.5(a).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of the Predicate Unlawful Act. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- ~~• Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].~~
- Gross Negligence. *People v. Penny*, (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Gross Negligence—Overall Circumstances. *People v. Bennett* (1992) 54 Cal.3d 1032, 1039 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].
- This Instruction Upheld. *People v. Hovda* (2009) 176 Cal.App.4th 1355, 1358 [98 Cal.Rptr.3d 499].

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Gross Negligence Without Intoxication. Pen. Code, § 192(c)(1); *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467

[26 Cal.Rptr.2d 610].

- Vehicular Manslaughter With Ordinary Negligence While Intoxicated. Pen. Code, § 191.5(b); *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Vehicular Manslaughter With Ordinary Negligence Without Intoxication. Pen. Code, § 192(c)(2); *People v. Rodgers* (1949) 94 Cal.App.2d 166, 166 [210 P.2d 71].
- Injury to Someone While Driving Under the Influence of Alcohol or Drugs. Veh. Code, § 23153; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].

Gross vehicular manslaughter while intoxicated is *not* a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 992 [103 Cal.Rptr.2d 698, 16 P.3d 118].)

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

The Vehicle Code driving-under-the-influence offense of the first element cannot do double duty as the predicate unlawful act for the second element. (*People v. Soledad* (1987) 190 Cal.App.3d 74, 81 [235 Cal.Rptr. 208].) “[T]he trial court erroneously omitted the ‘unlawful act’ element of vehicular manslaughter when instructing in . . . [the elements] by referring to Vehicle Code section 23152 rather than another ‘unlawful act’ as required by the statute.” (*Id.* at p. 82.)

Predicate Act Need Not Be Inherently Dangerous

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

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 191.5.) “[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~45~~²⁴th ed. 20~~12~~²⁴) Crimes Against the Person, §§ ~~165263–272176~~.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04, Ch. 142, *Crimes Against the Person*, § 142.02[2][c], [4], Ch. 145, *Narcotics and Alcohol Offenses*, §§ 145.02[4][c], 145.03[1][a] (Matthew Bender).

592. Gross Vehicular Manslaughter (Pen. Code, § 192(c)(1))

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

<Introductory Sentence: Alternative A—Charged Offense>

[The defendant is charged [in Count __] with gross vehicular manslaughter [in violation of Penal Code section 192(c)(1)].]

<Introductory Sentence: Alternative B—Lesser Included Offense>

[Gross vehicular manslaughter is a lesser crime than gross vehicular manslaughter while intoxicated.]

To prove that the defendant is guilty of gross vehicular manslaughter, the People must prove that:

- 1. The defendant (drove a vehicle/operated a vessel);**
- 2. While (driving that vehicle/operating that vessel), the defendant committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);**
- 3. The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence;**

AND

- 4. The defendant's grossly negligent conduct caused the death of another person.**

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

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

AND

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

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

[*Gross negligence* may include, based on the totality of the circumstances, any of the following:

- Participating in a sideshow; (and/or)
- Participating in a motor vehicle speed contest on a highway; (and/or)
- Speeding over 100 miles per hour.]

[A *sideshow* is an event in which two or more persons block or impede traffic on a highway, for the purpose of performing motor vehicle stunts, motor vehicle speed contests, motor vehicle exhibitions of speed, or reckless driving, for spectators.]

[*Participating in a motor vehicle speed contest* includes a motor vehicle race against another vehicle, a clock, or another timing device.]

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

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

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

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

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

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

[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: _____ <insert act[s] alleged>.]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one alleged (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]

[The People have the burden of proving beyond a reasonable doubt that the defendant committed gross vehicular manslaughter. If the People have not met this burden, you must find the defendant not guilty of that crime. You must consider whether the defendant is guilty of the lesser crime[s] of _____ <insert lesser offense[s]>.]

New January 2006; Revised February 2015, September 2020, September 2023, October 2025

BENCH NOTES

Instructional Duty

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

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr.

401].) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

~~The court has~~~~There is a split in authority over whether there is~~ a **sua sponte** duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count~~predicate offenses are alleged, if the prosecution has not elected the specific act relied upon to prove the charge and if the continuous course of conduct exception does not apply.~~ (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 [114 Cal.Rptr.3d 133, 188, 237 P.3d 474, 520–521]; *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) See the Bench Notes to CALCRIM No. 3500, *Unanimity*, for an extensive discussion of the sua sponte duty to instruct on unanimity. A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

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

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

AUTHORITY

- Gross Vehicular Manslaughter. Pen. Code, § 192(c)(1).
- Gross Vehicular Manslaughter During Operation of a Vessel. Pen. Code, § 192.5(a).

- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham, supra*, 159 Cal.App.3d at p. 506.
- Elements of Predicate Unlawful Act. *People v. Ellis, supra*, 69 Cal.App.4th at p. 1339.
- ~~Unanimity Instruction. *People v. Gary, supra*, 189 Cal.App.3d at p. 1218; overruled on other grounds in *People v. Flood, supra*, 18 Cal.4th at p. 481; *People v. Durkin, supra*, 205 Cal.App.3d Supp. at p. 13; *People v. Mitchell, supra*, 188 Cal.App.3d at p. 222 ; *People v. Leffel, supra*, 203 Cal.App.3d at pp. 586-587.~~
- Gross Negligence. *People v. Bennett* (1992) 54 Cal.3d 1032, 1036 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Examples of Gross Negligence. Pen. Code, § 192(e)(2).
- “Motor Vehicle Speed Contest” Defined. Veh. Code, § 23109(a).
- “Sideshow” Defined. Veh. Code, § 23109(i)(2)(A).
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware, supra*, 41 Cal.App.2d at p. 269.

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Ordinary Negligence. Pen. Code, § 192(c)(2); see *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Manslaughter During Operation of a Vessel Without Gross Negligence. Pen. Code, § 192.5(b).

RELATED ISSUES

Predicate Act Need Not Be Inherently Dangerous

“[T]he offense which constitutes the ‘unlawful act’ need not be an inherently dangerous misdemeanor or infraction. Rather, to be an ‘unlawful act’ within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.” (*People v. Wells, supra*, 12 Cal.4th at p.

982.)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 192(c)(1).) “[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~⁵th ed. 20~~12~~²⁴) Crimes Against the Person, §§ ~~262164–268174~~.

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

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

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

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

<Introductory Sentence: Alternative A—Charged Offense>

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

<Introductory Sentence: Alternative B—Lesser Included Offense>

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

~~The court has~~~~There is a split in authority over whether there is~~ a **sua sponte** duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count~~predicate offenses are alleged, if the prosecution has not elected the specific act relied upon to prove the charge and if the continuous course of conduct exception does not apply.~~ (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 [114 Cal.Rptr.3d 133, 188, 237 P.3d 474, 520–521]; *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) See the Bench Notes to CALCRIM No. 3500, *Unanimity*, for an extensive discussion of the sua sponte duty to instruct on unanimity. A

unanimity instruction is included in a bracketed paragraph for the court to use at its discretion. In the definition of ordinary negligence, the court should use the entire phrase “harm to oneself or someone else” if the facts of the case show a failure by the defendant to prevent harm to him- or herself rather than solely harm to another.

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

AUTHORITY

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

RELATED ISSUES

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

Manslaughter.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~45~~th ed. 20~~24~~¹²) Crimes Against the Person, §§ ~~263~~¹⁶⁵–~~271~~¹⁷⁴.

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

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

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.]

[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.]

<Give when kill zone theory applies; repeat the relevant paragraphs for each victim.>

[A person may intend to kill a primary target and also [a] secondary target[s] within a zone of fatal harm or “kill zone.” A “kill zone” is an area in which the defendant used lethal force that was designed and intended to kill everyone in the area around the primary target.

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.

In determining whether the defendant intended to kill _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>*, the People must prove that (1) the only reasonable conclusion from the defendant’s use of lethal force, is that the defendant intended to create a kill zone; and (2) _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>* was located within the kill zone.

In determining whether the defendant intended to create a “kill zone” and the scope of such a zone, you should consider all of the circumstances including, but not limited to, the following:

- [• The type of weapon used(;/.)]**
- [• The number of shots fired(;/.)]**
- [• The distance between the defendant and _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>(;/.)*]**
- [• The distance between _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>* and the primary target.]**

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>.*

2013, September 2019, April 2020, September 2023, March 2024, * February 2025, October 2025*

* Denotes changes only to bench notes and other commentaries.

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 when substantial evidence exists that the defendant intended to kill a primary target; the defendant concurrently intended to achieve that goal by killing all others in the fatal zone created by the defendant; and the alleged attempted murder victim was in that zone. (See *People v. Mumin* (2023) 15 Cal.5th 176, 203 [312 Cal.Rptr.3d 255, 534 P.3d 1].) “The use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction.” (*People v. Canizales* (2019) 7 Cal.5th 591, 608 [248 Cal.Rptr.3d 370, 442 P.3d 686], original italics.)

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.)

A verdict of attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code, § 188(a)(3); *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390].)

If the evidence supports a claim of accident during the course of lawful self-defense, give CALCRIM No. 510, *Excusable Homicide: Accident*, modified for a charge of attempted murder. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 54 [86 Cal.Rptr.3d 534].) If the evidence supports a claim of accident as to other, nonhomicide charges, give CALCRIM No. 3404, *Accident*.

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. Mumin, supra*, 15 Cal.5th at p. 193; *People v. Canizales, supra*, 7 Cal.5th at pp. 607–608; *People v. Stone* (2009) 46 Cal.4th 131, 137–138 [92 Cal.Rptr.3d 362, 205 P.3d 272].
- Application of Kill Zone Theory When Shooter Unaware of Presence of Other People. *People v. Hin* (2025) 17 Cal.5th 401, 458 [329 Cal.Rptr.3d 612, 563 P.3d 514] [did not apply]; *People v. Ibarra* (2024) 106 Cal.App.5th 1070, 1077–1080 [327 Cal.Rptr.3d 478] [did not apply]; *People v. Adams* (2008) 169 Cal.App.4th 1009, 1022–1023 [86 Cal.Rptr.3d 915] [applied]; *People v. Vang* (2001) 87 Cal.App.4th 554, 564 [104 Cal.Rptr.2d 704] [applied].
- This Instruction Correctly States the Law of Attempted Murder. *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556–557 [99 Cal.Rptr.3d 324].

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, supra*, 40 Cal.3d at p. 386.)

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. Santascy* (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, supra*, 28 Cal.4th at p. 331.) “[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.” (*Ibid.*)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~¹²²⁴th ed. 20~~12~~²⁴) Elements, §§ ~~6056~~⁷⁴¹.

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).

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

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

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

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

AND

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

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

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

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

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

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

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

*New January 2006; Revised August 2009, April 2010, April 2011, August 2015, October 2025**

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

BENCH NOTES

Instructional Duty

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

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

Related Instructions

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

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

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

AUTHORITY

- “Attempt” Defined. Pen. Code, §§ 21a, 664.

- “Manslaughter” Defined. Pen. Code, § 192.
- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].
- Gender Identity and Sexual Orientation Not Proper Basis for Finding Provocation Objectively Reasonable. Pen. Code, § 192(f), ~~amended effective January 1, 2015~~; see also *People v. Martinez* (2024) 106 Cal.App.5th 892, 903–905 [327 Cal.Rptr.3d 395] [victim’s alleged unwanted romantic advances were not forcible acts as they did not overpower defendants’ will to resist].

RELATED ISSUES

Specific Intent to Kill Required

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

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

No Attempted Involuntary Manslaughter

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

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2024) Crimes Against the Person § 2124.

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

**604. Attempted Voluntary Manslaughter: Imperfect Self-Defense—
Lesser Included Offense (Pen. Code, §§ 21a, 192, 664)**

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

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

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

1. The defendant took at least one direct but ineffective step toward killing a person.
2. The defendant intended to kill when (he/she) acted.
3. The defendant believed that (he/she/ [or] someone else/ _____
<insert name of third party>) was in imminent danger of being killed or suffering great bodily injury.

AND

4. The defendant believed that the immediate use of deadly force was necessary to defend against the danger.

BUT

5. At least one of the defendant's beliefs was unreasonable.

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

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

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of death or great bodily injury to (himself/herself/ [or] someone else).

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

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

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder.

New January 2006; Revised August 2009, October 2010, February 2012, February 2013, September 2020, September 2023, October 2025

BENCH NOTES

Instructional Duty

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

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

~~[upholding instructions containing great bodily injury definition as written.]~~

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

In evaluating whether the defendant actually believed in the need for self-defense, the jury may consider the effect of antecedent threats and assaults against the defendant, including threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337].) If there is sufficient evidence, the court should give the bracketed paragraphs on prior threats or assaults on request.

Related Instructions

CALCRIM Nos. 3470–3477, *Defense Instructions*.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

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

AUTHORITY

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

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

- “Imperfect Self-Defense” Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton, supra*, 12 Cal.4th at p. 201; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Availability of Imperfect Self-Defense. *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543] [not available]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433] [available].
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1307 [132 Cal.Rptr.3d 248].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense* and CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4⁵th ed. 20~~24~~¹²) Crimes Against the Person, § ~~2~~¹24.

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

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

605–619. Reserved for Future Use

810. Torture (Pen. Code, § 206)

The defendant is charged [in Count ____] with torture [in violation of Penal Code section 206].

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

1. The defendant inflicted great bodily injury on someone else;

AND

2. When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.

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

[It is not required that a victim actually suffer pain.]

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

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

[Someone acts with a *sadistic purpose* if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself.]

New January 2006; Revised September 2020, October 2025

BENCH NOTES

Instructional Duty

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

Unlike murder by torture, the crime of torture does not require that the intent to cause pain be premeditated or that any cruel or extreme pain be prolonged. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1205 [68 Cal.Rptr.2d 619]; *People v. Vital* (1996) 45 Cal.App.4th 441, 444 [52 Cal.Rptr.2d 676].) Torture as defined in section 206 of the Penal Code focuses on the mental state of the perpetrator and not the actual pain inflicted. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904].) Give the first bracketed paragraph on request if there is no proof that the alleged victim actually suffered pain. (See Pen. Code, § 206.)

“Extortion” need not be defined for purposes of torture. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1564 [18 Cal.Rptr.2d 395]; but see *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628] [term should be defined for kidnapping under Pen. Code, § 209].) Nevertheless, either of the bracketed definitions of extortion, and the related definition of “official act,” may be given on request if any of these issues are raised in the case. (See Pen. Code, § 518 [defining “extortion”]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining “official act”].) Extortion may also be committed by using “the color of official right” to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition of the term].) It appears that this type of extortion would rarely occur in the context of torture, so it is excluded from this instruction.

“Sadistic purpose” may be defined on request. (See *People v. Barrera, supra*, 14 Cal.App.4th at p. 1564; *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712] [approving use of phrase in torture-murder and special circumstances torture-murder instructions].)

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

Related Instructions

First degree murder by torture defines torture differently for the purposes of murder. See CALCRIM No. 521, *Murder: Degrees*.

AUTHORITY

- Elements. Pen. Code, § 206.

- “Extortion” Defined. Pen. Code, § 518.
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); see, e.g., *People v. Hale*, supra, ~~(1999)~~ 75 Cal.App.4th 94, at p. 108 [~~88 Cal.Rptr.2d 904~~] [broken and smashed teeth, split lip, and facial cut sufficient evidence of great bodily injury].
- Cruel Pain Equivalent to Extreme or Severe Pain. *People v. Aguilar*, supra, ~~(1997)~~ 58 Cal.App.4th 1196, at p. 1202 [~~68 Cal.Rptr.2d 619~~].
- Intent. *People v. Pre*, supra, ~~(2004)~~ 117 Cal.App.4th 413, at pp. 419–420 [~~11 Cal.Rptr.3d 739~~]; *People v. Hale*, supra, ~~(1999)~~ 75 Cal.App.4th 94, at pp. 106–107 [~~88 Cal.Rptr.2d 904~~]; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042–1043 [84 Cal.Rptr.2d 5]; see *People v. Aguilar*, supra, ~~(1997)~~ 58 Cal.App.4th 1196, at pp. 1204–1206 [~~68 Cal.Rptr.2d 619~~] [neither premeditation nor intent to inflict prolonged pain are elements of torture].
- “Sadistic Purpose” Defined. *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712]; *People v. Aguilar*, supra, ~~(1997)~~ 58 Cal.App.4th 1196, at pp. 1202–1204 [~~68 Cal.Rptr.2d 619~~]; see *People v. Healy* (1993) 14 Cal.App.4th 1137, 1142 [18 Cal.Rptr.2d 274] [sexual element not required].

LESSER INCLUDED OFFENSES

In *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1042–1046 [23 Cal.Rptr.3d 508], the court held that none of the following offenses were lesser included offenses to torture: assault with a deadly weapon (Pen. Code, § 245(a)(1)); corporal injury on a cohabitant (Pen. Code, § 273.5); forcible rape (Pen. Code, § 261(a)(2)); forcible oral copulation (Pen. Code, § 287(c)); criminal threats (Pen. Code, § 422); dissuading a witness by force or threats (Pen. Code, § 136.1(c)(1)); false imprisonment by violence. (Pen. Code, § 236.)

The court did not decide whether assault with force likely to cause great bodily injury is a lesser included offense to torture. (*Id.* at p. 1043–1044.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~45~~⁴th ed. 20~~24~~¹²) Crimes Against the Person, §§ ~~922~~⁷¹–~~95~~²⁷⁴.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.15 (Matthew Bender).

811–819. Reserved for Future Use

820. Assault Causing Death of Child (Pen. Code, § 273ab(a))

The defendant is charged [in Count ____] with killing a child under the age of 8 by assaulting the child with force likely to produce great bodily injury [in violation of Penal Code section 273ab(a)].

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

- 1. The defendant had care or custody of a child who was under the age of 8;**
- 2. The defendant did an act that by its nature would directly and probably result in the application of force to the child;**
- 3. The defendant did that act willfully;**
- 4. The force used was likely to produce great bodily injury;**
- 5. 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 great bodily injury to the child;**
- 6. When the defendant acted, (he/she) had the present ability to apply force likely to produce great bodily injury to the child;**

[AND]

- 7. The defendant's act caused the child's death(;/.)**

<Give element 8 when instructing on parental right to discipline>

[AND]

- 8. When the defendant acted, (he/she) was not 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.

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

An act causes death if:

1. The death was the natural and probable consequence of the act;
2. The act was a direct and substantial factor in causing the death;

AND

3. 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.

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

[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 2014, September 2020, October 2025

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, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 Cal.Rptr.2d 33].) Give bracketed element 8 and CALCRIM No. 3405, Parental Right to Punish a Child.

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

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to~~

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

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements. Pen. Code, § 273ab(a); see *People v. Malfavon* (2002) 102 Cal.App.4th 727, 735 [125 Cal.Rptr.2d 618] [sometimes called “child abuse homicide”].
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *People v. Albritton* (1998) 67 Cal.App.4th 647, 658 [79 Cal.Rptr.2d 169].
- “Willful” Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Force Likely to Produce Great Bodily Injury. *People v. Preller* (1997) 54 Cal.App.4th 93, 97–98 [62 Cal.Rptr.2d 507] [need not prove that reasonable person would believe force would be likely to result in child’s death].
- General Intent Crime. *People v. Albritton*, *supra* ~~(1998)~~ 67 Cal.App.4th ~~647~~, at pp. 658–659 ~~[79 Cal.Rptr.2d 169]~~.
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

LESSER INCLUDED OFFENSES

- Attempted Assault on Child With Force Likely to Produce Great Bodily Injury. Pen. Code, §§ 664, 273ab(b).
- Assault. Pen. Code, § 240.
- Assault With Force Likely to Produce Great Bodily Injury. Pen. Code, § 245(a)(1); *People v. Basuta* (2001) 94 Cal.App.4th 370, 392 [114 Cal.Rptr.2d 285].

Involuntary manslaughter is not a lesser included offense of Penal Code section 273ab. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 796 [91 Cal.Rptr.2d 888]; *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 261–262 [86 Cal.Rptr.2d 384].)

Neither murder nor child abuse homicide is a necessarily included offense within the other. (*People v. Malfavon*, *supra*, ~~(2002)~~ 102 Cal.App.4th ~~727~~, at pp. 743–744 ~~[125 Cal.Rptr.2d 618]~~.)

RELATED ISSUES

Care or Custody

“The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 2012~~42~~) Crimes Against the Person, § 21~~41~~5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.13[2A], 142.23[7] (Matthew Bender).

830. Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death (Pen. Code, § 368(b)(1))

The defendant is charged [in Count __] with (elder/dependent adult) abuse likely to produce great bodily harm or death [in violation of Penal Code section 368(b)(1)].

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

<Alternative A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on _____ *<insert name or description of elder or dependent adult>;*

<Alternative B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted _____ *<insert name or description of elder or dependent adult>* to suffer unjustifiable physical pain or mental suffering;

<Alternative C—while having custody, caused or permitted to be injured>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>* willfully caused or permitted (his/her) person or health to be injured;

<Alternative D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>* willfully caused or permitted (him/her) to be placed in a situation where (his/her) person or health was endangered;

2. The defendant (inflicted suffering on _____ *<insert name or description of elder or dependent adult>*/ [or] caused or permitted _____ *<insert name of elder or dependent adult>* to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce great bodily harm or death;

3. _____ <insert name or description of elder or dependent adult>
(is/was) (an elder/a dependent adult)(;/.)

[AND]

4. When the defendant acted, (he/she) knew or reasonably should have known that _____ <insert name or description of elder or dependent adult> was (an elder/a dependent adult)(;/.)

<Give element 5 when giving alternative 1B and it is alleged the defendant permitted the suffering.>

[AND]

- [5. The defendant had a legal duty to supervise and control the conduct of the person[s] who caused or inflicted unjustifiable physical pain or mental suffering on _____ <insert name or description of elder or dependent adult>, but failed to supervise or control that conduct(;/.)]

<Give element 6 when giving alternative 1B, 1C, or 1D.>

[AND]

6. The defendant was criminally negligent when (he/she) caused or permitted _____ <insert name or description of elder or dependent adult> to (suffer/ [or] be injured/ [or] be endangered).]

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

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

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. [This definition includes an adult who has physical or developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a (health facility/psychiatric health facility/ [or] chemical dependency recovery hospital).]

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[A person who does not have care or custody of (an elder/a dependent adult) may still have a *legal duty to supervise and control the conduct of a third person* who can inflict abuse on the (elder/dependent adult) if the person has a special relationship with the third person. A special relationship is created, for example, when (1) a person takes charge of a third person whom (he/she) knows or should know is likely to cause bodily harm to others if not controlled, and (2) the person has the ability to control the third person's conduct.]

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

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

AND

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

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

[(An elder/A dependent adult) does not need to actually suffer great bodily harm. But if (an elder/a dependent adult) does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

[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 March 2017, October 2025

BENCH NOTES

Instructional Duty

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

Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted an elder or dependent adult to suffer. If it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant caused or permitted the elder's or dependent adult's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant endangered the elder's or dependent adult's person or health. (See Pen. Code, § 368(b)(1).)

Give bracketed element 5 if it is alleged under element 1B that the defendant *permitted* an elder or dependent adult to suffer unjustifiable pain or mental suffering. (See *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229].) If element 5 is given, also give the bracketed paragraph defining who has a “legal duty to control the conduct of a third person.”

Give bracketed element 6 regarding criminal negligence, and the bracketed definition of “criminally negligent,” if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect act. (*People v. Manis* (1992) 10 Cal.App.4th 110, 114 [12 Cal.Rptr.2d 619], disapproved on other grounds by *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335], disapproved on other grounds by *People v. Heitzman*, *supra*, ~~(1994) 9 Cal.4th 189, at p. 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]~~; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780] [latter two cases in context of parallel child abuse statute].)

Give the bracketed definition of “elder” or “dependent adult” depending on the status of the alleged victim. (See Pen. Code, § 368(g) & (h).)

Give on request the bracketed definition of “unjustifiable” physical pain or mental suffering if there is a question about the necessity for or the degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

If there is a question whether an elder or dependent adult suffered great bodily harm, give on request the bracketed paragraph stating that a person “does not need to actually suffer great bodily harm.” (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [159 Cal.Rptr. 771] [in context of parallel child abuse statute].)

If a victim actually suffers great bodily injury or dies, the defendant's sentence may be enhanced based on the victim's age. (See Pen. Code, § 368(b)(2) & (3); see *People v. Adams* (2001) 93 Cal.App.4th 1192, 1198 [113 Cal.Rptr.2d 722].)

Give CALCRIM No. 3162, *Great Bodily Injury: Age of Victim*, or any other appropriate instructions on enhancements. (See series 3100-3399.)

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

AUTHORITY

- Elements. Pen. Code, § 368(b)(1).
- “Great Bodily Harm or Injury” Defined. Pen. Code, §§ 368(b)(2), 12022.7(f); see *People v. Cortes*, supra, ~~(1999)~~ 71 Cal.App.4th ~~62~~, at p. 80 ~~[83 Cal.Rptr.2d 519]~~ [in context of parallel child abuse statute].
- Sentence Enhancements. Pen. Code, § 368(b)(2) & (3); see *People v. Adams*, supra, ~~(2001)~~ 93 Cal.App.4th ~~1192~~, at p. 1198 ~~[113 Cal.Rptr.2d 722]~~.
- “Willful” Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct. *People v. Manis*, supra, ~~(1992)~~ 10 Cal.App.4th ~~110~~, at p. 114 ~~[12 Cal.Rptr.2d 619]~~; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335]; see *People v. Valdez*, supra, ~~(2002)~~ 27 Cal.4th ~~778~~, at p. 788, p. 789 ~~[118 Cal.Rptr.2d 3, 42 P.3d 511]~~; *People v. Peabody*, supra, ~~(1975)~~ 46 Cal.App.3d ~~43~~, at p. 47, pp. 48–49 ~~[119 Cal.Rptr. 780]~~ [in context of parallel child abuse statute].
- Duty to Control Conduct of Person Inflicting Abuse. *People v. Heitzman*, supra, ~~(1994)~~ 9 Cal.4th ~~189~~, at p. 212 ~~[37 Cal.Rptr.2d 236, 886 P.2d 1229]~~.
- General Criminal Intent Required for Direct Infliction of Pain or Suffering. See *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409] [in context of parallel child abuse statute].\

COMMENTARY

Any violation of Penal Code section 368(b)(1) must be willful. (See *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886]; *People v. Cortes*, supra, ~~(1999)~~ 71 Cal.App.4th ~~62~~, at p. 80 ~~[83 Cal.Rptr.2d 519]~~ [both in context of parallel child abuse statute]; but see *People v. Valdez*, supra, ~~(2002)~~ 27 Cal.4th ~~778~~, at p. 789 ~~[118 Cal.Rptr.2d 3, 42 P.3d 511]~~ [the prong punishing a *direct infliction* of unjustifiable physical pain or mental suffering does not expressly require that the conduct be willful].) Following *Smith* and *Cortes*, the

committee has included “willfully” in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

LESSER INCLUDED OFFENSES

- Attempted Abuse of Elder or Dependent Adult. Pen. Code, §§ 664, 368(b)(1).
- Misdemeanor Abuse of Elder or Dependent Adult. Pen. Code, § 368(c).

RELATED ISSUES

Care or Custody

“The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (See *People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [90 Cal.Rptr.2d 578] [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257]; both in context of parallel child abuse statute].)

Unanimity

The court has a **sua sponte** duty to instruct on unanimity when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].) However, the court does not have to instruct on unanimity if the offense constitutes a “continuous course of conduct.” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777].) Elder abuse may be a continuous course of conduct or a single, isolated incident. (*People v. Rae* (2002) 102 Cal.App.4th 116, 123 [125 Cal.Rptr.2d 312].) The court should carefully examine the statute charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (*People v. Napoles, supra*, 104 Cal.App.4th at pp. 115–116.) See generally CALCRIM No. 3500, *Unanimity*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~²⁴th ed. 20~~24~~¹²) Sex Offenses and Crimes Against Decency, §§ ~~231–179–187~~²³⁹.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.11[1][f], 142.13[5] (Matthew Bender).

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

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

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

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

<Alternative 1A—force with weapon>

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

[OR]

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;
3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;
4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon/with a firearm/with a semiautomatic firearm/with a machine gun/with an assault weapon/with a .50 BMG rifle) to a person;
5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer);

[AND]

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

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

[AND]

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

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

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

[The touching can be done indirectly (by causing an object [or someone else] to touch the other person/ [or] by touching something held by or attached to the other person).]

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it is designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

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

[An *assault weapon* includes _____ <insert names of appropriate designated assault weapons listed in Pen. Code, § 30510 and further 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*[/,]/ *firearm*[/,]/ *machine gun*[/,]/*assault weapon*[/,]/ [and] *.50 BMG rifle*) (is/are) defined in another instruction to which you should refer.]

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

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

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

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

New January 2006; Revised April 2011, February 2012, February 2013, September 2019, April 2020, September 2020, March 2022, February 2025.
October 2025

BENCH NOTES

Instructional Duty

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant’s reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give

the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

Give the 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.

Give the bracketed paragraph on indirect touching if relevant.

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

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

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- “Assault Weapon” Defined. Pen. Code, §§ 30510, 30515.
- “Firearm” Defined. Pen. Code, § 16520.
- “Machine Gun” Defined. Pen. Code, § 16880.
- “Semiautomatic Pistol” Defined. Pen. Code, § 17140.
- “.50 BMG Rifle” Defined. Pen. Code, § 30530.
- “Peace Officer” Defined. Pen. Code, § 830 et seq.
- “Firefighter” Defined. Pen. Code, § 245.1.
- “Willful” Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- “Deadly Weapon” Defined. *People v. 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]].
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra*, 4 Cal.5th at p. 1065 [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Dual Convictions Prohibited

Penal Code section 245(c) describes a single offense. (*In re C.D.* (2017) 18 Cal.App.5th 1021, 1029 [227 Cal.Rptr.3d 360] [“Aggravated assault against a peace officer under section 245, subdivision (c), remains a single offense, and multiple violations of the statute cannot be found when they are based on the same act or course of conduct”].) See CALCRIM No. 3516, *Multiple Counts: Alternative Charges For One Event—Dual Conviction Prohibited*.

If both theories of assault are included in the case, the jury must unanimously agree which theory or theories are the basis for the verdict.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Crimes Against the Person, § 245~~69~~.

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

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

- [1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and
1B. The force used was likely to produce great bodily injury;]
2. The defendant did that act willfully;
3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;
4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;
5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a custodial officer;

[AND]

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

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

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

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

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

[The touching can be done indirectly (by causing an object [or someone else] to touch the other person/ [or] by touching something held by or attached to the other person).]

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

New January 2006; Revised April 2011, February 2013, September 2019, September 2020, March 2022, February 2025, October 2025

BENCH NOTES

Instructional Duty

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

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

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

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

Give the 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.

Give the bracketed paragraph on indirect touching if relevant.

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a

matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 245, 245.3.
- “Custodial Officer” Defined. Pen. Code, § 831.
- “Local Detention Facility” Defined. Pen. Code, § 6031.4.
- “Willful” Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- “Deadly Weapon” Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- 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]].

- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra*, 4 Cal.5th at p. 1065 [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~th ed. 20~~24~~¹²) Crimes Against the Person, §§ ~~72248–74250~~.

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

**863. Assault on Transportation Personnel or Passenger
With Deadly Weapon or Force Likely to Produce Great Bodily Injury
(Pen. Code, §§ 240, 245, 245.2)**

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) on (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____
<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>
[in violation of Penal Code section 245.2].

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

- [1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and
1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;
3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;
4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

<Alternative 5A—transportation personnel>

- [5. When the defendant acted, the person assaulted was performing (his/her) duties as (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____ <insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>;]

<Alternative 5B—passenger>

[5. The person assaulted was a passenger of (a/an) _____ <insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>;]

[AND]

6. When the defendant acted, (he/she) knew, or reasonably should have known, [both] that the person assaulted was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____ <insert name of vehicle or transportation entity specified in Pen. Code, § 245.2> [and that (he/she) was performing (his/her) duties](;/.)

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

[AND]

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

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

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

[The touching can be done indirectly (by causing an object [or someone else] to touch the other person/ [or] by touching something held by or attached to the other person).]

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

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

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in

deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

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

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

New January 2006; Revised February 2013, September 2019, September 2020, March 2022, February 2025, October 2025

BENCH NOTES

Instructional Duty

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

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

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.2.)

If the victim was an operator, driver, station agent, or ticket agent of an identified vehicle or transportation entity, give element 5A and the bracketed language in element 6. If the victim was a passenger, give element 5B and omit the bracketed language in element 6.

Give the bracketed paragraph on indirect touching if relevant.

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.

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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].)

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 245, 245.2.
- “Willful” Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- “Deadly Weapon” Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- 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]].

- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra*, 4 Cal.5th at p. 1065 [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Crimes Against the Person, § ~~79~~255.

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

864–874. Reserved for Future Use

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

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/ [or] by touching something held by or attached to 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.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

[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.]

New January 2006; Revised June 2007, August 2009, October 2010, February 2012, February 2013, August 2013, September 2019, September 2020, March 2022, February 2025, October 2025

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 element 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 paragraph on indirect touching if relevant.

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.

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a deadly weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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].)

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- ~~To Have~~ Present Ability to Inflict Injury Requires Loaded, Gun ~~Must Be Loaded~~ Unless Used as Club or Bludgeon or if Ammunition is Readily Available and Able to be Loaded Immediately. *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618]; *People v. Lattin* (2024) 107 Cal.App.5th 596, 616 [328 Cal.Rptr.3d 241].
- 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, supra*, 16 Cal.4th at pp. 1028–1029.
- 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]].
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra*, 4 Cal.5th at p. 1065 [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

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].)

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 201224) Crimes Against the Person, §§ 41215, 216.

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

**970. Shooting Firearm or BB Device in Grossly Negligent Manner
(Pen. Code, § 246.3)**

The defendant is charged [in Count __] with shooting a (firearm/BB Device) in a grossly negligent manner [in violation of Penal Code section 246.3].

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

1. The defendant intentionally shot a (firearm/BB device);
2. The defendant did the shooting with gross negligence;

[AND]

3. The shooting could have resulted in the injury or death of a person(;/.)

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

[AND]

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

Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:

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

AND

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

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

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

[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 *BB device* is any instrument that expels a projectile, such as a BB or a pellet, through the force of air pressure, gas pressure, or spring action.]

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

New January 2006; Revised June 2007, February 2012, September 2019, September 2020, October 2025

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

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

AUTHORITY

- Elements. Pen. Code, § 246.3.

- Discharge Must be Intentional. *People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155]; *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538 [16 Cal.Rptr.2d 656].
- “Firearm” Defined. Pen. Code, § 16520.
- “BB Device” Defined. Pen. Code, § 246.3(c).
- “Willful” Defined. Pen. Code, § 7(1).
- “Gross Negligence” Defined. *People v. Alonzo*, *supra*, ~~(1993)~~ 13 Cal.App.4th 535, at p. 540 ~~[16 Cal.Rptr.2d 656]~~; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926].
- Actual Belief Weapon Not Loaded Negates Mental State. *People v. Robertson*, *supra*, ~~(2004)~~ 34 Cal.4th 156, at p. 167 ~~[17 Cal.Rptr.3d 604, 95 P.3d 872]~~; *In re Jerry R.*, *supra*, ~~(1994)~~ 29 Cal.App.4th 1432, at pp. 1438–1439, p. 1440 ~~[35 Cal.Rptr.2d 155]~~.

LESSER INCLUDED OFFENSES

Unlawful possession by a minor of a firearm capable of being concealed on the person (see Pen. Code, § 29610) is not a necessarily included offense of unlawfully discharging a firearm with gross negligence. (*In re Giovanni M.* (2000) 81 Cal.App.4th 1061, 1066 [97 Cal.Rptr.2d 319].)

RELATED ISSUES

Actual Belief Weapon Not Loaded Negates Mental State

“A defendant who believed that the firearm he or she discharged was unloaded . . . would not be guilty of a violation of section 246.3.” (*People v. Robertson*, *supra*, ~~(2004)~~ 34 Cal.4th 156, at p. 167 ~~[17 Cal.Rptr.3d 604, 95 P.3d 872]~~ [citing *In re Jerry R.*, *supra*, ~~(1994)~~ 29 Cal.App.4th 1432, at pp. 1438–1439, p. 1440 ~~[35 Cal.Rptr.2d 155]~~].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~45~~th ed. 20~~24~~12) Crimes Against the Person, § 22448.

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

971–979. Reserved for Future Use

982. Brandishing Firearm or Deadly Weapon to Resist Arrest (Pen. Code, § 417.8)

The defendant is charged [in Count __] with brandishing a (firearm/deadly weapon) to resist arrest or detention [in violation of Penal Code section 417.8].

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

1. The defendant drew or exhibited a (firearm/deadly weapon);

AND

2. When the defendant drew or exhibited the (firearm/deadly weapon), (he/she) intended to resist arrest or to prevent a peace officer from arresting or detaining (him/her/someone else).

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

[A *deadly weapon* 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.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

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

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

New January 2006; Revised February 2012, February 2013, September 2019, September 2020, March 2022, October 2025

BENCH NOTES

Instructional Duty

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

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.

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than~~

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

Related Instructions

CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor*.

CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer*.

CALCRIM No. 2653, *Taking Firearm or Weapon While Resisting Peace Officer or Public Officer*.

AUTHORITY

- Elements. Pen. Code, § 417.8.
- “Firearm” Defined. Pen. Code, § 16520; see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [7 Cal.Rptr.2d 44] [pellet gun not a “firearm” within meaning of Pen. Code, § 417(a)].
- “Peace Officer” Defined. Pen. Code, § 830 et seq.
- “Deadly Weapon” Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar*, *supra*, (1997) 16 Cal.4th 1023, at pp. 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204] [hands and feet not deadly weapons]; see, e.g., *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [50 Cal.Rptr.2d 351] [screwdriver was capable of being used as a deadly weapon and defendant intended to use it as one if need be]; *People v. Henderson* (1999) 76 Cal.App.4th 453, 469–470 [90 Cal.Rptr.2d 450] [pit bulls were deadly weapons under the circumstances].
- Lawful Performance of Duties Not an Element. *People v. Simons*, *supra*, (1996) 42 Cal.App.4th 1100, at pp. 1109–1110 [50 Cal.Rptr.2d 351].
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar*, *supra*, (1997) 16 Cal.4th 1023, at pp. 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*, *supra*, (2018) 4 Cal.5th 1055, at p. 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

Resisting arrest by a peace officer engaged in the performance of his or her duties in violation of Penal Code section 148(a) is not a lesser included offense of Penal Code section 417.8. (*People v. Simons*, *supra*, ~~(1996)~~ 42 Cal.App.4th ~~1100~~, at pp. 1108–1110 [~~50 Cal.Rptr.2d 351~~].) Brandishing a deadly weapon in a rude, angry, or threatening manner in violation of Penal Code section 417(a)(1) is also not a lesser included offense of section 417.8. (*People v. Pruett* (1997) 57 Cal.App.4th 77, 88 [66 Cal.Rptr.2d 750].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against Public Peace and Welfare, §§ 87–109.

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

983. Brandishing Firearm or Deadly Weapon: Misdemeanor (Pen. Code, § 417(a)(1) & (2))

The defendant is charged [in Count __] with brandishing a (firearm/deadly weapon) [in violation of Penal Code section 417(a)].

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

1. The defendant drew or exhibited a (firearm/deadly weapon) in the presence of someone else;

[AND]

<Alternative 2A—displayed in rude, angry, or threatening manner>

2. The defendant did so in a rude, angry, or threatening manner(;/.)]

<Alternative 2B—used in fight>

2. The defendant [unlawfully] used the (firearm/deadly weapon) in a fight or quarrel(;/.)]

<Give element 3 when instructing on self-defense or defense of another>

[AND]

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

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

[A *deadly weapon* 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.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

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

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

New January 2006; Revised October 2010, February 2012, February 2013, September 2019, September 2020, March 2022, October 2025

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 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the prosecution alleges that the defendant displayed the weapon in a rude, angry, or threatening manner, give alternative 2A. If the prosecution alleges that the defendant used the weapon in a fight, give alternative 2B.

If the defendant is charged under Penal Code section 417(a)(2)(A), the court **must** also give CALCRIM No. 984, *Brandishing Firearm: Misdemeanor—Public Place*.

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

On request, give the bracketed sentence stating that the firearm need not be loaded.

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

AUTHORITY

- Elements. Pen. Code, § 417(a)(1) & (2).
- “Firearm” Defined. Pen. Code, § 16520.
- “Deadly Weapon” Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar*, *supra*, ~~(1997)~~ 16 Cal.4th ~~1023~~, at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Victim’s Awareness of Firearm Not a Required Element. *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891].
- Weapon Need Not Be Pointed Directly at Victim. *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420].
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar*, *supra*, ~~(1997)~~ 16 Cal.4th ~~1023~~, at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*, *supra*, ~~(2018)~~ 4 Cal.5th ~~1055~~, at p. 1065 ~~[232 Cal.Rptr.3d 51, 416 P.3d 42]~~ [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~th ed. 20~~24~~~~12~~) Crimes Against Public Peace and Welfare, §§ ~~43–76~~.

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

1120. Continuous Sexual Abuse (Pen. Code, § 288.5(a))

The defendant is charged [in Count __] with continuous sexual abuse of a child under the age of 14 years [in violation of Penal Code section 288.5(a)].

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

1. The defendant (lived in the same home with/ [or] had recurring access to) a minor child;
2. The defendant engaged in three or more acts of (substantial sexual conduct/ [or] lewd or lascivious conduct) with the child;
3. Three or more months passed between the first and last acts;

AND

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

[*Substantial sexual conduct* means oral copulation or masturbation of either the child or the perpetrator, or penetration of the child's or perpetrator's vagina or rectum by (the other person's penis/ [or] any foreign object).]

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

[*Lewd or lascivious conduct* is any willful touching of a child accomplished with the intent to sexually arouse 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.] [*Lewd or lascivious conduct* [also] includes causing a child to touch his or her own body or someone else's body at the instigation of a perpetrator who has the required intent.]

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

You cannot convict the defendant unless all of you agree that (he/she) committed three or more acts over a period of at least three months, but you do not all need to agree on which three acts were committed.

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

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

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

*New January 2006; Revised February 2013, October 2025**

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

BENCH NOTES

Instructional Duty

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

If the court gives the definition of “lewd and lascivious conduct,” the definition of “willfully” must also be given.

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

Give the bracketed paragraph that begins with “It is not a defense that the child,” on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

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

AUTHORITY

- Elements. Pen. Code, § 288.5(a); *People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284–1285, 1287 [59 Cal.Rptr.2d 389].
- “Substantial Sexual Conduct” Defined. Pen. Code, § 1203.066(b).
- Unanimity on Specific Acts Not Required. Pen. Code, § 288.5(b); *People v. Adames* (1997) 54 Cal.App.4th 198, 208 [62 Cal.Rptr.2d 631].
- Actual Arousal Not Required. *People v. McCurdy*, *supra*, ~~(1923)~~ 60 Cal.App. 499, at p. 502 ~~[213 P. 59]~~.

- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Child Touching Own Body Parts at Defendant’s Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Minor’s Consent Not a Defense. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta in context of lewd or lascivious act].
- “Oral Copulation” Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884]; see Pen. Code, § 288a(a).
- “Recurring Access” Is Commonly Understand Term Not Requiring Sua Sponte Definitional Instruction. *People v. Rodriguez* (2002) 28 Cal.4th 543, 550 [122 Cal.Rptr.2d 348, 49 P.3d 1085][disapproving *People v. Gohdes* (1997) 58 Cal.App.4th 1520, 1529 [68 Cal.Rptr.2d 719].
- Necessary Intent in Touching. *People v. Cuellar* (2012) 208 Cal.App.4th 1067, 1070–1072 [145 Cal.Rptr.3d 898].
- This Instruction Upheld. *People v. Canales* (2024) 106 Cal.App.5th 1230, 1245–1249 [327 Cal.Rptr.3d 678].

COMMENTARY

Penal Code section 288.5 does not require that the defendant reside with, or have access to, the child continuously for three consecutive months. It only requires that a period of at least three months passes between the first and last acts of molestation. (*People v. Vasquez*, *supra*, (1996) 51 Cal.App.4th 1277, at pp. 1284–1285, 1287 ~~[59 Cal.Rptr.2d 389]~~.)

Section 288.5 validly defines a prohibited offense as a continuous course of conduct and does not unconstitutionally deprive a defendant of a unanimous jury verdict. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309–1312 [18 Cal.Rptr.2d 511].)

LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, § 242.

Since a conviction under Penal Code section 288.5 could be based on a course of substantial sexual conduct without necessarily violating section 288 (lewd or lascivious conduct), the latter is not necessarily included within the former and no sua sponte instruction is required. (*People v. Avina*, *supra*, (1993) 14 Cal.App.4th 1303, at pp. 1313–1314 [18 Cal.Rptr.2d 511]; see *People v. Palmer* (2001) 86 Cal.App.4th 440, 444–445 [103 Cal.Rptr.2d 301].)

RELATED ISSUES

Alternative Charges

Under Penal Code section 288.5(c), continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period may only be charged in the alternative. In these circumstances, multiple convictions are precluded. (*People v. Johnson* (2002) 28 Cal.4th 240, 245, 248 [121 Cal.Rptr.2d 197, 47 P.3d 1064] [exception to general rule in Pen. Code, § 954 permitting joinder of related charges].) In such cases, the court has a **sua sponte** duty to give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*. (*People v. Martinez* (2024) 105 Cal.App.5th 178, 184 [325 Cal.Rptr.3d 700].) If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses and a greater aggregate sentence is imposed for the specific offenses, the appropriate remedy is to reverse the conviction for continuous sexual abuse. (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1060 [126 Cal.Rptr.2d 92]; cf. *Martinez, supra*, 105 Cal.App.5th at pp. 187–188 [case remanded for trial court to determine which counts to vacate].)

Masturbation

For a discussion of the term masturbation, see *People v. Chambless* (1999) 74 Cal.App.4th 773, 783–784, 786–787 [88 Cal.Rptr.2d 444] [construing term for purposes of finding defendant committed sexually violent offenses under the Sexually Violent Predators Act].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 201224) Sex Offenses and Crimes Against Decency, §§ 6276-6481, 229178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][c][ii], [2] (Matthew Bender).

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

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

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

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

<Alternative 1A—sent or brought>

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

<Alternative 1B—possessed>

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

<Alternative 1C—offered to distribute>

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

<Alternative 1D—distributed>

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

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

[AND]

3. When the defendant acted, (he/she) knew that the matter **(showed a person under the age of 18 years/ or contained digitally altered or artificial-intelligence-generated data depicting what appears to be a person under the age of 18 years)** who was **[personally] engaging participating** in or simulating sexual conduct(;/.)

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

[AND

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

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

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

AND

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

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

[As used here,](M/m)atter means any representation of information, data, or image, including any _____ <insert type of material described in Pen. Code, § 311.1 and/or § 311.2.>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through (another person/other people).]

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

<Defense: Legitimate scientific or educational purpose>

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

<Defense: Law enforcement agent>

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

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

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

New January 2006; Revised September 2022, October 2025

BENCH NOTES

Instructional Duty

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

In element 1, give one of the alternatives A–D depending on the charges and evidence in the case. In element 3, give the bracketed word “personally” if the defendant is charged under Penal Code section 311.2(b). Likewise, in element 3, give the alternative “contained digitally altered or artificial-intelligence-generated data depicting what appears to be a person under the age of 18 years” if the defendant is charged under Penal Code section 311.2(b) and if applicable.

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

Give any of the other bracketed paragraphs on request.

For the definition of matter, give the bracketed phrase “As used here” when CALCRIM No. 1142, *Distributing or Intending to Distribute Obscene Matter* or CALCRIM No. 1145, *Possession of Matter Depicting Minor Engaged in Sexual Conduct* is also given.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, §§ 311.2(e); 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the

absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] [“legitimate” does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

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

AUTHORITY

- Elements. Pen. Code, §§ 311.1(a), 311.2(b).
- Specific Intent to Distribute or Exhibit. *People v. Young*, *supra*, 77 Cal.App.3d Supp. at p. 12 [possession with intent to distribute or exhibit]; see *People v. Burrows*, *supra*, 260 Cal.App.2d at p. 231 [preparation or publication with specific intent to distribute]; *In re Klor*, *supra*, 64 Cal.2d at p. 819.
- “Obscene Matter” Defined. Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81 [127 Cal.Rptr. 317, 545 P.2d 229]; *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [107 S.Ct. 1918, 95 L.Ed.2d 439].
- “Artificial Intelligence” Defined. Pen. Code, § 311(b).
- Contemporary Community Standards. See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- “Prurient Interest” Defined. *Bloom v. Municipal Court*, *supra*, 16 Cal.3d at p. 77.
- “Sexual Conduct” Defined. Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- “Person” Defined. Pen. Code, § 311(~~ed~~).
- “Distribute” Defined. Pen. Code, § 311(~~de~~).

- “Knowingly” Defined. Pen. Code, § 311(~~ef~~); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- “Exhibit” Defined. Pen. Code, § 311(~~fg~~).
- Matter Designed for Deviant Sexual Group. Pen. Code, § 311(a)(1); see *People v. Young, supra*, 77 Cal.App.3d Supp. at pp. 14–15.
- Commercial Exploitation Is Probative of Matter’s Nature. Pen. Code, § 311(a)(2); *People v. Kuhns, supra*, 61 Cal.App.3d at pp. 748–753 .
- Knowledge That Matter Depicts Child Under 16 Is Probative of Matter’s Nature. Pen. Code, § 311(a)(3).
- Similar Matter Shown in Community. *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Exceptions to Statutory Prohibitions. Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); Pen. Code, § 311.8.
- “Agent” Defined. See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527] [in context of entrapment].
- Taken or Considered as a Whole. *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Obscenity Contrasted With Sex. *Roth v. United States, supra*, 354 U.S. at p. 487.
- Obscenity Contrasted With Nudity. *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Possessing For Personal Use Not a Crime. *Stanley v. Georgia* (1969) 394 U.S. 557, 568 [89 S.Ct. 1243, 22 L.Ed.2d 542].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- “Commercial Benefit” Defined. *People v. Wimer* (2022) 74 Cal.App.5th 113, 129 [289 Cal.Rptr.3d 164].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Advertising Obscene Matter Involving Minors

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

Employing or Using Minor to Pose in Film

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

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

Excluded Conduct

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

Telephone Services

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

Expert Testimony Not Required

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~⁵⁵th ed. 2012²⁴) Sex Offenses and Crimes Against Decency, §§ ~~94122~~⁹⁴¹²²–~~13806~~¹³⁸⁰⁶, ~~13170~~¹³¹⁷⁰.

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

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

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

1142. Distributing or Intending to Distribute Obscene Material (Pen. Code, § 311.2(a))

The defendant is charged [in Count __] with distributing obscene material [in violation of Penal Code section 311.2(a)].

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

<Alternative 1A—sent or brought>

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

<Alternative 1B—possessed>

[1. The defendant **knowingly** (possessed[,]/ [or] prepared[,]/ [or] published[,]/ [or] produced[,]/ [or] printed) obscene material in California;]

<Alternative 1C—offered to distribute>

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

<Alternative 1D—distributed>

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

[AND]

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

<Give element 3 when instructing with alternative 1A, 1B, or 1C; see Bench Notes.>

[AND]

3. When the defendant acted, (he/she) intended to (sell or distribute/distribute or show/distribute) the material to someone else.]

You must decide whether the **material** at issue in this case meet[s] the definition of obscene **material**. **Material**, when considered as a whole, is *obscene* if:

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

AND

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

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

[As used here,](M/m)**aterial** means ([a] ((book[,]/ [or] magazine[,]/ [or] newspaper[,]/ [or] [other] printed or written material)[(,;)]/ [or] [a picture[,]/ [or] drawing[,]/ [or] photograph[,]/ [or] motion picture[,]/ [or] [other] pictorial representation)[(,;)]/ [or] [a statue or other figure)[(,;)]/ [or] [a (recording[,]/ [or] transcription[,]/ [or] mechanical, chemical, or electrical reproduction)[(,;)]/ [or] any other article, equipment, or machine)). [**Material** also means live or recorded telephone messages transmitted, disseminated, or distributed as part of a commercial transaction.]

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

[You may consider evidence of local community standards in deciding what the contemporary statewide standards are. However, you may not use the standards of a specific local community, by themselves, to establish the contemporary statewide standards.]

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

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

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

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

The People must prove that the defendant knew the character of the **material** but do not need to prove that the defendant knew whether the **material** met the definition of obscene.

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

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

[In deciding the **material**'s character and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ [or] presentation[,]/ [or] sale[,]/ [or] dissemination[,]/ [or] distribution[,]/ [or] publicity) indicate that the **material** was being commercially exploited because of its prurient appeal. You must decide the weight, if any, to give this evidence.]

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

[In deciding whether, according to contemporary statewide standards, the **material** appeals to a prurient interest, you may consider whether similar

matterial is openly shown in the statewide community. You must decide the weight, if any, to give this evidence.]

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

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through (another person/other people).]

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

<Defense: Legitimate Scientific or Educational Purpose>

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

<Defense: Law Enforcement Agent>

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

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

BENCH NOTES

Instructional Duty

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

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

For the definition of matter, give the bracketed phrase “As used here” when CALCRIM No. 1141, *Distributing Obscene Matter Showing Sexual Conduct by a Minor*, CALCRIM No. 1144, *Using a Minor to Perform Prohibited Acts*, or CALCRIM No. 1145, *Possession of Matter Depicting Minor Engaged in Sexual Conduct* is also given.

Defenses—Instructional Duty

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

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

AUTHORITY

- Elements. Pen. Code, § 311.2(a).
- Specific Intent to Distribute or Exhibit. *People v. Young*, *supra*, (1977) 77 Cal.App.3d Supp. 10, at p. 12 ~~[143 Cal.Rptr. 604]~~ [possession with intent to distribute or exhibit]; see *People v. Burrows*, *supra*, (1968) 260 Cal.App.2d 228, at p. 231 ~~[67 Cal.Rptr. 28]~~ [preparation or publication with specific intent to distribute]; *In re Klor*, *supra*, (1966) 64 Cal.2d 816, at p. 819 ~~[51 Cal.Rptr. 903, 415 P.2d 791]~~.
- “Obscene Matter” Defined. Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81 [127 Cal.Rptr. 317, 545 P.2d 229]; *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [107 S.Ct. 1918, 95 L.Ed.2d 439].
- Contemporary Community Standards. See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- “Prurient Interest” Defined. *Bloom v. Municipal Court*, *supra*, (1976) 16 Cal.3d 71, at p. 77 ~~[127 Cal.Rptr. 317, 545 P.2d 229]~~.
- “Person” Defined. Pen. Code, § 311(ed).
- “Distribute” Defined. Pen. Code, § 311(de).
- “Knowingly” Defined. Pen. Code, § 311(ef); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- “Exhibit” Defined. Pen. Code, § 311(fg).
- Matter Designed for Deviant Sexual Group. Pen. Code, § 311(a)(1); see *People v. Young*, *supra*, (1977) 77 Cal.App.3d Supp. 10, at pp. 14–15 ~~[143 Cal.Rptr. 604]~~.
- Commercial Exploitation Is Probative of Matter’s Nature. Pen. Code, § 311(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].
- Knowledge That Matter Depicts Child Under 16 Is Probative of Matter’s Nature. Pen. Code, § 311(a)(3).
- Similar Matter Shown in Community. *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Exceptions to Statutory Prohibitions. Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); 311.8.

- “Agent” Defined. See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527] [in context of entrapment].
- Taken or Considered as a Whole. *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Obscenity Contrasted With Sex. *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Obscenity Contrasted With Nudity. *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Possessing for Personal Use Not a Crime. *Stanley v. Georgia* (1969) 394 U.S. 557, 568 [89 S.Ct. 1243, 22 L.Ed.2d 542].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

LESSER INCLUDED OFFENSES

- Attempted Distribution of Obscene Matter. Pen. Code, §§ 664, 311.1(a).

RELATED ISSUES

Definition of “Sexual Conduct”

“Obscene matter” must depict or describe “sexual conduct in a patently offensive way . . .” (Pen. Code, § 311(a).) The statute does not define “sexual conduct.” Penal Code sections 311.4(d)(1) and 311.3(b) provide definitions of the term “sexual conduct” as used in those sections. If the court determines that a definition of “sexual conduct” is necessary, the court may wish to review those statutes. (See also *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1131 [8 Cal.Rptr.3d 372] [discussing definition of sexual conduct in prosecution for violating Pen. Code, §§ 311.3 and 311.4].)

See the Related Issues section of CALCRIM No. 1141, *Distributing Obscene Matter Showing Sexual Conduct by a Minor*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 12294–10638, 17031.

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

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

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

1144. Using a Minor to Perform Prohibited Acts (Pen. Code, § 311.4(b), (c))

The defendant is charged [in Count __] with using a minor to perform prohibited acts [in violation of _____ <insert appropriate code section[s]>].

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

<Alternative ~~A~~: defendant promoted, employed, etc.>

1. The defendant (promoted/ [or] employed/ [or] used/ [or] persuaded/ [or] induced/ [or] coerced) a minor who was under (18/14) years old at the time to pose or model or assist others to pose or model, alone or with others;
2. The defendant knew that (he/she) was (promoting/ [or] employing/ [or] using/ [or] persuading/ [or] inducing/ [or] coercing) a minor of that age to pose or model or assist others to pose or model;

<Alternative ~~B~~: defendant was parent or guardian>

1. The defendant was the (parent/ [or] guardian) in control of a minor who was under (18/14) years old at the time and the defendant permitted that minor to pose or model or assist others to pose or model, alone or with others;
2. At the time the defendant gave permission to the minor, (he/she) knew that the minor would pose or model or assist others to pose or model, alone or with others;
- ~~23.~~ The purpose of the posing or modeling was to prepare matter containing [or incorporating] sexual conduct;
- ~~3.~~ The minor participated in the sexual conduct alone[, or with other persons][, or with animals];
4. The defendant was aware ~~that~~ of the purpose of the minor's posing or modeling was to prepare character of the matter containing [or incorporating] sexual conduct or live conduct;

5. The minor participated in the sexual conduct alone[, or with other persons], or with animals[;]

[AND]

56. The defendant knew[, or reasonably should have known, based on facts of which (he/she) was aware,] that the minor was under (18/14) years of age;

<Give only for Pen. Code, § 311.4(b) offense.>

[AND]

67. When the defendant acted, (he/she) intended that the matter would be used for commercial purposes.]

[As used here,](M/m)atter means any representation of information, data, or image, including any _____ <insert type of material described in Pen. Code, § 311.4.>

(film/filmstrip/photograph/negative/slide/photocopy/videotape/video laser disc/computer hardware or software/computer floppy disk/data storage medium/CD-ROM/computer-generated equipment/ [or] computer-generated image that contains any film or filmstrip). [For the purpose of this instruction matter does not include material (in which all of the persons depicted under the age of 18 are legally emancipated/ [or] that only depicts lawful conduct between spouses).]

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

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

[*Use for commercial purposes* includes intending to trade the matter depicting sexual conduct for a commercial purpose at some point in the future. A commercial purpose does not have to include financial gain.]

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

<Defense: Legitimate scientific or educational purpose>

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

New April 2010; Revised October 2025

BENCH NOTES

Instructional Duty

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

In element 6, give the bracketed phrase that begins “or reasonably should have known” if the defendant is charged as having promoted, employed, used, etc. the minor to pose or model. This phrase does not apply to a parent or guardian who permitted a minor under their control to pose or model.

Give element 7 if the defendant is charged under Penal Code section 311.4(b).

For the definition of matter, give the bracketed phrase “As used here” if CALCRIM No. 1142, *Distributing or Intending to Distribute Obscene Matter* or CALCRIM No. 1145, *Possession of Matter Depicting Minor Engaged in Sexual Conduct* is also given.

Defenses—Instructional Duty

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

AUTHORITY

- Elements. Pen. Code, § 311.4(b), (c).

- “Sexual Conduct” Defined. Pen. Code, § 311.4(d)(~~4~~); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- Factors for Determining Whether Exhibition of Specified Body Parts Constitute “Sexual Conduct.” *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1754–1755 [37 Cal.Rptr.2d 327]; *People v. Jacobo* (2019) 37 Cal.App.5th 32, 48–51 [249 Cal.Rptr.3d 236].
- “Artificial Intelligence” Defined. Pen. Code, § 311(b).
- “Person” Defined. Pen. Code, § 311(ed).
- Defendant Need Not Directly Engage in Posing or Modeling Victim. *People v. Haraszewski* (2012) 203 Cal.App.4th 924, 937–938 [137 Cal.Rptr.3d 641]; *People v. Hobbs* (2007) 152 Cal.App.4th 1, 5–7 [60 Cal.Rptr.3d 685].
- Minor Under Age of 14. Pen. Code, § 311.4(f).
- “Commercial Purposes” Defined. *People v. Cochran* (2002) 28 Cal.4th 396, 402–407 [121 Cal.Rptr.2d 595, 48 P.3d 1148].
- “Knowingly” Defined. Pen. Code, § 311(ef); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Calculating Age. Fam. Code, § 6500; In re Harris (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Prior Version of This Instruction Upheld. People v. Hicks (2017) 17 Cal.App.5th 496, 506 [225 Cal.Rptr.3d 682].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~²² ed. 20~~12~~²⁴) Sex Offenses and Crimes Against Decency, §§ ~~12496~~, ~~1443~~–~~1462~~.

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

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

1145. Possession of Matter Depicting Minor Engaged in Sexual Conduct (Pen. Code, § 311.11(a))

The defendant is charged [in Count __] with possessing matter that shows a minor engaged in or simulating sexual conduct [in violation of Penal Code section 311.11(a)].

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

1. The defendant possessed or controlled matter that contained [an] image[s] of a minor personally engaging in or simulating sexual conduct;
2. The defendant knew that (he/she) possessed or controlled the matter;

AND

3. The defendant knew that the matter contained [an] image[s] of a minor personally engaging in or simulating sexual conduct.

[As used here,](Mm)atter, as used in this instruction, means any visual work[s], including any (film/filmstrip/photograph/negative/slide/photocopy/video recording/computer-generated media[,]/[or] _____ <insert other item listed in Pen. Code § 311.11(a)>).

[Matter includes digitally altered and artificial-intelligence-generated data.]

[Matter does not include drawings, figurines, or statues.]

[Matter does not include any film rated by the Motion Picture Association of America.]

[The matter does not have to be obscene.] <For a definition of obscene, see CALCRIM No. 1141.>

[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.]

[Two or more people may possess something at the same time.]

A *minor* is anyone under the age of 18. [Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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

<Sentencing Factors>

[If you find the defendant guilty of this crime [as charged in Count[s] ____], you must then decide whether the People have proved the additional allegation[s].] [You must decide whether the People have proved (this/these) allegation[s] for each crime beyond a reasonable doubt and return a separate finding for each crime.]

<Give the following paragraph if the defendant is charged with the felony enhancement under Penal Code section 311.11(b)>

[To prove the prior conviction allegation, the People must prove that the defendant has at least one prior conviction for violating or attempting to violate Penal Code section 311.11(a) or for committing or attempting to commit (_____) <insert description of offense requiring registration pursuant to Penal Code section 290>.]

<Give the following four paragraphs if the defendant is charged with the felony enhancement under Penal Code section 311.11(c)(1)>

[To prove the multiple images allegation, the People must prove that:

The *matter* the defendant knowingly possessed or controlled contained more than 600 images all of which the defendant knew showed a minor engaged in or simulating sexual conduct;

AND

The *matter* contained at least ten or more images involving a prepubescent minor or a minor under 12 years of age.

Each photograph, picture, computer or computer-generated image, or any similar visual depiction counts as *one image*.

Each video, video-clip, movie, or similar visual depiction counts as 50 images.]

<Give the following three paragraphs if the defendant is charged under Penal Code section 311.11(c)(2)>

[To prove the sexual sadism or sexual masochism allegation, the People must prove that the *matter* showed sexual sadism or sexual masochism involving a minor.

***Sexual sadism* means intentionally causing pain for purposes of sexual gratification or stimulation.**

***Sexual masochism* means intentionally experiencing pain for purposes of sexual gratification or stimulation.]**

New March 2019; Revised October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Give the sentencing factors if appropriate.

For the definition of matter, give the bracketed phrase “As used here” if CALCRIM No. 1141, *Distributing Obscene Matter Showing Sexual Conduct by a Minor*, CALCRIM No. 1142, *Distributing or Intending to Distribute Obscene Matter*, or CALCRIM No. 1144, *Using a Minor to Perform Prohibited Acts* is also given.

AUTHORITY

- Elements. Pen. Code, § 311.11(a)~~(e)~~.
- “Sexual Conduct” Defined. Pen. Code, § 311.4(d)~~(1)~~; see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- “Artificial Intelligence” Defined. Pen. Code, § 311(b).
- “Person” Defined. Pen. Code, § 311(~~e~~d).
- “Knowingly” Defined. Pen. Code, § 311(~~e~~f); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Calculating Age. Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

- “Personally” Defined. *People v. Gerber* (2011) 196 Cal.App.4th 368, 386 [126 Cal.Rptr.3d 688].
- Possession or Control of Computer Image. *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1418-1419 [87 Cal.Rptr.3d 460].
- Simultaneous Possession of Materials at Same Location is One Offense. *People v. Manfredi* (2008) 169 Cal.App.4th 622, 624 [86 Cal.Rptr.3d 810].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~45~~²²⁴th ed. 20~~12~~²²⁴) Sex Offenses and Crimes Against Decency, §§ ~~91224~~¹⁰⁶³⁸, ~~13170~~.

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

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

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

1146–1149. Reserved for Future Use

1180. Incest (Pen. Code, § 285)

The defendant is charged [in Count __] with incest [in violation of Penal Code section 285].

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

1. The defendant had sexual intercourse with another person;
2. When the defendant did so, (he/she) was at least 14 years old;
3. When the defendant did so, the other person was at least 14 years old;

AND

4. The defendant and the other person are related to each other as *<insert description of relationship from Family Code section 2200>*].

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

-[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 June 2007, October 2010, February 2012, August 2015, October 2025**

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

BENCH NOTES

Instructional Duty

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

This instruction focuses on incestuous sexual intercourse with a minor, which is the most likely form of incest to be charged. Incest is also committed by intercourse between adult relatives within the specified degree of consanguinity, or by an incestuous marriage. (See Pen. Code, § 285.)

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

AUTHORITY

- Elements. Pen. Code, § 285.
- Incestuous Marriages. Fam. Code, § 2200.
- “Sexual Intercourse” Defined. See 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 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Genetic Testing or Cohabitation Evidence Not Required to Establish Parent/Child Relationship. *People v. Torres* (2024) 107 Cal.App.5th 513, 528–529 [328 Cal.Rptr.3d 300].

LESSER INCLUDED OFFENSES

- Attempted Incest. Pen. Code, §§ 664, 285.

RELATED ISSUES

Accomplice Instructions

A minor is a victim of, not an accomplice to, incest. Accomplice instructions are not appropriate in a trial for incest involving a minor. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see *People v. Stoll* (1927) 84 Cal.App. 99, 101–102 [257 P. 583].) An exception may exist when two minors engage in consensual sexual intercourse, and thus both are victims of the other’s crime. (*People v. Tobias, supra*, 25 Cal.4th at p. 334; see *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364–1365 [73 Cal.Rptr.2d 331] [minor perpetrator under Pen. Code, § 261.5].) An adult woman who voluntarily engages in the incestuous act is an accomplice, whose testimony must be corroborated. (See *People v. Stratton* (1904) 141 Cal. 604, 609 [75 P. 166].)

Half-Blood Relationship

Family Code section 2200 prohibits sexual relations between brothers and sisters of half blood, but not between uncles and nieces of half blood. (*People v. Baker* (1968) 69 Cal.2d 44, 50 [69 Cal.Rptr. 595, 442 P.2d 675] [construing former version of § 2200].) However, sexual intercourse between persons the law deems to be related is proscribed. A trial court may properly instruct on the conclusive presumption of legitimacy (see Fam. Code, § 7540) if a defendant uncle asserts

that the victim's mother is actually his half sister. The presumption requires the jury to find that if the defendant's mother and her potent husband were living together when the defendant was conceived, the husband was the defendant's father, and thus the defendant was a full brother of the victim's mother. (*People v. Russell* (1971) 22 Cal.App.3d 330, 335 [99 Cal.Rptr. 277].)

Lack of Knowledge as Defense

No reported cases have held that lack of knowledge of the prohibited relationship is a defense to incest. (But see *People v. Patterson* (1894) 102 Cal. 239, 242–243 [36 P. 436] [dictum that party without knowledge of relationship would not be guilty]; see also *People v. Vogel* (1956) 46 Cal.2d 798, 801, 805 [299 P.2d 850] [good faith belief is defense to bigamy].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~¹²²⁴th ed. 20~~1224~~) Sex Offenses and Crimes Against Decency §§ ~~1840–1483~~, ~~178229~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[3] (Matthew Bender).

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

1215. Kidnapping (Pen. Code, § 207(a))

The defendant is charged [in Count __] with kidnapping [in violation of Penal Code section 207(a)].

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

1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;
2. Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;

[AND]

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

<Give element 4 when instructing on reasonable belief in consent.>

[AND]

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

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

Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as [whether the distance the other person was moved was beyond that merely incidental to the commission of _____ <insert associated crime>], whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]

<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.]]

*New January 2006; Revised October 2010, April 2020, October 2021, March 2022, October 2025**

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

BENCH NOTES

Instructional Duty

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

In the paragraph defining “substantial distance,” give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512], overruled on other grounds in *People v. Fontenot* (2019) 8 Cal.5th 57, 70 [251 Cal.Rptr.3d 341, 447 P.3d 252].) ~~However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)~~

The court must give the bracketed language on movement incidental to an associated crime when it is supported by the evidence. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; *People v. Bell* (2009) 179 Cal.App.4th 428, 439 [102 Cal.Rptr.3d 300].)

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.”

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 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 4 and the bracketed paragraph on the defense.

Related Instructions

If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*. An illegal purpose or intent is not required for an intoxicated and resisting adult victim. (*People v. Hartland* (2020) 54 Cal.App.5th 71, 80 [268 Cal.Rptr.3d 1].)

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. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *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 relating to other defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*, and CALCRIM No. 1226, *Defense to Kidnapping: Citizen’s Arrest*.

AUTHORITY

- Elements. Pen. Code, § 207(a).

- Punishment If Victim Under 14 Years of Age. Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not a defense].
- Asportation Requirement. *People v. Hin* (2025) 17 Cal.5th 401, 469 [329 Cal.Rptr.3d 612, 563 P.3d 514]; *People v. Martinez*, *supra*, ~~(1999)~~ 20 Cal.4th 225, at pp. 235–237 [~~83 Cal.Rptr.2d 533, 973 P.2d 512~~] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement. See *People v. Davis*, *supra*, ~~(1995)~~ 10 Cal.4th 463, at pp. 516–518 [~~41 Cal.Rptr.2d 826, 896 P.2d 119~~].
- 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]; see *People v. Davis*, *supra*, ~~(1995)~~ 10 Cal.4th 463, at p. 517, fn. 13, 518 [~~41 Cal.Rptr.2d 826, 896 P.2d 119~~] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent. Pen. Code, § 26(3) [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt*, *supra*, ~~(1976)~~ 55 Cal.App.3d 23, at p. 28 [~~127 Cal.Rptr. 279~~]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].
- Incidental Movement Test. *People v. Martinez*, *supra*, ~~(1999)~~ 20 Cal.4th 225, at pp. 237–238 [~~83 Cal.Rptr.2d 533, 973 P.2d 512~~].
- Intent Requirement. *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Davis*, *supra*, ~~(1995)~~ 10 Cal.4th 463, at p. 519 [~~41 Cal.Rptr.2d 826, 896 P.2d 119~~]; *People v. Moya*, *supra*, ~~(1992)~~ 4 Cal.App.4th 912, at p. 916 [~~6 Cal.Rptr.2d 323~~].
- Substantial Distance Requirement. *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

COMMENTARY

Penal Code section 207(a) uses the term “steals” in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The

instruction uses “take,” “hold,” or “detain” as the more inclusive terms, but includes in brackets the statutory terms “steal” and “arrest” if either one more closely matches the evidence.

LESSER INCLUDED OFFENSES

- False Imprisonment. Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

Threat of Arrest

“[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant’s conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim’s belief is objectively reasonable.” (*People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~²⁴²th ed. 20~~196~~²⁴²) Crimes Against the Person, §§ ~~281~~²⁴²~~96~~²⁴²–~~291~~²⁴²~~306~~²⁴², ~~316~~²⁴²~~31~~²⁴².

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

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

1216–1224. Reserved for Future Use

1240. Felony False Imprisonment (Pen. Code, §§ 236, 237)

The defendant is charged [in Count __] with false imprisonment by violence, ~~or~~ menace, fraud, or deceit [in violation of Penal Code sections 236 and 237(a)].

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

1. The defendant intentionally [and unlawfully] (restrained[,]/ [or] confined[,]/ [or] detained) someone [or caused that person to be (restrained[,]/ [or] confined[,]/ [or] detained)] by (violence[,]/ or menace[,]/ or fraud[,]/ or deceit);

AND

2. The defendant made the other person stay or go somewhere against that person's will.

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.

[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.]

[False imprisonment does not require that the person restrained be confined in jail or prison.]

New January 2006; Revised October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Haney* (1977) 75 Cal.App.3d 308, 312–313 [142 Cal.Rptr. 186] [failure to instruct on elements of violence, menace, fraud, or deceit necessary to establish felony false imprisonment requires reversal].)

Give the bracketed words “and unlawfully” in element 1 on request if there is evidence that the defendant acted lawfully. The court will need to further define for the jury when a restraint, detention, or confinement is legal.

Give the bracketed definition of “against a person’s will” on request.

Give the final paragraph on request to inform jurors that false “imprisonment” is not limited to confinement in jail or prison. (*People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].)

Related Instructions

CALCRIM No. 1242, *Misdemeanor False Imprisonment*.

If the defendant is charged with false imprisonment for purposes of protection from arrest or use as a shield (Pen. Code, § 210.5), see CALCRIM No. 1241, *False Imprisonment: Hostage*.

AUTHORITY

- Elements. Pen. Code, §§ 236, 237; *People v. Agnew* (1940) 16 Cal.2d 655, 659–660 [107 P.2d 601].
- Confinement in Jail or Prison Not Required. *People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].
- General-Intent Crime. *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717–718 [31 Cal.Rptr.2d 677]; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399–1400 [251 Cal.Rptr. 880]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768].
- “Menace” Defined. *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1359 [103 Cal.Rptr.3d 864]; *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- “Violence” Defined. *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].
- Fraud and Deceit. *People v. Dominguez, supra*, 180 Cal.App.4th at pp. 1359–1360; *People v. Rios* (1986) 177 Cal.App.3d 445, 450–451 [222 Cal.Rptr. 913]; *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 409–410 [173 Cal.Rptr. 906].

COMMENTARY

The instruction includes a definition of “violence” because it has a specific meaning in the context of felony false imprisonment. In addition, force and violence are separate elements with different meanings that must be made clear to the jury. (*People v. Babich* (1993) 14 Cal.App.4th 801, 806–807 [18 Cal.Rptr.2d 60].) Force is required for a finding of both misdemeanor and felony false imprisonment, while violence is only required for the felony. “Violence” is a force greater than that reasonably necessary to effect the restraint. (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462 [10 Cal.Rptr.2d 922].)

A definition of “menace” is also included. Menace has a specific meaning in the context of felony false imprisonment. (*People v. Babich, supra*, 14 Cal.App.4th at p. 806.) Two categories of menace include a threat involving either the use of a deadly weapon or verbal threats of harm. (*People v. Matian* (1995) 35 Cal.App.4th 480, 485–486 [41 Cal.Rptr.2d 459].) “Menace” is not a mere modifier of “violence.” (*People v. Arvanites* (1971) 17 Cal.App.3d 1052, 1060 [95 Cal.Rptr. 493].)

~~The committee found only one case that involved fraud and deceit. (*People v. Rios* (1986) 177 Cal.App.3d 445, 450–451 [222 Cal.Rptr. 913]; see also *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 409–410 [173 Cal.Rptr. 906].) Thus, this instruction focuses on the use of violence or menace to restrain the victim. If there is evidence of the use of fraud or deceit, the court must modify the instruction.~~

LESSER INCLUDED OFFENSES

- Attempted False Imprisonment. Pen. Code, §§ 664, 236, 237; *People v. Ross* (1988) 205 Cal.App.3d 1548, 1554–1555 [253 Cal.Rptr. 178] [present ability not prerequisite to attempted false imprisonment].
- Misdemeanor False Imprisonment. Pen. Code, § 236; *People v. Matian* (1995) 35 Cal.App.4th 480, 484, fn. 4, 487 [41 Cal.Rptr.2d 459]; *People v. Babich* (1993) 14 Cal.App.4th 801, 807 [18 Cal.Rptr.2d 60].

RELATED ISSUES

Elder or Dependent Adult Victim

False imprisonment of an elder or dependent adult by use of violence, menace, fraud, or deceit is punishable by imprisonment for two, three, or four years. (Pen. Code, §§ 237(b), 368(f).) An elder is any person who is 65 years of age or older. (Pen. Code, § 368(g).) A dependent adult is any person between the ages of 18 and 64 with specified physical or mental limitations. (Pen. Code, § 368(h).)

Parent Confining Child

A parent who confines his or her child with the intent to endanger the health and safety of the child or for an unlawful purpose can be prosecuted for false imprisonment. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1195 [84 Cal.Rptr.2d 491] [unlawful purpose of avoiding prosecution].) A parent asserting the defense of parental authority may introduce evidence of his or her intent in confining or restraining the child and of the reasonableness of the restraint or confinement. (*Id.* at p. 1196.) There is no sua sponte duty to instruct on the defense absent substantial evidence supporting the defense or reliance on it during the trial. (*Id.* at p. 1197.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2012) Crimes Against the Person, §§ 273.5-276.81, 283.79.

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

1242. Misdemeanor False Imprisonment (Pen. Code, §§ 236, ~~237(a)~~)

The defendant is charged [in Count ____] with false imprisonment [in violation of Penal Code section 23~~6~~**7(a)**].

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

1. The defendant intentionally [and unlawfully] (restrained[,]/ [or] detained[,]/ [or] confined) a person;

AND

2. The defendant's act made that person stay or go somewhere against that person's will.

[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.]

[False imprisonment does not require that the person restrained or detained be confined in jail or prison.]

New January 2006; Revised October 2025

BENCH NOTES

Instructional Duty

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

Give the bracketed words “and unlawfully” in element 1 on request if there is evidence that the defendant acted lawfully. The court will need to further define for the jury when a restraint, detention, or confinement is legal.

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

Give the final paragraph on request to inform jurors that false “imprisonment” is not limited to confinement in jail or prison. (*People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].)

AUTHORITY

- Elements. Pen. Code, §§ 236, 237(a); *People v. Agnew*, supra, ~~(1940)~~ 16 Cal.2d ~~655~~, at pp. 659–660 ~~[107 P.2d 601]~~.
- General-Intent Crime. *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717–718 [31 Cal.Rptr.2d 677]; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399–1400 [251 Cal.Rptr. 880]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768].
- Confinement in Jail or Prison Not Required. *People v. Agnew*, supra, ~~(1940)~~ 16 Cal.2d ~~655~~, at p. 659 ~~[107 P.2d 601]~~; *People v. Haney*, supra, ~~(1977)~~ 75 Cal.App.3d ~~308~~, at p. 313 ~~[142 Cal.Rptr. 186]~~.

RELATED ISSUES

General-Intent Crime

False imprisonment is a general-intent crime. (*People v. Fernandez*, supra, ~~(1994)~~ 26 Cal.App.4th ~~710~~, at pp. 716–718 ~~[31 Cal.Rptr.2d 677]~~; *People v. Olivencia*, supra, ~~(1988)~~ 204 Cal.App.3d ~~1391~~ at pp. 1399–1400 ~~[251 Cal.Rptr. 880]~~; *People v. Swanson*, supra, ~~(1983)~~ 142 Cal.App.3d ~~104~~, at p. 109 ~~[190 Cal.Rptr. 768]~~.)

Thus, the court is not required to instruct on the joint union of act and specific intent (*People v. Fernandez*, supra, 26 Cal.App.4th at p. 716), on the use of circumstantial evidence to prove specific intent (*People v. Swanson*, supra, 142 Cal.App.3d at pp. 109–110), or that the jury should consider mental illness in deciding whether the defendant acted with specific intent (*People v. Olivencia*, supra, 204 Cal.App.3d at p. 1399).

Parent Confining Child

A parent who confines his or her child with the intent to endanger the health and safety of the child or for an unlawful purpose can be prosecuted for false imprisonment. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1195 [84 Cal.Rptr.2d 491] [unlawful purpose of avoiding prosecution]; see also *People v. Rios* (1986) 177 Cal.App.3d 445, 451 [222 Cal.Rptr. 913].) If there is sufficient evidence that the parent's restraint or confinement was a reasonable exercise of parental authority, the court has a **sua sponte** duty to instruct on that defense. (*People v. Checketts*, supra, 71 Cal.App.4th at p. 1196.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against the Person, §§ 275–277~~73~~, 279~~83~~.

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

**1244. Human Trafficking of aCausing Minor toEngage in
Commercial Sex Act (Pen. Code, § 236.1(c))**

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

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

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

AND

3. When the defendant did so, (the other person was under 18 years of age/ [or] the defendant believed that the person was under 18 years of age).

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

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

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

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

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

New February 2014; Revised March 2019, October 2021, March 2024, October 2025

BENCH NOTES

Instructional Duty

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

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

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

Related Instructions

CALCRIM No. 3184, *Sex Offenses: Sentencing Factors—Using Force or Fear to Cause Minor to Engage in Commercial Sex Act*.

AUTHORITY

- Elements and Definitions. Pen. Code, § 236.1.
- “Menace” Defined [in context of false imprisonment]. *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Calculating Age. Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Attempt to Cause, Induce, or Persuade Does Not Require Minor Victim. *People v. Moses* (2020) 10 Cal.5th 893, 912–913 [272 Cal.Rptr.3d 862, 477 P.3d 579].
- Specific Intent for Attempt. *People v. Moses, supra*, 10 Cal.5th at pp. 912–913 [adult posing as minor]; *People v. Middleton* (2023) 91 Cal.App.5th 749, 767–768 [308 Cal.Rptr.3d 705] [actual minor].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 20~~12~~24) Crimes Against the Person, § 27885–287.

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

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

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

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

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____ *<insert name of complaining witness or member[s] of complaining witness's immediate family>*;
2. The defendant made the threat (orally/in writing/by electronic communication device);
3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____ *<insert name of complaining witness>*];
4. Under the circumstances, the threat was so clear, immediate, unconditional, and specific that it communicated to _____ *<insert name of complaining witness>* a serious intention and the immediate prospect that the threat would be carried out;
5. The threat actually caused _____ *<insert name of complaining witness>* to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

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

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

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

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

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

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

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

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

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

New January 2006; Revised August 2006, June 2007, February 2015, February 2016, March 2018, September 2020, September 2022, October 2025

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances. *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler*, *supra*, 85 Cal.App.4th at pp. 752–753; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime That Will Result in Great Bodily Injury Judged on Objective Standard. *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threatening Hand Gestures Not Verbal Threats Under Penal Code Section 422. *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147 [218 Cal.Rptr.3d 150, 394 P.3d 1074].
- Threat Not Required to Be Unconditional On Its Face. *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1540; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].

- Immediate Ability to Carry Out Threat Not Required. *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear. *In re Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1139–1140; *People v. Solis*, *supra*, 90 Cal.App.4th at p. 1024; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].
- Verbal Statement, Not Mere Conduct, Is Required. *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague. *People v. Maciel*, *supra*, 113 Cal.App.4th at pp. 684–686.
- Attempted Criminal Threats. *People v. Chandler*, *supra*, 60 Cal.4th at p. 525.
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter. *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].
- First Amendment Requires Recklessness as to Threat. *Counterman v. Colorado* (2023) 600 U.S. 66, 69 [143 S.Ct. 2106, 216 L.Ed.2d 775].

COMMENTARY

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

Because a threat need only be “so ... unconditional,” a conditional threat may nonetheless violate Penal Code section 422 if it conveys a gravity of purpose and the immediate prospect of execution. (See *People v. Bolin*, *supra*, 18 Cal.4th at pp. 339–340, disapproving *People v. Brown*, *supra*, 20 Cal.App.4th at p. 1256.)

LESSER INCLUDED OFFENSES

- Attempted Criminal Threat. See Pen. Code, § 422; *People v. Toledo*, *supra*, 26 Cal.4th at pp. 230–231.
- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

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

Related Statutes

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

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler*, *supra*, 85 Cal.App.4th at p. 755, fn. 4; *People v. Melhado*, *supra*, 60 Cal.App.4th at pp. 1534, 1539.)

Whether Threat Actually Received

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2012) Crimes Against Public Peace and Welfare, §§ 246–320.

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

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

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

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

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

{AND}

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

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

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

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

[A person makes a *credible threat* when the maker of the threat consciously disregards a substantial risk that the target of the threat would view the communication as threatening harm to the target [or to the target's immediate family] and it is reasonably foreseeable that the target would become aware of the threat.]

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

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

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

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

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

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

[*Repeatedly* means more than once.]

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

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

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

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

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

New January 2006; Revised April 2010, March 2017, September 2024, * October 2025

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

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

~~Give element 3 if the defendant is charged with stalking in violation of a temporary restraining order, injunction, or any other court order. (See Pen. Code, § 646.9(b).) When the threat is not directly communicated to the victim, give the bracketed sentence that begins “A person makes a credible threat when the maker of the threat consciously disregards a substantial risk.”~~

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

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

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 646.9(a), (e)–(h); *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239 [89 Cal.Rptr.2d 806].
- Intent to Cause Victim Fear. *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [60 Cal.Rptr.2d 624]; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1236, 1238–1240 [44 Cal.Rptr.2d 328]; see *People v. McCray* (1997) 58 Cal.App.4th 159, 171–173 [67 Cal.Rptr.2d 872] [evidence of past violence toward victim].
- “Repeatedly” Defined. *People v. Heilman* (1994) 25 Cal.App.4th 391, 399, 400 [30 Cal.Rptr.2d 422].
- “Safety” Defined. *People v. Borrelli* (2000) 77 Cal.App.4th 703, 719–720 [91 Cal.Rptr.2d 851]; see *People v. Falck, supra*, 52 Cal.App.4th at pp. 294–295.
- “Substantial Emotional Distress” Defined. *People v. Ewing, supra*, 76 Cal.App.4th at p. 210; see *People v. Carron, supra*, 37 Cal.App.4th at pp. 1240–1241.
- Victim’s Fear Not Contemporaneous With Stalker’s Threats. *People v. Norman, supra*, 75 Cal.App.4th at pp. 1239–1241.
- Subsections (b) & (c) of Pen. Code, § 646.9 are Alternate Penalty Provisions. *People v. Muhammad* (2007) 157 Cal.App.4th 484, 494 [68 Cal.Rptr.3d 695].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1195–1197 [67 Cal.Rptr.3d 871].
- Examples of Credible Threats. *People v. Tafoya* (2025) 109 Cal.App.5th 868, 892–895 [330 Cal.Rptr.3d 845]; *People v. Planchard* (2025) 109 Cal.App.5th 157, 170 [330 Cal.Rptr.3d 277]; *People v. Frias* (2024) 98 Cal.App.5th 999, 1018–1019 [317 Cal.Rptr.3d 202]; *People v. Lopez* (2015) 240 Cal.App.4th 436, 452–454 [192 Cal.Rptr.3d 585]; *People v. Uecker* (2009) 172 Cal.App.4th 583, 594–595 [91 Cal.Rptr.3d 355].
- First Amendment Requires Recklessness as to Threat. *Counterman v. Colorado* (2023) 600 U.S. 66, 69 [143 S.Ct. 2106, 216 L.Ed.2d 775].
- Conscious Disregard of Substantial Risk that Victim Would View Communication as Threatening Harm. *People v. Obermueller* (2024) 104 Cal.App.5th 207, 220 [324 Cal.Rptr.3d 544].
- Threat to Victim May Be Conveyed Indirectly. *People v. Planchard* (2025) 109 Cal.App.5th 157, 166, 169 [330 Cal.Rptr.3d 277].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Harassment Not Contemporaneous With Fear

The harassment need not be contemporaneous with the fear caused. (See *People v. Norman*, *supra*, 75 Cal.App.4th at pp. 1239–1241.)

Constitutionality of Terms

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

Labor Picketing

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2012²⁴) Crimes Against the Person, §§ 33349–33653.

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

1402. Gang-Related Firearm Enhancement (Pen. Code, § 12022.53)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*] and you find that the defendant committed (that/those) crime[s] for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals (personally used/personally and intentionally discharged) a firearm during that crime [and caused (great bodily injury/ [or] death)]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

[1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the _____ *<insert appropriate crime listed in Penal Code section 12022.53(a)(./;)>*

[AND]

[2. That person intended to discharge the firearm(./;)]

[AND]

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

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.

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

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

[A principal *personally uses* a firearm if he or she intentionally does any of the following:

1. Displays the firearm in a menacing manner.
2. Hits someone with the firearm.

OR

3. Fires the firearm.]

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

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

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

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. A person is subject to prosecution if he or she committed the crime or if:

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

AND

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

<If there is an issue in the case over whether the defendant used the firearm “during the commission of” the offense, see Bench Notes.>

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

New January 2006; Revised June 2007, April 2010, February 2012, September 2020, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In order for the defendant to receive an enhancement under Penal Code section 12022.53(e), the jury must find both that the defendant committed a felony for the benefit of a street gang and that a principal used or intentionally discharged a firearm in the offense. Thus, the court **must give** CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang*, with this instruction and the jury must find both allegations have been proved before the enhancement may be applied.

In this instruction, the court **must** select the appropriate options based on whether the prosecution alleges that the principal used the firearm, intentionally discharged the firearm, and/or intentionally discharged the firearm causing great bodily injury or death. The court should review CALCRIM Nos. 3146, 3148, and 3149 for guidance. Give the bracketed definition of “personally used” only if the prosecution specifically alleges that the principal “personally used” the firearm. Do not give the bracketed definition of “personally used” if the prosecution alleges intentional discharge or intentional discharge causing great bodily injury or death.

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

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

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

If, in the elements, the court gives the bracketed phrase “who was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

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

AUTHORITY

- Enhancement. Pen. Code, § 12022.53(e).
- Vicarious Liability Under Subdivision (e). *People v. Garcia* (2002) 28 Cal.4th 1166, 1171 [124 Cal.Rptr.2d 464, 52 P.3d 648]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12 [104 Cal.Rptr.2d 247].
- “Principal” Defined. Pen. Code, § 31.
- “Firearm” Defined. Pen. Code, § 16520.
- Personally Uses. *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(2).
- “In Commission of” Felony. *People v. Jones*, *supra*, ~~(2001)~~ 25 Cal.4th ~~98~~, at pp. 109–110 [~~104 Cal.Rptr.2d 753, 18 P.3d 674~~]; *People v. Masbruch*, *supra*, ~~(1996)~~ 13 Cal.4th ~~1001~~, at p. 1014 [~~55 Cal.Rptr.2d 760, 920 P.2d 705~~]; *People v. Taylor*, *supra*, ~~(1995)~~ 32 Cal.App.4th ~~578~~, at p. 582 [~~38 Cal.Rptr.2d 127~~].
- Proximate Cause. *People v. Jomo K. Bland*, *supra*, ~~(2002)~~ 28 Cal.4th ~~313~~, at pp. 335–338 [~~121 Cal.Rptr.2d 546, 48 P.3d 1107~~].
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde*, *supra*, ~~(2002)~~ 100 Cal.App.4th ~~1146~~, at pp. 1167–1168 [~~123 Cal.Rptr.2d 322~~]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

RELATED ISSUES

Principal Need Not Be Convicted

It is not necessary that the principal who actually used or discharged the firearm be convicted. (*People v. Garcia*, supra, ~~(2002)~~ 28 Cal.4th ~~1166~~, at p. 1176 ~~[124 Cal.Rptr.2d 464, 52 P.3d 648]~~.)

Defendant Need Not Know Principal Armed

For an enhancement charged under Penal Code section 12022.53(e) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal intended to use or discharge a firearm. (*People v. Gonzales*, supra, ~~(2001)~~ 87 Cal.App.4th ~~1~~, at pp. 14–15 ~~[104 Cal.Rptr.2d 247]~~.)

See the Related Issues sections of CALCRIM Nos. 3146–3149.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (~~45~~th ed. 20~~24~~~~12~~) Punishment, §§ ~~359~~~~419~~–~~360~~~~428~~.

5 Witkin & Epstein, California Criminal Law (~~54~~th ed. 20~~24~~~~12~~) Criminal Trial, § ~~75~~~~827~~.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03[4] (Matthew Bender).

1501. Arson: Great Bodily Injury (Pen. Code, § 451)

The defendant is charged [in Count __] with arson that caused great bodily injury [in violation of Penal Code section 451].

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

1. The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);
2. (He/She) acted willfully and maliciously;

AND

3. The fire caused great bodily injury to another person.

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

As used here, someone acts *maliciously* when he or she intentionally does a wrongful act under circumstances that the direct, natural, and highly probable consequences would be the burning of the (structure/ [or] property) or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

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

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire

also injures someone else or someone else's structure, forest land, or property.]

New January 2006; Revised February 2013, March 2020, September 2020, February 2025, October 2025

BENCH NOTES

Instructional Duty

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

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

Related Instructions

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451.
- Great Bodily Injury. Pen. Code, § 12022.7(f).
- “Structure” and “Forest Land” Defined. Pen. Code, § 450.
- “Maliciously” Defined. Pen. Code, § 450(e); *People v. Atkins* (2001) 25 Cal.4th 76, 88 [104 Cal.Rptr.2d 738, 18 P.3d 660]; *In re V.V.* (2011) 51 Cal.4th 1020, 1031, fn. 6 [125 Cal.Rptr.3d 421, 252 P.3d 979].
- “To Burn” Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Arson. Pen. Code, § 451.
- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to

instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1515, *Arson*.

Dual Convictions Prohibited

A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Crimes Against Property, §§ ~~268~~²⁶⁸–~~297~~²⁹⁷.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1530. Unlawfully Causing a Fire: Great Bodily Injury (Pen. Code, § 452)

The defendant is charged [in Count __] with unlawfully causing a fire that caused great bodily injury [in violation of Penal Code section 452].

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

1. The defendant set fire to[,] [or] burned[,] [or caused the burning of] (a structure/forest land/property);
2. The defendant did so recklessly;

AND

3. The fire caused great bodily injury to another person.

<Alternative A—Recklessness: General Definition>

[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

<Alternative B—Recklessness: Voluntary Intoxication>

[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]

New January 2006; Revised September 2020, October 2025

BENCH NOTES

Instructional Duty

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

If the prosecution's theory is that the defendant did not set the fire but "caused" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272, Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on the point that defense counsel's objection to instruction on lesser included offense constituted invited error; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].)

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

AUTHORITY

- Elements. Pen. Code, § 452.
- Great Bodily Injury. Pen. Code, § 12022.7(f).
- “Structure,” and “Forest Land” Defined. Pen. Code, § 450.
- Difference Between This Crime and Arson. *People v. Hooper*, supra, ~~(1986)~~ 181 Cal.App.3d ~~1174~~, at p. 1182 [~~226 Cal.Rptr. 810~~].
- “To Burn” Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Unlawfully Causing a Fire. Pen. Code, § 452.

RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1515, *Arson* and CALCRIM No. 1532, *Unlawfully Causing a Fire*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~45~~th ed. 20~~24~~¹²) Crimes Against Property, §§ ~~286~~⁸–~~279~~⁶.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1551. Arson Enhancements (Pen. Code, §§ 451.1, 456(b))

If you find the defendant guilty of arson [as charged in Count[s] ____], you must then decide whether[, for each crime of arson,] the People have proved (the additional allegation that/one or more of the following additional allegations):

<Alternative A—prior felony violation(s) of Pen. Code, § 451 or § 452>

- [The defendant was convicted of (felony arson/ [(and/or)] felony unlawfully causing a fire) on _____ *<insert date of conviction>*.
<Repeat for each prior felony conviction alleged.>]

<Alternative B—injury to firefighter, peace officer, or EMT>

- [(A/An) (firefighter[,]/ peace officer[,]/ [or] emergency worker) suffered great bodily injury as a result of the arson.]

<Alternative C—great bodily injury to more than one person>

- [The defendant caused great bodily injury to more than one person during the commission of the arson.]

<Alternative D—multiple structures burned>

- [The defendant caused multiple structures to burn during the commission of the arson.]

<Alternative E—device designed to accelerate fire>

- [The arson (caused great bodily injury[,]/ [or] caused an inhabited structure or inhabited property to burn[,]/ [or] burned a structure or forest land), and was caused by use of a device designed to accelerate the fire or delay ignition.]

<Alternative F—monetary gain, Pen. Code, § 456(b)>

- [The defendant committed the arson for monetary gain.]

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

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

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

[An *emergency worker* includes an emergency medical technician. An *emergency medical technician* is someone who holds a valid certificate under the Health and Safety Code as an emergency medical technician.]

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

[A (structure/ [or] property) is *inhabited* if someone lives there and either is present or has left but intends to return.]

[A (structure/ [or] property) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (structure/ [or] property) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *device designed to accelerate the fire* means a piece of equipment or a mechanism intended, or devised, to hasten or increase the fire's progress.]

[In order to prove that the defendant *caused* (great bodily injury to more than one person/ [or] more than one structure to burn), the People must prove that:

1. A reasonable person in the defendant's position would have foreseen that committing arson could begin a chain of events likely to result in (great bodily injury to more than one person/ [or] the burning of more than one structure);
2. The commission of arson was a direct and substantial factor in causing (great bodily injury to more than one person/ [or] the burning of more than one structure);

AND

3. The (great bodily injury to more than one person/ [or the] burning of more than one structure) would not have happened if the defendant had not committed arson.]

[You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

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

New January 2006; Revised September 2020, March 2024, October 2025

BENCH NOTES

Instructional Duty

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

The reference to “arson” in the first paragraph refers to all crimes charged under Penal Code section 451, including arson of a structure, forest land, or property (see CALCRIM No. 1515), arson causing great bodily injury (see CALCRIM No. 1501), and arson of an inhabited structure (see CALCRIM No. 1502). -It does not refer to aggravated arson under Penal Code section 451.5 (see CALCRIM No. 1500).

Give one of the bracketed alternatives, A through E, depending on the enhancement alleged. Give all relevant bracketed definitions based on the enhancement alleged.

Give alternative F if monetary gain is alleged under Penal Code section 456(b). (See *Southern Union Co. v. U.S.* (2012) 567 U.S. 343 [132 S.Ct. 2344, 183 L.Ed.2d 318] [holding that the jury trial right prescribed by *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] applies to the imposition of criminal fines not statutorily authorized by the elements of the crime]; cf. *People v. Kramis* (2012) 209 Cal.App.4th 346, 351–352 [147 Cal.Rptr.3d 84] [*Apprendi* not implicated when trial court exercised discretion to impose fine within statutory range that did not require additional factual findings].)

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The

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

Give the bracketed paragraph that begins with “In order to prove that the defendant *caused*” if the prosecution alleges that the defendant caused great bodily injury to multiple people or caused multiple structures to burn. (Pen. Code, § 451.1(a)(5); see Pen. Code, § 451(a)–(c).)

Give the bracketed sentence that begins with “You must decide whether the People have proved” if the same enhancement is alleged for multiple counts of arson.

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

AUTHORITY

- Enhancements. Pen. Code, §§ 451.1, 456(b).
- “Device Designed to Accelerate Fire” Defined. *People v. Johnson* (2022) 86 Cal.App.5th 258, 266–267 [301 Cal.Rptr.3d 814]; *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1278–1280 [139 Cal.Rptr.3d 637]; *People v. Andrade* (2000) 85 Cal.App.4th 579, 587 [102 Cal.Rptr.2d 254].
- “Peace Officer” Defined. Pen. Code, § 830 et seq.
- “Firefighter” Defined. Pen. Code, § 245.1.
- “Emergency Medical Technician” Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Duty to Define Proximate Cause. See *People v. Bland* (2002) 28 Cal.4th 313, 334–335 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [in context of firearm enhancement].

RELATED ISSUES

Discretion to Strike Enhancement

The trial court retains discretion under Penal Code section 1385 to strike an arson sentence enhancement. (*People v. Wilson* (2002) 95 Cal.App.4th 198, 203 [115 Cal.Rptr.2d 355] [enhancement for use of an accelerant under Pen. Code, § 451.1(a)(5)].)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (~~5~~⁴th ed. 20~~24~~¹²) Punishment, § ~~433~~⁷².

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[3] (Matthew Bender).

1552–1599. Reserved for Future Use

1703. Shoplifting (Pen. Code, § 459.5)

The defendant is charged [in Count __] with shoplifting [in violation of Penal Code section 459.5].

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

1. The defendant entered a commercial establishment;
2. When the defendant entered the commercial establishment, it was open during regular business hours;

AND

3. When (he/she) entered the commercial establishment, (he/she) intended to commit theft.

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

The defendant does not need to have actually committed theft as long as (he/she) entered with the intent to do so.

[A person *enters a structure* if some part of his or her body [or some object under his or her control] penetrates the area inside the structure's outer boundary.]

[A structure's *outer boundary* includes the area inside a window screen.]

*New August 2015; Revised October 2025**

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

BENCH NOTES

Instructional Duty

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

To instruct on the necessary intent to commit theft, see CALCRIM No. 1800, *Theft by Larceny*.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision (c) of section 290, give CALCRIM No. 3100, *Prior Conviction: -Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

When the People allege the defendant has two or more prior convictions for an offense listed in Penal Code section 666.1, give CALCRIM No. 1851, *Petty Theft or Shoplifting With Prior Convictions*.

AUTHORITY

- Elements. Pen. Code, § 459.5.
- Burden for Consent Defense Is to Raise Reasonable Doubt. *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1308–1309 [128 Cal.Rptr.3d 255].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2024~~15~~ Supp.) Crimes Against Property, §17, 18~~5~~.

1705. Unlawful Entry of a Vehicle (Pen. Code, § 465(a))

The defendant is charged [in Count __] with unlawful entry of a vehicle [in violation of Penal Code section 465].

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

1. The defendant forcibly entered a vehicle;

AND

2. When (he/she) entered the vehicle, (he/she) intended to commit (theft/ [or] _____ <insert one or more felonies>).

Forcibly entered means gaining entry through the use of a tool or device that manipulates the vehicle's locking mechanism[including (a slim jim or other lockout tool[,]/a shaved key, jiggler key, or lock pick[,]/[or] an electronic device such as a signal extender),] or through the use of force that damages the exterior of the vehicle[including (breaking a window[,]/ cutting a convertible top[,]/ punching a lock[,]/[or] prying open a door].

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

An unlawful entry was committed if the defendant forcibly entered with the intent to commit (theft/[or] _____ <insert one or more felonies>). The defendant does not need to have actually committed (theft/[or] _____ <insert one or more felonies>) as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/[or] _____ <insert one or more felonies>).]

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

BENCH NOTES

Instructional Duty

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

Penal Code section 465(d) prohibits dual convictions for Penal Code section 465(a) and Penal Code section 459 (auto burglary). See CALCRIM No. 3516, *Multiple Counts: Alternative Charges For One Event—Dual Conviction Prohibited*.

Give all appropriate instructions on theft or the felony alleged.

If multiple underlying felonies are charged, give the bracketed paragraph that begins with “The People allege that the defendant intended to commit.” (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

AUTHORITY

- Elements. Pen. Code, § 465.
- “Forcible Entry” Defined. Pen. Code, § 465(c).

1760. Automotive Property Theft For Resale (Pen. Code, § 496.5)

The defendant is charged [in Count __] with automotive property theft for resale [in violation of Penal Code section 496.5].

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

1. The defendant possessed property that was obtained through [an] act[s] of (theft from a vehicle[,]/[or] unlawful entry of a vehicle[,]/[or] burglary of a locked vehicle[,]/[or] vehicle tampering);
2. When the defendant possessed the property, the defendant knew that the property had been stolen;
3. The defendant (intended to sell or exchange the property for value/ [or] intended to act with [an]other person[s] to sell or exchange the property for value);
4. The defendant did not possess the property for personal use;

AND

5. The [combined] value of the property was more than \$950.

[Two or more people can possess the property 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.]

[In deciding whether the defendant intended to sell or exchange the property for value, you may consider whether, in the two years prior to the offense date, the defendant sold or exchanged for value any property obtained through (theft from a vehicle[,]/[or] burglary of a locked vehicle[,]/[or] vehicle tampering[,]/[or] _____ *<insert related offense>*).]

[In deciding whether the defendant intended to sell or exchange the property for value, you may [also] consider whether the property is of a type or quantity that would not normally be purchased for personal use or personal consumption, including use or consumption by one's immediate family.]

[In deciding whether the combined value of the property is more than \$950, you may include the value of other property obtained through [an] act[s] of (theft from a vehicle[,]/[or] unlawful entry of a vehicle[,]/[or] auto burglary[,]/[or] vehicle tampering) that the defendant possessed within two years prior to the offense date, if the defendant also intended to sell or exchange that property for value.]

[In deciding whether the combined value of the property is more than \$950, you may [also] include the value of property possessed by another person if that person acted with the defendant to sell or exchange that property for value and that property was also obtained through [an] act[s] of (vehicle theft[,]/[or] unlawful entry of a vehicle[,]/[or] burglary of a locked vehicle[,]/[or] vehicle tampering).]

[The prosecution is not required to prove the (identity/identities) of the person[s] who committed the act[s] of (vehicle theft[,]/[or] burglary of a locked vehicle[,]/[or] vehicle tampering).]

New October 2025

BENCH NOTES

Instructional Duty

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

Give the related theft, burglary, unlawful entry, or vehicle tampering instruction applicable to the facts of the case.

Related Instructions

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

CALCRIM No. 376, *Possession of Recently Stolen Property as Evidence of a Crime.*

CALCRIM No. 1700, *Burglary.*

CALCRIM No. 1705, *Unlawful Entry of a Vehicle.*

CALCRIM No. 1800, *Theft by Larceny.*

CALCRIM No. 1821, *Tampering With a Vehicle.*

AUTHORITY

- Elements. Pen. Code, § 496.5.
- “Theft” Defined. Pen. Code, §§ 484, 490a.
- Possession and Control. *People v. Land* (1994) 30 Cal.App.4th 220, 223–224 [35 Cal.Rptr.2d 544]; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336 [75 Cal.Rptr. 616]; see *People v. Gatlin* (1989) 209 Cal.App.3d 31, 44–45 [257 Cal.Rptr. 171] [constructive possession means knowingly having the right of control over the property directly or through another]; *People v. Scott* (1951) 108 Cal.App.2d 231, 234 [238 P.2d 659] [two or more persons may jointly possess property].

COMMENTARY

Enacted by Senate Bill No. 905 (Stats. 2024, ch. 170), Penal Code section 496.5 prohibits unlawful possession of property that had been stolen from a vehicle, when the possessor intends to sell or exchange the property for value, or intends to act in concert with another to sell or exchange the property for value, and the value of the possessed property exceeds \$950. In determining the meaning of unlawful possession in the context of this statute, the committee concluded that the statute requires that the possessor knew that the property had been stolen. (See *People v. Hall* (2017) 2 Cal.5th 494, 501 [213 Cal.Rptr.3d 561, 388 P.3d 794] [“More commonly, though, courts construe criminal statutes against the backdrop of the common law presumption that scienter is required and imply the requisite mental state, even where the statute is silent.”]; *In re Jorge M.* (2000) 23 Cal.4th 866, 872 [98 Cal.Rptr.2d 466, 4 P.3d 297] [“the requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it.”].)

1761. Unlawful Deprivation of Retail Business Opportunity (Pen. Code, § 496.6(a))

The defendant is charged [in Count __] with unlawful deprivation of a retail business opportunity [in violation of Penal Code section 496.6(a)].

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

1. The defendant (possessed/[or] acted together with [an]other person[s] to possess) property that had been obtained by (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business;
2. The defendant knew that the property had been stolen;
3. When the defendant possessed the property, (he/she) did not intend to personally use the property;
4. When the defendant possessed the property, (he/she) intended to (sell[,]/[or] exchange[,]/[or] return) the property for value;

AND

5. The [combined] value of the property was more than \$950.

As used here, *property* includes merchandise or other products or goods that can be bought or sold in a retail business.

[Two or more people can possess an item 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.]

[In deciding whether the defendant intended to (sell[,]/[or] exchange[,]/[or] return) the property for value, you may consider whether, in the two years prior to the offense date, the defendant (sold[,]/[or] exchanged[,]/[or] returned) for value any property obtained through (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business[, or _____ <insert related offense>].]

[In deciding whether the defendant intended to sell or exchange the property for value, you may [also] consider whether the property is of a type or quantity that would not normally be purchased for personal use or personal consumption, including use or consumption by one's immediate family.]

[In deciding whether the combined value of the property is more than \$950, you may include the value of other property obtained through [an] act[s] of (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business that the defendant possessed within two years prior to the offense date, if the defendant also intended to (sell[,]/[or] exchange[,]/[or] return) that property for value.]

[In deciding whether the combined value of the property is more than \$950, you may [also] include the value of property possessed by another person if that person acted with the defendant to (sell[,]/[or] exchange[,]/[or] return) that property for value and that property was also obtained through [an] act[s] of (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business.]

[The prosecution is not required to prove the (identity/identities) of the person[s] who committed the act[s] of (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business.]

New October 2025

BENCH NOTES

Instructional Duty

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

Give the related shoplifting, theft, or burglary instruction applicable to the facts of the case.

Related Instructions

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

CALCRIM No. 376, *Possession of Recently Stolen Property as Evidence of a Crime.*

CALCRIM No. 1700, *Burglary.*

CALCRIM No. 1703, *Shoplifting.*

CALCRIM No. 1800, *Theft by Larceny*.

CALCRIM No. 3218, *Value of Property Sold, Exchanged, or Returned*.

AUTHORITY

- Elements. Pen. Code, § 496.6(a).
- “Theft” Defined. Pen. Code, §§ 484, 490a.
- “Shoplifting” Defined. Pen. Code, § 459.5.
- “Burglary” Defined. Pen. Code, § 459.
- Possession and Control. *People v. Land* (1994) 30 Cal.App.4th 220, 223–224 [35 Cal.Rptr.2d 544]; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336 [75 Cal.Rptr. 616]; see *People v. Gatlin* (1989) 209 Cal.App.3d 31, 44–45 [257 Cal.Rptr. 171] [constructive possession means knowingly having the right of control over the property directly or through another]; *People v. Scott* (1951) 108 Cal.App.2d 231, 234 [238 P.2d 659] [two or more persons may jointly possess property].

COMMENTARY

Enacted by Assembly Bill No. 2943 (Stats. 2024, ch. 168), Penal Code section 496.6 prohibits unlawful possession of property that had been stolen from a retail business when the possessor intends to sell, exchange, or return the property for value, or intends to act in concert with another to sell, exchange, or return the property for value, and the value of the possessed property exceeds \$950. In determining the meaning of unlawful possession in the context of this statute, the committee concluded that the statute requires that the possessor knew that the property had been stolen. (See *People v. Hall* (2017) 2 Cal.5th 494, 501 [213 Cal.Rptr.3d 561, 388 P.3d 794] [“More commonly, though, courts construe criminal statutes against the backdrop of the common law presumption that scienter is required and imply the requisite mental state, even where the statute is silent.”]; *In re Jorge M.* (2000) 23 Cal.4th 866, 872 [98 Cal.Rptr.2d 466, 4 P.3d 297] [“the requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it.”].)

1800. Theft by Larceny (Pen. Code, § 484)

The defendant is charged [in Count __] with [grand/petty] theft [by larceny] [in violation of Penal Code section 484].

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

1. The defendant took possession of property owned by someone else;
2. The defendant took the property without the owner's [or owner's agent's] consent;
3. When the defendant took the property (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent'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);

AND

4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief.

[The taking of property can include its consumption or the use of utilities.]

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

[For petty theft, the property taken can be of any value, no matter how slight.]

*New January 2006; Revised August 2016, March 2024, October 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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 3.

Related Instructions

If the defendant is also charged with grand theft, give CALCRIM No. 1801, *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with Penal Code section 666~~petty theft with a prior conviction~~, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

If the defendant is charged with Penal Code section 666.1, give CALCRIM No. 1851, *Petty Theft or Shoplifting With Prior Convictions*.

If a different theory of theft is presented, see CALCRIM No. 1804, *Theft by False Pretense*, CALCRIM No. 1805, *Theft by Trick*, CALCRIM No. 1806, *Theft by Embezzlement*. See also CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft*. The court may also wish to instruct with the bracketed “[by larceny]” in the first sentence to distinguish this theory of theft from the others.

For theft of real property, use CALCRIM No. 1804, *Theft by False Pretense*. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].)

AUTHORITY

- Elements. Pen. Code, § 484; *People v. Williams* (1946) 73 Cal.App.2d 154, 157 [166 P.2d 63]; *People v. Edwards* (1925) 72 Cal.App. 102, 112–117 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].
- Intent to Deprive Owner of Main Value. *People v. Avery, supra*, 27 Cal.4th at pp. 57–59; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250].
- Unauthorized Use of Utilities. *People v. Myles* (2023) 89 Cal.App.5th 711, 731 [306 Cal.Rptr.3d 288].

COMMENTARY

Asportation

To constitute a completed theft, the property must be asported or carried away. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654 [78 Cal.Rptr.2d 177].)

Asportation requires three things: (1) the goods are severed from the possession or custody of the owner, (2) the goods are in the complete possession of the thief or

thieves, and (3) the property is moved, however slightly. (*Ibid.*; *People v. Edwards* (1925) 72 Cal.App. 102, 114–115 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948]; *People v. Collins* (1959) 172 Cal.App.2d 295, 299 [342 P.2d 370] [joint possession of property by more than one thief].) Asportation is fulfilled by wrongful removal of property from the owner or possessor, against his or her will with the intent to steal it, even though the property is retained by the thief but a moment. (*People v. Quiel* (1945) 68 Cal.App.2d 674, 679 [157 P.2d 446].) Paragraph 4 sets forth the asportation element.

Value

The property taken must have some intrinsic value, however slight. (*People v. Franco* (1970) 4 Cal.App.3d 535, 542 [84 Cal.Rptr. 513]; *People v. Martinez* (2002) 95 Cal.App.4th 581, 585 [115 Cal.Rptr.2d 574].) The final bracketed paragraph may be given on request if the property in question was of slight value.

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.
- Taking an Automobile Without Consent. Veh. Code, § 10851; *People v. Pater* (1968) 267 Cal.App.2d 921, 926 [73 Cal.Rptr. 823].
- Auto Tampering. Veh. Code, § 10852; *People v. Anderson* (1975) 15 Cal.3d 806, 810–811 [126 Cal.Rptr. 235, 543 P.2d 603].
- Misdemeanor Joyriding. Pen. Code, § 499b [of bicycle, motorboat, or vessel].

Petty theft is a not lesser-included offense of grand theft when the charge of grand theft is based on the type of property taken. (*People v. Thomas* (1974) 43 Cal.App.3d 862, 870 [118 Cal.Rptr. 226].)

RELATED ISSUES

Claim of Right

If a person actually 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 theft. (*People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440]; see also *People v. Devine* (1892) 95 Cal. 227, 229 [30 P. 378] [“[i]t is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another’s goods”]; *In re Bayles* (1920) 47 Cal.App. 517, 519–521 [190 P. 1034] [larceny conviction reversed where landlady actually believed she was entitled to take tenant’s property for cleaning fees incurred even if her belief was

unreasonable]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4–6, 10–11 [160 Cal.Rptr. 692]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.)

Community Property

A person may be found guilty of theft of community property, but only if he or she has the intent to deprive the other owner of the property permanently. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1738–1740 [60 Cal.Rptr.2d 357].)

Fraudulent Refunds

A person who takes property while in a store and presents it for a refund is guilty of theft. (*People v. Davis* (1998) 19 Cal.4th 301 [79 Cal.Rptr.2d 295, 965 P.2d 1165].) The Supreme Court held that taking with the intent to fraudulently obtain a refund constitutes both an intent to permanently deprive the store of property and a trespassory taking within the meaning of larceny. (*Id.* at pp. 317–318; see also *People v. Shannon* (1998) 66 Cal.App.4th 649 [78 Cal.Rptr.2d 177].)

Multiple or Single Conviction of Theft—Overall Plan or Scheme

If multiple items are stolen over a period of time and the takings are part of one intention, one general impulse, and one plan, see CALCRIM No. 1802, *Theft: As Part of Overall Plan*.

No Need to Use or Benefit From the Property Taken

It does not matter that the person taking the property does not intend to use the property or benefit from it; he or she is guilty of theft if there is intent to permanently deprive the other person of the property. (*People v. Kunkin* (1973) 9 Cal.3d 245, 251 [107 Cal.Rptr. 184, 507 P.2d 1392]; *People v. Green* (1980) 27 Cal.3d 1, 57–58 [164 Cal.Rptr. 1, 609 P.2d 468] [defendant intended to destroy the property], 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. Pierce* (1952) 110 Cal.App.2d 598, 609 [243 P.2d 585] [irrelevant that defendant did not personally benefit from embezzled funds]; see also *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [intent to deprive owner of major value or enjoyment].)

Possession

The victim of a theft does not have to be the owner of property, only in possession of it. (*People v. Edwards* (1925) 72 Cal.App. 102, 116 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].) “Considered as an element of larceny, ‘ownership’ and ‘possession’ may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner.” (*Ibid.*; see also *People v. Davis* (1893) 97 Cal. 194, 195 [31 P. 1109] [fact that property in possession of victim sufficient to show ownership].)

Unanimity of Theft Theory Not Required

If multiple theories of theft have been presented, the jury does not need to agree on which form of theft was committed. All the jury must agree on is that an unlawful taking of property occurred. (*People v. Counts* (1995) 31 Cal.App.4th 785, 792–793 [37 Cal.Rptr.2d 425]; *People v. Failla* (1966) 64 Cal.2d 560, 567–569 [51 Cal.Rptr. 103, 414 P.2d 39] [burglary case]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 [233 P.2d 897] [addressing the issue for theft].) See CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4⁵th ed. 201~~2~~⁴²) Crimes Against Property, §§ 14~~5~~⁵–21~~1~~⁷.

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

1801. Grand and Petty Theft (Pen. Code, §§ 486, 487–488, 490.2, 490.3, 491)

If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.

[The defendant committed petty theft if (he/she) stole (property/ [(and/or)] services) worth \$950 or less.]

[The defendant committed grand theft if the value of the (property/ [(and/or)] services) is more than \$950.]

[The defendant committed grand theft if the sum of the value of all (property/[or] merchandise) [referenced in Count] is more than \$950.]

[Theft of property from the person is grand theft if the value of the property is more than \$950. Theft is *from the person* if the property taken was in the clothing of, on the body of, or in a container held or carried by, that person.]

[Theft of (an automobile/ a horse/ _____ <insert other item listed in statute>) is grand theft if the value of the property is more than \$950.]

[Theft of a firearm is grand theft.]

[Theft of (fruit/nuts/ _____ <insert other item listed in statute>) worth more than \$950 is grand theft.]

[Theft of (fish/shellfish/aquacultural products/ _____ <insert other item listed in statute>) worth more than \$950 is grand theft if (it/they) (is/are) taken from a (commercial fishery/research operation).]

[The value of _____ <insert relevant item enumerated in Pen. Code, § 487(b)(1)(B)> may be established by evidence proving that on the day of the theft, the same items of the same variety and weight as those stolen had a wholesale value of more than \$950.]

[The value of (property/services) is the fair (market value of the property/market wage for the services performed).]

<Fair Market Value—Generally>

[Fair market value is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]

<Fair Market Value—Urgent Sale>

[Fair market value is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.]

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

New January 2006; Revised February 2012, August 2015, April 2020, September 2023, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if grand theft has been charged.

If grand theft is based on multiple thefts arising from one overall plan, give CALCRIM No. 1802, *Theft: As Part of Overall Plan*.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision (c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the evidence raises an issue that the value of the property may be inflated or deflated because of some urgency on the part of either the buyer or seller, the second bracketed paragraph on fair market value should be given.

AUTHORITY

- Determination of Grand vs. Petty Theft. Pen. Code, §§ 486, 487–488, 490.2, 490.3, 491.
- Value/Nature of Property/Theft From the Person. Pen. Code, §§ 487(b)–(e), 487a.
- Theft of a Firearm Is Grand Theft. Pen. Code, §§ 487(d)(2), 490.2(c)
- Aggregation Into Single Count or Charge. Pen. Code, § 490.3.

RELATED ISSUES

~~**Proposition 47**~~ (~~**Penal Code Sections 490.2 and 490.3**~~)

After the passage of Proposition 47 in 2014, theft is defined in Penal Code section 487 as a misdemeanor unless the value of the property taken exceeds \$950. (Pen. Code, § 490.2.) This represents a change from the way grand theft was defined under Penal Code section 487(b)–(d) before the enactment of Proposition 47. In 2016, Proposition 63 added subdivision (c) to Penal Code section 490.2 (excepting theft of a firearm). In 2024, Proposition 36 added Penal Code section 490.3, which allows the degree of theft to be determined by the total value of stolen property or merchandise from one or more acts of theft or shoplifting when aggregated into a single count or charge.

Taking From the Person

To constitute a taking from the person, the property must, in some way, be physically attached to the person. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1472 [12 Cal.Rptr.2d 243].) Applying this rule, the court in *Williams* held that a purse taken from the passenger seat next to the driver was not a taking from the person. (*Ibid.* [see generally for court’s discussion of origins of this rule].) *Williams* was distinguished by the court in *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656–1657 [60 Cal.Rptr.2d 177], where evidence that the defendant took a purse placed on the floor next to and touching the victim’s foot was held sufficient to establish a taking from the person. The victim intentionally placed her foot next to her purse, physically touching it and thereby maintaining dominion and control over it.

Theft of Fish, Shellfish, or Aquacultural Products

Fish taken from public waters are not “property of another” within the meaning of Penal Code section 484 and 487; only the Fish and Game Code applies to such takings. (*People v. Brady* (1991) 234 Cal.App.3d 954, 959, 961–962 [286 Cal.Rptr. 19]; see, e.g., Fish & Game Code, § 12006.6 [unlawful taking of abalone].)

Value of Written Instrument

If the thing stolen is evidence of a debt or some other written instrument, its value is (1) the amount due or secured that is unpaid, or that might be collected in any contingency, (2) the value of the property, title to which is shown in the instrument, or (3) the sum that might be recovered in the instrument’s absence. (Pen. Code, § 492; see *Buck v. Superior Court* (1966) 245 Cal.App.2d 431, 438 [54 Cal.Rptr. 282] [trust deed securing debt]; *People v. Frankfort* (1952) 114 Cal.App.2d 680, 703 [251 P.2d 401] [promissory notes and contracts securing debt]; *People v. Quiel* (1945) 68 Cal.App.2d 674, 678 [157 P.2d 446] [unpaid

bank checks]; see also Pen. Code, §§ 493 [value of stolen passage tickets], 494 [completed written instrument need not be issued or delivered].) If evidence of a debt or right of action is embezzled, its value is the sum due on or secured by the instrument. (Pen. Code, § 514.) Section 492 only applies if the written instrument has value and is taken from a victim. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1414, fn. 16 [79 Cal.Rptr.2d 806].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~²⁴²th ed. 2012) Crimes Against Property §§ 4, 5, 8.

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

1810. Diversion of Construction Funds (Pen. Code, § 484b)

The defendant is charged [in Count __] with diversion of construction funds [in violation of Penal Code section 484b].

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

- 1. The defendant received money for the purpose of obtaining or paying for [construction] (services[,]/[or] labor[,]/[or] materials[,]/[or] equipment);**
- 2. The defendant willfully failed [either] (to complete the improvements for which the money was provided/ [or] to pay for the [construction] (services[,]/[or] labor[,]/[or] materials[,]/[or] equipment)) for which the money was provided;**

[AND]

- 3. The defendant wrongfully diverted this money for a use other than one for which the money was received(;/.)**

[AND]

- 4. The amount of money diverted was greater than \$2350.]**

New October 2025

BENCH NOTES

Instructional Duty

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

The jury must unanimously agree about the act that constitutes the wrongful diversion. If there is evidence of more than one act and if the prosecution fails to elect which act constitutes the alleged wrongful diversion, the court should instruct the jury about unanimity. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850–852 [42 Cal.Rptr.2d 798].) See CALCRIM No. 3500, *Unanimity*.

AUTHORITY

- Elements. Pen. Code, § 484b.
- General Intent Required. *People v. Williams* (2013) 218 Cal.App.4th 1038, 1064 [160 Cal.Rptr.3d 779]; *People v. Stark* (1994) 26 Cal.App.4th 1179, 1182–1183 [31 Cal.Rptr.2d 887].
- Funds Must Be Intended for Specific, Dedicated Purpose. *People v. Heitz* (1983) 145 Cal.App.3d Supp. 8, 14–15 [193 Cal.Rptr. 138].

COMMENTARY

There is a split of authority regarding the role of causation in Penal Code section 484b. *People v. Williams* (2013) 218 Cal.App.4th 1038, 1064 [160 Cal.Rptr.3d 779] and *People v. Worrell* (1980) 107 Cal.App.3d 50, 55–56 [165 Cal.Rptr. 459] held that there is no causative element and that diversion of funds alone is enough to violate the statute. *People v. Butcher* (1986) 185 Cal.App.3d 929, 940 [229 Cal.Rptr. 910] held that “section 484b is not violated unless the wrongful diversion is a cause of the failure to complete the project or defray its expenses.”

**1851. Petty Theft or Shoplifting With Two or More Prior Convictions
(Pen. Code, § 666.1)**

If you find the defendant guilty of (petty theft/[or] shoplifting), you must then decide whether the People have proved the additional allegation that the defendant was previously convicted of two or more theft offenses. It has already been determined that the defendant is the person named in exhibits _____ *<insert numbers or descriptions of exhibits>*. You must decide whether the evidence proves that the defendant was previously convicted of the alleged crimes.

The People allege that the defendant was previously convicted of:

1. A violation of _____ *<insert code section violated, as listed in Pen. Code, §666.1(a)(2)>*, **on** _____ *<insert date of conviction>*, **in the** _____ *<insert name of court>*, **in Case Number** _____ *<insert docket or case number>*;

[AND]

2. A violation of _____ *<insert code section violated, as listed in Pen. Code, §666.1(a)(2)>*, **on** _____ *<insert date of conviction>*, **in the** _____ *<insert name of court>*, **in Case Number** _____ *<insert docket or case number>(;/.)*

[AND]

3. *<Repeat for each prior conviction alleged>.*

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crimes alleged [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing credibility of the defendant>*]. Do not consider this evidence for any other purpose.]

You must consider each alleged conviction separately. 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.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior convictions. (See Pen. Code, § 1025 [on defendant's denial, jury must decide issue of prior convictions]; *People v. Barre* (1992) 11 Cal.App.4th 961, 965 [14 Cal.Rptr.2d 307].)

Give CALCRIM No. 3500, *Unanimity*, if more than two prior theft convictions are alleged.

If a second or subsequent conviction of Penal Code section 666.1 is charged, give either CALCRIM No. 3100, *Prior Conviction: NonBifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Enhancement. Pen. Code, § 666.1.
- Convictions From Other States. Pen. Code, § 668; *People v. Perry* (1962) 204 Cal.App.2d 201, 204 [22 Cal.Rptr. 54].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

1852–1859. Reserved for Future Use

2100. Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153(a), (f), (g))

The defendant is charged [in Count __] with causing injury to another person while (driving a vehicle/operating a vessel) under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug) [in violation of Vehicle Code section 23153(a)/(f)/(g)].

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

1. The defendant (drove a vehicle/operated a vessel);
2. When (he/she) (drove a vehicle/operated a vessel), the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug);
3. While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

4. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to (drive a vehicle/operate a vessel) with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>.]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to (drive a vehicle/operate a vessel) as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would (drive a vehicle/operate a vessel) under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[The People allege that the defendant committed the following illegal act[s]: _____ <list name[s] of offense[s]>.

To decide whether the defendant committed _____ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/_____ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in

the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury 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 injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to (drive a vehicle/operate a vessel).]

*New January 2006; Revised June 2007, April 2008, December 2008, August 2015, September 2017, March 2018, September 2019, October 2021, October 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor*, *supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

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 injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (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].)

The court has ~~There is a split in authority over whether there is a sua sponte duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count-predicate offenses are alleged, if the prosecution has not elected the specific act relied upon to prove the charge and if the continuous course of conduct exception does not apply. (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 [114 Cal.Rptr.3d 133, 188, 237 P.3d 474, 520–521]; *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) See the Bench Notes to CALCRIM No. 3500, *Unanimity*, for an extensive discussion of the sua sponte duty to instruct on unanimity.~~ If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” if there is no substantial evidence that the defendant’s blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayan* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(a), (f), (g); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- “Alcoholic Beverage” Defined. Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- “Drug” Defined. Veh. Code, § 312.
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- “Under the Influence” Defined. *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Manner of Driving. *People v. Stockman* (2020) 56 Cal.App.5th 1093, 1099–1101 [270 Cal.Rptr.3d 812]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [282 Cal.Rptr. 170]; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Must Instruct on Elements of Predicate Offense. *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense. Veh. Code, § 23630.
- ~~Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].~~

- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].
- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence. *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].
- Violations of Vehicle Code section 23153(a), are not lesser included offenses of Vehicle Code section 23153(f) [now 23153(g)]. *People v. Cady* (2016) 7 Cal.App.5th 134, 145-146 [212 Cal.Rptr.3d 319].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

“[T]he evidence must show an unlawful act or neglect of duty *in addition to* driving under the influence.” (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641] [italics in original]; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law

The term “ ‘any act forbidden by law’ . . . refers to acts forbidden by the Vehicle Code . . . ” (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not committed “when” defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

“In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated.” (Veh. Code, § 23153(c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) “[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant’s conduct amounts to no more than ordinary negligence.” (*People v. Oyaas, supra*, 173 Cal.App.3d at p. 669.) “[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle.” (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

“In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of

felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving.” (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when “a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident.” (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~45~~²⁴²th ed. 20~~12~~²⁴) Crimes Against Public Peace and Welfare §§ ~~272-277~~³³⁰⁻³³⁹.

2 Witkin, California Evidence (~~56~~²²⁴th ed. 20~~12~~²⁴) Demonstrative, Experimental, and Scientific Evidence § 56.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

2101. Driving With 0.08 Percent Blood Alcohol Causing Injury (Veh. Code, § 23153(b))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23153(b)].

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

1. The defendant drove a vehicle;
2. When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;
3. When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

4. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[The People allege that the defendant committed the following illegal act[s]: _____ <list name[s] of offense[s]>

To decide whether the defendant committed _____ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/ _____ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury 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 injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

*New January 2006; Revised August 2006, April 2008, August 2015, March 2018, September 2019, October 2025**

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

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor*, *supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

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 injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (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].)

The court has ~~There is a split in authority over whether there is a~~ **sua sponte** duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count~~predicate offenses are alleged, if the prosecution has not elected the specific act relied upon to prove the charge and if the continuous course of conduct exception does not apply. (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 [114 Cal.Rptr.3d 133, 188, 237 P.3d 474, 520–521]; ~~(*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438].) [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) See the Bench Notes to CALCRIM No. 3500, *Unanimity*, for an extensive discussion of the sua sponte duty to instruct~~~~

on unanimity. If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” if there is no substantial evidence that the defendant’s blood alcohol level was at or above 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal. Rptr. 2d 690].)

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the “imminent peril/sudden emergency” doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio. Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense. *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- ~~Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].~~

- Statute Constitutional. *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~⁵th ed. 20~~12~~²⁴) Crimes Against Public Peace and Welfare §§ ~~272-277~~³³⁰⁻³³⁹.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

2102. Driving With 0.04 Percent Blood Alcohol Causing Injury With a Passenger for Hire (Veh. Code, § 23153(e))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood-alcohol level of 0.04 percent or more [in violation of Vehicle Code section 23153(e)].

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

1. The defendant drove a vehicle;
2. When (he/she) drove, the defendant's blood-alcohol level was 0.04 percent or more by weight;
3. When (he/she) drove with that blood-alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);
4. When (he/she) drove, there was a passenger for hire in the vehicle;

AND

5. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

A person is a *passenger for hire* when the person or someone else pays, or is expected to pay, for the ride, the payment is or will be with money or something else of value, and the payment is made to, or expected to be made to, the owner, operator, agent or any other person with an interest in the vehicle.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood-alcohol level of 0.04 percent or more, you may, but are not required to, conclude that the defendant's blood-alcohol level was 0.04 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[The People allege that the defendant committed the following illegal act[s]: _____ <list name[s] of offense[s]>.

To decide whether the defendant committed _____ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/ _____ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury 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 injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

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 injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (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].)

~~The court has~~~~There is a split in authority over whether there is~~ a **sua sponte** duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count~~multiple predicate offenses are alleged, if the prosecution has not elected the specific act relied upon to prove the charge and if the continuous course of conduct exception does not apply.~~ (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 [114 Cal.Rptr.3d 133, 188, 237 P.3d 474, 520–521] (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203

~~Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) See the Bench Notes to CALCRIM No. 3500, *Unanimity*, for an extensive discussion of the sua sponte duty to instruct on unanimity.~~ If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23153(e); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” if there is no substantial evidence that the defendant’s blood-alcohol level was at or above 0.04 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayan* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Do **not** give this instruction if the court has bifurcated the trial. Instead, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. See the Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, for an extensive discussion of bifurcation. If the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the “imminent peril/sudden emergency” doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on

sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(e); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio. Veh. Code, § 23152; *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. Veh. Code, § 23153(e); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense. *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- ~~Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].~~
- Statute Constitutional. *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

LESSER INCLUDED OFFENSES

- Driving With 0.04 Percent Blood Alcohol With a Passenger for Hire. Veh. Code, § 23152(e).

RELATED ISSUES

| See the Related Issues section in CALCRIM No. 2111, *- Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153)(a), (f), (g)* and CALCRIM No. 2100, *Driving With 0.08 Percent Blood Alcohol (Veh. Code, § 23152(b))*.

2307. Possession of Hard Drug (Health & Saf. Code, § 11395)

The defendant is charged [in Count __], in violation of Health and Safety Code section 11395,] with possessing _____ *<insert substance specified in Health & Saf. Code, § 11395(e)>* with two or more prior drug-related convictions.

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

1. The defendant [unlawfully] possessed _____ *<insert substance specified in Health & Saf. Code, § 11395(e)>*;
2. The defendant knew of its presence;
3. The defendant knew of its nature or character as _____ *<insert substance specified in Health & Saf. Code, § 11395(e)>*;
4. The _____ *<insert substance specified in Health & Saf. Code, § 11395(e)>* was in a usable amount;

AND

5. The defendant was previously convicted of (two/ _____ *<insert number if more than two>* drug related offenses.

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 drug (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 drug does not, by itself, mean that a person has control over that drug.]

<Defense: Prescription>

[The defendant is not guilty of possessing _____ < insert drug specified in Health & Saf. Code, § 11395(e)> if (he/she) had a valid, written prescription for that substance from a physician, dentist, podiatrist, [naturopathic doctor], or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty.]

New October 2025

BENCH NOTES

Instructional Duty

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

Give CALCRIM No. 3500, *Unanimity*, if more than two prior drug related convictions are alleged.

Defenses—Instructional Duty

The prescription defense is codified in Health and Safety Code section 11395. It is not available as a defense to possession of all controlled substances. The defendant need only raise a reasonable doubt about whether his or her possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense.

Section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.

AUTHORITY

- Elements. Health & Saf. Code, § 11395.
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.
- “Hard Drug” Defined. Health & Saf. Code, § 11395(e).

2501. Carrying Concealed Explosive or Dirk or Dagger (Pen. Code, §§ 21310, 16470)

The defendant is charged [in Count __] with unlawfully carrying a concealed (explosive/dirk or dagger) [in violation of Penal Code section 21310].

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

1. The defendant carried on (his/her) person (an explosive/a dirk or dagger);
2. The defendant knew that (he/she) was carrying it;
3. It was substantially concealed on the defendant's person;

AND

4. The defendant knew that it (was an explosive/could readily be used as a stabbing weapon).

The People do not have to prove that the defendant used or intended to use the alleged (explosive/dirk or dagger) as a weapon.

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

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

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

[A *dirk or dagger* is a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. *Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

[A (pocketknife/nonlocking folding knife/folding knife that is not prohibited by Penal Code section 21510) is not a *dirk or dagger* unless the blade of the knife is exposed and locked into position.]

[A knife carried in a sheath and worn openly suspended from the waist of the wearer is not *concealed*.]

<Give only if object may have innocent uses.>

[When deciding whether the defendant knew the object (was an explosive/could be used as a stabbing weapon), consider all the surrounding circumstances, including the time and place of possession. Consider also (the destination of the defendant[,]/ the alteration of the object from standard form[,]) and other facts, if any.]

[The People allege that the defendant carried the following weapons:

_____ <insert description of each weapon when multiple items alleged>.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant carried at least one of these weapons and you all agree on which weapon (he/she) carried and when (he/she) carried it.]

New January 2006; Revised February 2012, September 2020, October 2025

BENCH NOTES

Instructional Duty

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

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

Give the bracketed paragraph that begins with “When deciding whether” only if the object was not designed solely for use as a stabbing weapon but may have innocent uses. (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

When instructing on the meaning of “explosive,” if the explosive is listed in Health and Safety Code section 12000, the court may use the bracketed sentence stating, “_____ is an explosive.” For example, “Nitroglycerine is an

explosive.” However, the court may not instruct the jury that the defendant used an explosive. For example, the court may not state, “The defendant used an explosive, nitroglycerine,” or “The substance used by the defendant, nitroglycerine, was an explosive.” (See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257]; *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].)

If the court gives the instruction on a “folding knife that is not prohibited by Penal Code section 21510,” give a modified version of CALCRIM No. 2502, *Possession, etc., of Switchblade Knife*.

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

AUTHORITY

- Elements. Pen. Code, § 21310.
- Need Not Prove Intent to Use. *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Knowledge Required. *People v. Rubalcava*, supra, ~~(2000)~~ 23 Cal.4th ~~322~~, at pp. 331–332 ~~[96 Cal.Rptr.2d 735, 1 P.3d 52]~~.
- Substantial Concealment. *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885].
- “Explosive” Defined. Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [789 P.2d 127, 268 Cal.Rptr. 399].
- “Dirk or Dagger” Defined. Pen. Code, § 16470.
- Dirk or Dagger—No Length Requirement. *In re Victor B.* (1994) 24 Cal.App.4th 521, 526 [29 Cal.Rptr.2d 362].
- Dirk or Dagger—Object Not Originally Designed as Knife. *In re Victor B.*, supra, ~~(1994)~~ 24 Cal.App.4th ~~521~~, at pp. 525–526 ~~[29 Cal.Rptr.2d 362]~~.
- Dirk or Dagger—Capable of Ready Use. *People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [67 Cal.Rptr.2d 782].

- Dirk or Dagger—Pocketknives. *In re Luke W.* (2001) 88 Cal.App.4th 650, 655–656 [105 Cal.Rptr.2d 905]; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215 [80 Cal.Rptr.2d 868].

RELATED ISSUES

Knowledge Element

“[T]he relevant language of section 12020 is unambiguous and establishes that carrying a concealed dirk or dagger does not require an intent to use the concealed instrument as a stabbing weapon.” (*People v. Rubalcava*, *supra*, ~~(2000)~~ 23 Cal.4th 322, at p. 328 [~~96 Cal.Rptr.2d 735, 1 P.3d 52~~] [interpreting now-repealed Pen. Code, § 12020].) However, “to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument ‘that is capable of ready use as a stabbing weapon.’ ([now repealed] § 12020(a), (c)(24).) A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020.” (*Id.* at pp. 331–332 [emphasis in original] [referencing repealed Pen. Code § 12020; see now Pen. Code, §§ 16479, 21310].)

Definition of Dirk or Dagger

The definition of “dirk or dagger” contained in Penal Code section 16470 was effective on January 1, 2012. Prior decisions interpreting the meaning of “dirk or dagger” should be viewed with caution. (See *People v. Mowatt* (1997) 56 Cal.App.4th 713, 719–720 [65 Cal.Rptr.2d 722] [comparing old and new definitions]; *People v. Sisneros*, *supra*, ~~(1997)~~ 57 Cal.App.4th 1454, at p. 1457 [~~67 Cal.Rptr.2d 782~~] [same]; *In re George W.*, *supra*, ~~(1998)~~ 68 Cal.App.4th 1208, at p. 1215 [~~80 Cal.Rptr.2d 868~~] [discussing 1997 amendment].)

Dirk or Dagger—“Capable of Ready Use”

“[T]he ‘capable of ready use’ requirement excludes from the definition of dirk or dagger a device carried in a configuration that requires assembly before it can be utilized as a weapon.” (*People v. Sisneros*, *supra*, ~~(1997)~~ 57 Cal.App.4th 1454, at p. 1457 [~~67 Cal.Rptr.2d 782~~].)

Dirk or Dagger—“Pocketknife”

“Although they may not have folding blades, small knives obviously designed to be carried in a pocket in a closed state, and which cannot be used until there have been several intervening manipulations, comport with the implied legislative intent that such knives do not fall within the definition of proscribed dirks or daggers but are a type of pocketknife excepted from the statutory proscription.” (*In re Luke W.*, *supra*, ~~(2001)~~ 88 Cal.App.4th 650, at pp. 655–656 [~~105 Cal.Rptr.2d 905~~].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~²⁴th ed. 20~~12~~¹²) Crimes Against Public Peace and Welfare, § ~~246~~²⁴¹~~3~~.

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

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

2503. Possession of Deadly Weapon With Intent to Assault (Pen. Code, § 17500)

The defendant is charged [in Count __] with possessing a deadly weapon with intent to assault [in violation of Penal Code section 17500].

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

1. The defendant possessed a deadly weapon on (his/her) person;
2. The defendant knew that (he/she) possessed the weapon;

AND

3. At the time the defendant possessed the weapon, (he/she) intended to assault someone.

A person intends to assault someone else if he or she intends to do an act that by its nature would directly and probably result in the application of force to a person.

[A *deadly weapon* 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.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

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

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

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,]
[and] [whether the object was changed from its standard form] and any other evidence that indicates that the object would be used for a dangerous, rather than a harmless, purpose.]

The term *application of force* means 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/ [or] by touching something held by or attached to the other person).]

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

[The People allege that the defendant possessed the following weapons:
_____ <insert description of each weapon when multiple items alleged>.
You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]

New January 2006; Revised February 2012, February 2013, September 2019, September 2020, March 2022, February 2025, October 2025

BENCH NOTES

Instructional Duty

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

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

Give the bracketed paragraph on indirect touching if relevant.

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

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a

matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed paragraph that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

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

AUTHORITY

- Elements. Pen. Code, § 17500.
- “Deadly Weapon” Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Objects With Innocent Uses. *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029; *People v. Godwin, supra*, 50 Cal.App.4th at pp. 1573–1574.
- “Knowledge” Required. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Assault. Pen. Code, § 240; see also *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]].
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra*, 4 Cal.5th at p. 1065 [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2024) Crimes Against Public Peace and Welfare, § 189.215, 245, 312.

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

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

2514. Possession of Firearm by Person Prohibited by Statute: Self-Defense

The defendant is not guilty of unlawful possession of a firearm[, as charged in Count __,] if (he/she) temporarily possessed the firearm in (self-defense/ [or] defense of another). The defendant possessed the firearm in lawful (self-defense/ [or] defense of another) if:

1. The defendant reasonably believed that (he/she/someone else/_____ <insert name of third party>) was in imminent danger of suffering great bodily injury;
2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;
3. A firearm became available to the defendant without planning or preparation on (his/her) part;
4. The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or reasonably appeared to have been necessary] for self-defense;
5. No other means of avoiding the danger of injury was available;

AND

6. The defendant's use of the firearm was reasonable under the circumstances.

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

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar

knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

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

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

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

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

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.

New January 2006; Revised December 2008, February 2012, September 2020, March 2022, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000] [self-defense applies to charge under now repealed Pen. Code, § 12021].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats or assaults against the defendant on the reasonableness of defendant’s conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.) If these instructions have already been given in CALCRIM No. 3470 or CALCRIM No. 505, the court may delete them here.

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

Related Instructions

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

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

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

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

AUTHORITY

- Temporary Possession of Firearm by Felon in Self-Defense. *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases. *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Possession Must Be Brief and Not Planned. *People v. McClindon* (1980) 114 Cal.App.3d 336, 340 [170 Cal.Rptr. 492].
- Instructional Requirements. *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance. Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], disapproved on other grounds by *People v. Humphrey*, supra, ~~(1996)~~ 13 Cal.4th ~~1073~~, at pp. 1088–1089 ~~[56 Cal.Rptr.2d 142, 921 P.2d 1]~~.
- Reasonable Belief. *People v. Humphrey*, supra, ~~(1996)~~ 13 Cal.4th ~~1073~~, at p. 1082 ~~[56 Cal.Rptr.2d 142, 921 P.2d 1]~~; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

RELATED ISSUES

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

Reasonable Person Standard and Physical Limitations

A defendant’s physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686

[277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2024) Defenses, §§ 8694, 8795, 6875, 718, 729, 7380.

2 Witkin & Epstein, California Criminal Law (54th ed. 2024) Crimes Against Public Peace and Welfare, § 233278-237283.

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

2515–2519. Reserved for Future Use

2578. Explosion of Explosive or Destructive Device Causing Death, Mayhem, or Great Bodily Injury (Pen. Code, § 18755)

The defendant is charged [in Count __] with (exploding/ [or] igniting) (an explosive/ [or] a destructive device) causing (death[,]/ mayhem[,]/ [or] great bodily injury) to another person [in violation of Penal Code section 18755].

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

1. The defendant willfully and maliciously (exploded/ [or] ignited) (an explosive/ [or] a destructive device);

AND

2. The explosion caused (death[,]/ mayhem[,]/ [or] great bodily injury) to another person.

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.

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.

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

[*Mayhem* means unlawfully:

<A. Removing Body Part>

[Removing a part of someone's body](;[or]/.)

<B. Disabling Body Part>

[Disabling or making useless a part of someone's body and the disability is more than slight or temporary](;[or]/.)

<C. Disfigurement>

[Permanently disfiguring someone](;[or]/.)

<D. Tongue Injury>

[Cutting or disabling someone's tongue](; [or]/.)

<E. Slitting Nose, Ear, or Lip>

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

<F. Significant Eye Injury>

[Putting out someone's eye or injuring someone's eye in a way that so significantly reduces his or her ability to see that the eye is useless for the purpose of ordinary sight.]]

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

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

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

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

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

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

[The term[s] (*explosive*/ [and] *destructive device*) (is/are) defined in another instruction.]

[An act causes (death[,]/ mayhem[,]/ [or] great bodily injury) if the (death/injury) is the direct, natural, and probable consequence of the act, and the (death[,]/ mayhem[,]/ [or] great bodily injury) 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[,]/ mayhem[,]/ [or] great bodily injury). An act causes (death/injury) only if it is a substantial factor in causing the (death/injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/injury).]

New January 2006; Revised February 2012, September 2020, October 2025

BENCH NOTES

Instructional Duty

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401] [causation issue in homicide].) If the evidence indicates that there was only one cause of injury, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of injury, the court should also give the “substantial factor” instruction and definition in the second bracketed 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].)

Depending on the device or substance used, give the bracketed definitions of “explosive” or “destructive device,” inserting the appropriate definition from Penal Code section 16460, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 16460, the court may instead give the bracketed sentence stating that the listed item “is an explosive” or “is a destructive device.” For example, “A grenade is a destructive device.” However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that “the defendant used a destructive device, a grenade,” or “the device used by the defendant, a grenade, was a destructive device.” (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word “bomb” in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra*, 33 Cal.App.4th at p. 25.) Appellate courts have held that the term “bomb” is not vague and is understood in its “common, accepted, and popular sense.” (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra*, 33 Cal.App.4th at p. 25.) If the court wishes to define

the term “bomb,” the court may use the following definition: “A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions.” (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

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

AUTHORITY

- Elements. Pen. Code, § 18755.
- “Explosive” Defined. Health & Saf. Code, § 12000.
- “Destructive Device” Defined. Pen. Code, § 16460.
- “Maliciously” Defined. Pen. Code, § 7(4); *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101]; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335 [130 Cal.Rptr. 349].
- Must Injure Another Person. See *People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538 [37 Cal.Rptr.2d 489].
- General Intent Crime. See *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970–1971 [10 Cal.Rptr.2d 15].
- “Great Bodily Injury” Defined. *People v. Poulin* (1972) 27 Cal.App.3d 54, 61 [103 Cal.Rptr. 623].

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 18710; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].
- Possession of Explosive. Health & Saf. Code, § 12305; *People v. Westoby*, *supra*, ~~(1976)~~ 63 Cal.App.3d 790, at p. 795 ~~[134 Cal.Rptr. 97]~~.
- Explosion of a Destructive Device Causing Injury. Pen. Code, § 18750; see *People v. Poulin*, *supra*, ~~(1972)~~ 27 Cal.App.3d 54, at p. 60 ~~[103 Cal.Rptr. 623]~~.

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier*, and CALCRIM No. 2577, *Explosion of Explosive or Destructive Device Causing Bodily Injury*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~45~~th ed. 20~~24~~¹²) Crimes Against Public Peace and Welfare, §§ ~~25825–26026~~, ~~227~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04, Ch. 142, *Crimes Against the Person*, § 142.01[2][a][i], [ii], Ch. 144, *Crimes Against Order*, § 144.01[1][c] (Matthew Bender).

**2593. Purchase, Possession, or Use of Tear Gas or Tear Gas Weapon
(Pen. Code, § 22810(a), (e)(1), (g))**

The defendant is charged [in Count __] with unlawfully (purchasing[,]/[or] possessing[,]/[or] using) (tear gas/[or] a tear gas weapon) [in violation of Penal Code section 22810].

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

1. The defendant (purchased[,]/[or] possessed[,]/[or] used) (an item containing tear gas/[or] a tear gas weapon);
2. When the defendant (purchased[,]/[or] possessed[,]/[or] used) the (item/weapon), the defendant knew that it (contained tear gas/was a tear gas weapon);

AND

<prohibited grounds related to defendant>

[3. When the defendant (purchased[,]/[or] possessed[,]/[or] used) the (item/weapon), the defendant was (not acting in self-defense/had been convicted of _____ *<insert applicable offense>*).]

<prohibited characteristics of a tear gas weapon>

[3. The tear gas weapon (could expel (a projectile/tear gas by any method other than an aerosol spray)/[or] contained more than 2.5 ounces net weight of aerosol spray).]

Tear gas is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury when vaporized or otherwise dispersed in the air.

[A ***tear gas weapon*** is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A ***tear gas weapon*** [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A ***tear gas weapon*** does not include a device regularly manufactured and sold for use with firearm ammunition.]

[Pepper spray is a type of tear gas.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant possessed the following (tear gas/tear gas weapons): _____ *<insert description of each tear gas or tear gas weapon when multiple items alleged>*. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (purchased[,]/[or] possessed[,]/[or] used) at least one of the alleged items, and you all agree on which alleged item (he/she) (purchased[,]/[or] possessed[,]/[or] used).]

<sentence enhancement under Pen. Code, § 22810(g)(2)>

[The defendant used (tear gas/[or] a tear gas weapon) against a peace officer engaged in the performance of official duties and, when the defendant used the (tear gas/[or] tear gas weapon), the defendant knew or reasonably should have known that the person was a peace officer.]

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

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

New October 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense, give any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].) Give the

bracketed paragraph that begins “The People allege that the defendant possessed the following tear gas or tear gas weapons” and insert the items alleged.

If the sentence enhancement under Penal Code section 22810(g)(2) is charged, the jury must determine whether the alleged victim is a peace officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

AUTHORITY

- Elements. Pen. Code, § 22810(a), (e)(1).
- “Tear Gas” Defined. Pen. Code, § 17240.
- Pepper Spray is a Type of Tear Gas. *People v. Auttersen* (1968) 261 Cal.App.2d 627, 630–631 [68 Cal.Rptr. 113].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 629 [154 Cal.Rptr. 314].
- Constructive vs. Actual Possession. See *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]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].

2670. Lawful Performance: Peace Officer

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

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

<A. Unlawful Detention>

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

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

AND

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

Any other detention is unlawful.

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

<B. Unlawful Arrest>

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

Any other arrest is unlawful.

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

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

<Arrest without warrant for most misdemeanors or infractions>

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

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

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

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

<Entering home without warrant>

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

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

AND

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

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

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

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

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

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

<C. Use of Force by a Peace Officer>

[Special rules control the use of force.]

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

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

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

OR

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

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

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

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

AND

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

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

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

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

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

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

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

[If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him or her.]]

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

A person being arrested or detained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable

or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

New January 2006; Revised August 2016, March 2022, September 2022, October 2025

BENCH NOTES

Instructional Duty

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

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

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the first paragraph in bracketed ~~sentence in~~ section ~~CD~~ that begins with “If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her.” (*People v. White, supra*, 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with “However, you may not find the defendant guilty of resisting arrest.”

When giving the bracketed section under the heading “A. Unlawful Detention,” if there is a factual issue about whether the person was in fact “detained,” the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the

court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

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

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

AUTHORITY

- Instructional Duty. *People v. Gonzalez, supra*, 51 Cal.3d at p. 1217; *People v. Olguin, supra*, 119 Cal.App.3d at pp. 46–47; *People v. Castain, supra*, 122 Cal.App.3d at p. 145; *People v. White, supra*, 101 Cal.App.3d at pp. 166–168.
- Lawful Detention. *People v. Celis* (2004) 33 Cal.4th 667, 674-675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].
- Lawful Arrest. Pen. Code, §§ 834–836, 841.
- “Probable Cause” Defined. *People v. Celis, supra*, 33 Cal.4th at p. 673; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer’s Training and Experience Relevant. *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention. Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home. *People v. Wilkins, supra*, 14 Cal.App.4th at p. 777; *People v. Ramey* (1976) 16 Cal.3d 263, 276 [127

Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].

- Reasonable Force. Pen. Code, §§ 692, 693.
- “Deadly Force” Defined. Pen. Code, § 835a(e).
- Excessive Use of Deadly Force. Pen. Code, § 835a.
- Excessive Force Makes Arrest Unlawful. *People v. White, supra*, 101 Cal.App.3d at pp. 166–168.
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. *People v. Curtis, supra*, 70 Cal.2d at p. 356.
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

COMMENTARY

Graham Factors

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

RELATED ISSUES

Service of Warrant

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

Lawfulness of Officer’s Conduct Based on Objective Standard

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

Photographing or Recording Officers

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

SECONDARY SOURCES

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

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

2720. Assault by Prisoner Serving Life Sentence (Pen. Code, § 4500)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence [in violation of Penal Code section 4500].

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 that by its nature would directly and probably result in the application of force to a person;]**

<Alternative 1B—force without weapon>

- [1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]**
- 2. The defendant did that act willfully;**
- 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
- 4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;**
- 5. The defendant acted with malice aforethought;**

[AND]

<Alternative 6A—defendant sentenced to life term>

- [6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]**

<Alternative 6B—defendant sentenced to life and to determinate term>

[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

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

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

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/ [or] by touching something held by or attached to the other person).]

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

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].

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

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 this crime.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill the person assaulted.

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 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 is committed. It does not require deliberation or the passage of any particular period of time.

[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]

BENCH NOTES

Instructional Duty

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

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

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

Give the bracketed paragraph on indirect touching if relevant.

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.

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

On request, give the bracketed definition of “sentenced to a term in state prison.” Within that definition, give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

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].)

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless “the person subjected to such assault does not die within a year and a day after” the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

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

Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidence raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense–Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

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

AUTHORITY

- Elements of Assault by Life Prisoner. Pen. Code, § 4500.
- Elements of Assault With Deadly Weapon or Force Likely. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- “Willful” Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

- “Deadly Weapon” Defined. *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- 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]].
- Malice Equivalent to Malice in Murder. *People v. St. Martin, supra*, 1 Cal.3d at pp. 536–537; *People v. Chacon, supra*, 69 Cal.2d at pp. 780–781.
- “Malice” Defined. 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].
- Ill Will Not Required for Malice. *People v. Seden* (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].
- Undergoing Sentence of Life. *People v. Superior Court of Monterey (Bell), supra*, 99 Cal.App.4th at p. 1341.
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra*, 4 Cal.5th at p. 1065 [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; *People v. Milward* (2011) 52 Cal.4th 580, 588–589 [129 Cal.Rptr.3d 145, 257 P.3d 748].
- Assault. Pen. Code, § 240; see *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747 [71 Cal.Rptr.3d 845] [Pen. Code, § 4501].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Status as Life Prisoner Determined on Day of Alleged Assault

Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell), supra*, 99

Cal.App.4th at p. 1341; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell)*, *supra*, 99 Cal.App.4th at p. 1341; *Graham v. Superior Court*, *supra*, 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life

This statute applies to “[e]very person undergoing a life sentence” (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)*, *supra*, 99 Cal.App.4th at p. 1341, the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating “a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had ‘nothing left to lose’ by committing the assault.” (*Ibid.*)

Error to Instruct on General Definition of Malice and General Intent

“Malice,” as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin*, *supra*, 1 Cal.3d at pp. 536–537; *People v. Chacon*, *supra*, 69 Cal.2d at pp. 780–781.) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. (*Ibid.*)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Crimes Against the Person, §§ ~~4558–4760~~.

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

2721. Assault by Prisoner (Pen. Code, § 4501)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence [in violation of Penal Code section 4501].

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 that by its nature would directly and probably result in the application of force to a person;]**

<Alternative 1B—force without weapon>

- [1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]**
- 2. The defendant did that act willfully;**
- 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
- 4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;**

[AND]

- 5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)**

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND]

- 6. 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/ [or] by touching something held by or attached to the other person).]

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

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].

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

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

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

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

A person is *confined in a state prison* if he or she is (confined in _____
<insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the

(confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *confined in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *confined in a state prison*.]

New January 2006; Revised August 2016, September 2019, September 2020, March 2022, February 2025, October 2025

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 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

Give the bracketed paragraph on indirect touching if relevant.

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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

In the definition of “serving a sentence in a state prison,” give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

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].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements of Assault by Prisoner. Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- “Willful” Defined. Pen. Code, § 7 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- “Deadly Weapon” Defined. *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- 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]].
- “Confined in State Prison” Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*,

supra, 4 Cal.5th at p. 1065 [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; see *People v. Milward* (2011) 52 Cal.4th 580, 588–589 [129 Cal.Rptr.3d 145, 257 P.3d 748] [Pen. Code, § 4501].
- Assault. Pen. Code, § 240; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747 [71 Cal.Rptr.3d 845].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~²⁴th ed. 20~~24~~¹²) Crimes Against the Person, §§ ~~486~~¹, ~~63~~⁵⁰.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

2745. Possession or Manufacture of Weapon in Penal Institution (Pen. Code, § 4502)

The defendant is charged [in Count __] with (possessing[,]/ [or] manufacturing[,]/ [or] attempting to manufacture) a weapon, specifically [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>*, while (in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution) [in violation of Penal Code section 4502].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was (present at or confined in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution);
2. The defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>*;
3. The defendant knew that (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>*;

AND

4. The defendant knew that the object (was [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>*/could be used _____ *<insert description of weapon’s use, e.g., “as a stabbing weapon,” or “for purposes of offense or defense”>*).

A penal institution is a (state prison[,]/ [or] prison camp or farm[,]/ [or] county jail[,]/ [or] county road camp).

[Metal knuckles means any device or instrument made wholly or partially of metal that is worn in or on the hand for purposes of offense or defense and

that either protects the wearer's hand while striking a blow or increases the injury or force of impact from the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs that would contact the individual receiving a blow.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <insert type of explosive from Health & Saf. Code, § 12000> (is/are) [an] *explosive*[s].]

[*Fixed ammunition* is a projectile and powder enclosed together in a case ready for loading.]

[A *dirk or dagger* is a knife or other instrument, with or without a handguard, that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

[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 firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury when vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

[[**(A/An)**] _____ <insert type of weapon from Pen. Code, § 4502, not covered in above definitions> **(is/means/includes)** _____ <insert appropriate definition, see Bench Notes>.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____ <insert type of weapon from Pen. Code, § 4502>, as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the following weapons: _____ <insert description of each weapon when multiple items alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) at least one of these weapons and you all agree on which weapon (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture).]

New January 2006; Revised February 2012, September 2020, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Where indicated in the instruction, insert one or more of the following weapons from Penal Code section 4502, based on the evidence presented:

metal knuckles

explosive substance

fixed ammunition

dirk or dagger

sharp instrument

pistol, revolver, or other firearm

tear gas or tear gas weapon

an instrument or weapon of the kind commonly known as a blackjack,
slungshot, billy, sandclub, sandbag

Following the elements, give the appropriate definition of the alleged weapon. If the prosecution alleges that the defendant possessed an “instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, [or] sandbag,” the court should give an appropriate definition based on case law. (See *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496] [definition of “slungshot”]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons].)

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with “You may consider evidence that the object could be used in a harmless way” (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If the prosecution alleges that the defendant attempted to manufacture a weapon, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether “there can *ever* be a circumstance justifying temporary possession in a penal institution.” (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Elements. Pen. Code, § 4502.
- “Metal Knuckles” Defined. Pen. Code, § 21810.
- “Explosive” Defined. Health & Saf. Code, § 12000.
- ~~Fixed Ammunition. *The Department of Defense Dictionary of Military Terms*, http://www.dtic.mil/doctrine/dod_dictionary/ (accessed January 11, 2012).~~
- “Dirk or Dagger” Defined. Pen. Code, § 16470.
- “Firearm” Defined. Pen. Code, § 16520.
- “Tear Gas” Defined. Pen. Code, § 17240.
- “Tear Gas Weapon” Defined. Pen. Code, § 17250.
- “Blackjack,” etc., Defined. *People v. Fannin*, *supra*, (2001) 91 Cal.App.4th 1399, at p. 1402 ~~[111 Cal.Rptr.2d 496]~~; *People v. Mulherin*, *supra*, (1934) 140 Cal.App. 212, at p. 215 ~~[35 P.2d 174]~~.
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735]; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Harmless Use. *People v. Savedra*, *supra*, (1993) 15 Cal.App.4th 738, at pp. 743–744 ~~[19 Cal.Rptr.2d 115]~~; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe*, *supra*, (2003) 114 Cal.App.4th 177, at pp. 184–185 ~~[7 Cal.Rptr.3d 483]~~.

- Constructive vs. Actual Possession. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

“[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023.” (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763] [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

Possession of Multiple Weapons at One Time Supports Only One Conviction

“[D]efendant is subject to only one conviction for his simultaneous possession of three sharp wooden sticks in prison.” (*People v. Rowland*, *supra*, (1999) 75 Cal.App.4th 61, at p. 65 [88 Cal.Rptr.2d 900].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2024) Crimes Against Public Peace and Welfare, §§ 244.93, 248.97.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners’ Rights*, § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

2746. Possession of Firearm, Deadly Weapon, or Explosive in a Jail or County Road Camp (Pen. Code, § 4574(a))

The defendant is charged [in Count __] with possessing a weapon while confined in a (jail/county road camp) [in violation of Penal Code section 4574(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was lawfully confined in a (jail/county road camp);
2. While confined there, the defendant [unlawfully] possessed [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) within the (jail/county road camp);
3. The defendant knew that (he/she) possessed the (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon);

AND

4. The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).

[A *jail* is a place of confinement where people are held in lawful custody.]

[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 firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument, or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

**[_____ <insert type of explosive from Health & Saf. Code, § 12000>
(is/are) [an] *explosive*[s/].]**

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding whether the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,/ [or] carried by the defendant on (his/her) person[,/ [or] (displayed/visible)).]

[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 knowingly has (control over it/ [or] the right to control it), either personally or through another person).]

**[The People allege that the defendant possessed the following weapons:
_____ <insert description of each weapon when multiple items alleged>.
You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]**

<Defense: Possession Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to possess the weapon by (law[,/ [or] a person in charge of the (jail/county road

camp)[,]/ [or] an officer of the (jail/county road camp) empowered by the person in charge of the (jail/camp) to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the weapon. If the People have not met this burden, you must find the defendant not guilty of this offense.]

New January 2006; Revised February 2012, September 2020, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

Note that the definition of “deadly weapon” in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with “You may consider evidence that the object could be used in a harmless way” (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If there is sufficient evidence that the defendant was authorized to possess the weapon, give the bracketed word “unlawfully” in element 2. Give also the bracketed paragraph headed “Defense: Possession Authorized.”

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether “there can *ever* be a circumstance justifying temporary possession in a penal institution.” (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained

in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Elements. Pen. Code, § 4574(a).
- “Firearm” Defined. Pen. Code, § 16520.
- “Explosive” Defined. Health & Saf. Code, § 12000.
- “Tear Gas” Defined. Pen. Code, § 17240.
- “Tear Gas Weapon” Defined. Pen. Code, § 17250.
- “Deadly Weapon” Defined. *People v. Martinez*, supra, ~~(1998)~~ 67 Cal.App.4th ~~905~~, at p. 909 ~~[79 Cal.Rptr.2d 334]~~.
- “Jail” Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].
- Harmless Use. *People v. Savedra*, supra, ~~(1993)~~ 15 Cal.App.4th ~~738~~, at pp. 743–744 ~~[19 Cal.Rptr.2d 115]~~; *People v. Martinez*, supra, ~~(1998)~~ 67 Cal.App.4th ~~905~~, at pp. 910–913 ~~[79 Cal.Rptr.2d 334]~~.
- Unanimity. *People v. Wolfe*, supra, ~~(2003)~~ 114 Cal.App.4th ~~177~~, at pp. 184–185 ~~[7 Cal.Rptr.3d 483]~~.
- Firearm Need Not Be Operable. *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].

- Constructive vs. Actual Possession. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

“[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023.” (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763]; [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4⁵th ed. 20~~24~~¹²) Crimes Against Public Peace and Welfare, §§ 244~~93~~⁹³, 248~~97~~⁹⁷.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights*, § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

2747. Bringing or Sending Firearm, Deadly Weapon, or Explosive Into Penal Institution (Pen. Code, § 4574(a)-(c))

The defendant is charged [in Count __] with (bringing/sending/ [or] assisting in (bringing/sending)) a weapon into a penal institution [in violation of Penal Code section 4574].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] (brought/sent/ [or] assisted in (bringing/sending)) [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];
2. The defendant knew that (he/she) was (bringing/sending/ [or] assisting in (bringing/sending)) an object into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];

AND

3. The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] jail[,]/ [or] county road camp[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees).

[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 firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [Great bodily injury means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <insert type[s] of explosive[s] from Health & Saf. Code, § 12000> (is/are) [an] *explosive[s]*.]

[*Tear gas* means a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* means any shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)) the following weapons: _____ <insert description of each weapon when multiple items alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (brought/sent/ [or] assisted in (bringing/sending)) at least one of these weapons and you all agree on which weapon (he/she) (brought/sent/ [or] assisted in (bringing/sending)).]

<Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to (bring/send) a weapon into the penal institution by (law[,]/ [or] a person in charge of the penal institution[,]/ [or] an officer of the penal institution empowered by the person in charge of the institution to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (bring/send) the weapon into the institution. If the People have not met this burden, you must find the defendant not guilty of this offense.]

New January 2006; Revised February 2012, September 2020, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant brought or sent multiple weapons into the institution, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)),” inserting the items alleged.

If the defendant is charged with a felony for bringing or sending tear gas or a tear gas weapon into a penal institution resulting in the release of tear gas (Pen. Code, § 4574(b)), the court has a **sua sponte** duty to instruct the jury on this additional allegation. The court should give the jury an additional instruction on this issue and a verdict form on which the jury may indicate if this fact has or has not been proved.

Note that the definition of “deadly weapon” in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object, give the bracketed sentence that begins with “You may consider evidence that the object could be used in a harmless way” (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If there is sufficient evidence that the defendant was authorized to bring or send the weapon, give the bracketed word “unlawfully” in element 1. Give also the bracketed paragraph headed “Defense: Conduct Authorized.”

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Elements. Pen. Code, § 4574(a), (b) & (c).
- “Firearm” Defined. Pen. Code, § 16520.
- “Explosive” Defined. Health & Saf. Code, § 12000.
- “Tear Gas” Defined. Pen. Code, § 17240.
- “Tear Gas Weapon” Defined. Pen. Code, § 17250.
- “Deadly Weapon” Defined. *People v. Martinez*, supra, ~~(1998)~~ 67 Cal.App.4th 905, at p. 909 ~~[79 Cal.Rptr.2d 334]~~.
- “Jail” Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Nature of Object. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].
- Knowledge of Location as Penal Institution. *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- Harmless Use. *People v. Savedra*, supra, ~~(1993)~~ 15 Cal.App.4th 738, at pp. 743–744 ~~[19 Cal.Rptr.2d 115]~~; *People v. Martinez*, supra, ~~(1998)~~ 67 Cal.App.4th 905, at pp. 910–913 ~~[79 Cal.Rptr.2d 334]~~.
- Unanimity. *People v. Wolfe*, supra, ~~(2003)~~ 114 Cal.App.4th 177, at pp. 184–185 ~~[7 Cal.Rptr.3d 483]~~.
- Firearm Need Not Be Operable. *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].
- “Adjacent to” and “Grounds” Not Vague. *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [78 Cal.Rptr. 811].

LESSER INCLUDED OFFENSES

- Attempt to Bring or Send Weapon Into Penal Institution. Pen. Code, §§ 664, 4574(a), (b), or (c); *People v. Carter* (1981) 117 Cal.App.3d 546, 548 [172 Cal.Rptr. 838].

If the defendant is charged with bringing or sending tear gas or a tear gas weapon into a penal institution, the offense is a misdemeanor unless tear gas was released in the institution. (Pen. Code, § 4574(b) & (c).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that tear gas was released. If the jury finds that this has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment pursuant to Penal Code section 2684 is not “under the custody of prison officials.” (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2024¹²) Crimes Against Governmental Authority, § 10543.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

**2964. Purchasing Alcoholic Beverage for Person Under 21:
Resulting in Death or Great Bodily Injury (Bus. & Prof. Code, §
25658(a) & (c))**

The defendant is charged [in Count __] with [unlawfully] (purchasing an alcoholic beverage for[,]/ [or] (furnishing[,]/ [or] giving[,]/ [or] giving away) an alcoholic beverage to[,]) a person under 21 years old causing (death/ [or] great bodily injury) [in violation of Business and Professions Code section 25658].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] (purchased an alcoholic beverage for[,]/ [or] (furnished[,]/ [or] gave[,]/ [or] gave away) an alcoholic beverage to[,]) _____ <insert name of person under 21>;
2. When the defendant did so, _____ <insert name of person under 21> was under 21 years old;
3. _____ <insert name of person under 21> consumed the alcoholic beverage;

AND

4. _____'s <insert name of person under 21> consumption of the alcoholic beverage caused (death/ [or] great bodily injury) to (himself/herself/ [or] another person).

An alcoholic beverage is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An alcoholic beverage includes _____ <insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>.]

[**Great bodily injury** is significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

An act causes (death/ [or] great bodily injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the act and the (death/ [or] injury) 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/ [or] great bodily injury). An act causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (death/ [or] injury).]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief at Least 21>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ *<insert name of person under 21>* was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____ *<insert name of person under 21>* was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Actual Reliance on Identification>

[The defendant did not unlawfully furnish an alcoholic beverage to a person under 21 years old if:

- 1. The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of _____'s *<insert name of person under 21>* age and identity;**
- 2. _____ *<insert name of person under 21>* showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;**

AND

- 3. The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of _____'s *<insert name of person under 21>* age and identity.**

As used here, a *government-issued document* is a document [including a driver's license or an identification card issued to a person in the armed forces] that has been, or appears to have been, issued by a government agency

and contains the person's name, date of birth, description, and picture. The government-issued document does not have to be genuine.

[An *agent* is a person who is authorized to act for the defendant in dealings with other people.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government-issued document, as evidence of _____'s <insert name of person under 21> age and identity. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised August 2006, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If there is evidence of multiple causes of death or injury, the court should also give the bracketed paragraph on causation that begins with “There may be more than one cause of (death/ [or] great bodily injury).” (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].)

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, although the prosecution is not required to prove that the defendant knew the age of the person he or she provided with alcohol, the defendant may assert as a defense a good faith belief that the person was at least 21. The burden is on the defendant to prove this defense. (*Ibid.*) The Court failed to state what burden of proof applies. Following *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067], the committee has drafted the instruction on the premise that the defendant's burden is to merely raise a reasonable doubt about the defense, and the prosecution must then prove beyond a reasonable doubt that the defense does not apply. If there is sufficient

evidence supporting the defense, the court has a **sua sponte** duty to give the bracketed paragraph on the defense. (*Ibid.*)

Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower, supra*, 28 Cal.4th at pp. 478–481.) Give the bracketed word “unlawfully” in the first sentence and element 1, and the bracketed paragraph on the defense.

AUTHORITY

- Elements. Bus. & Prof. Code, § 25658(a) & (c).
- “Alcoholic Beverage” Defined. Bus. & Prof. Code, § 23004.
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f).
- Knowledge of Age Not an Element. *In re Jennings, supra, (2004)* 34 Cal.4th 254, at p. 280 [~~17 Cal.Rptr.3d 645, 95 P.3d 906~~].
- Good Faith Belief Person at Least 21 Defense. *In re Jennings, supra, (2004)* 34 Cal.4th 254, at p. 280 [~~17 Cal.Rptr.3d 645, 95 P.3d 906~~].
- Bona Fide Evidence of Age Defense. Bus. & Prof. Code, § 25660(c); *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899 [73 Cal.Rptr. 352].
- Affirmative Defenses. See *People v. Mower, supra, (2002)* 28 Cal.4th 457, at pp. 478–481 [~~122 Cal.Rptr.2d 326, 49 P.3d 1067~~].

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2962, *Selling or Furnishing Alcoholic Beverage to Person Under 21*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2012) Crimes Against Public Peace and Welfare, § 443364–369448.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

3130. Personally Armed With Deadly Weapon (Pen. Code, § 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a deadly weapon in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly weapon* 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.

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.

A person is *armed* with a deadly weapon when that person:

1. Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense in connection with the crime[s] charged;

AND

2. Knows that he or she is carrying the deadly weapon [or has it available].

<If there is an issue in the case over whether the defendant was armed with the weapon "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised December 2008, February 2013, September 2019, September 2020, March 2022, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed phrase “that is inherently deadly or one” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the definition of “armed,” the court may give the bracketed phrase “or has a deadly weapon available” on request if the evidence shows that the weapon was at the scene of the alleged crime and “available to the defendant to use in furtherance of the underlying felony.” (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed “in the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancement. Pen. Code, § 12022.3.
- “Deadly Weapon” Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar*, *supra*, ~~(1997)~~ 16 Cal.4th ~~1023~~, at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses. *People v. Aguilar*, *supra*, ~~(1997)~~ 16 Cal.4th ~~1023~~, at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Armed. *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338]; *People v. Bland*, *supra*, ~~(1995)~~ 10 Cal.4th ~~991~~, at pp. 997–998 ~~[43 Cal.Rptr.2d 77, 898 P.2d 391]~~; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick*, *supra*, ~~(1991)~~ 227 Cal.App.3d ~~918~~, at pp. 927–928 ~~[278 Cal.Rptr. 274]~~.
- Must Be Personally Armed. *People v. Renner* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- “In Commission of” Felony. *People v. Jones*, *supra*, ~~(2001)~~ 25 Cal.4th ~~98~~, at pp. 109–110 ~~[104 Cal.Rptr.2d 753, 18 P.3d 674]~~; *People v. Masbruch*, *supra*, ~~(1996)~~ 13 Cal.4th ~~1001~~, at p. 1014 ~~[55 Cal.Rptr.2d 760, 920 P.2d 705]~~; *People v. Taylor*, *supra*, ~~(1995)~~ 32 Cal.App.4th ~~578~~, at p. 582 ~~[38 Cal.Rptr.2d 127]~~.
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar*, *supra*, ~~(1997)~~ 16 Cal.4th ~~1023~~, at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*, *supra*, ~~(2018)~~ 4 Cal.5th ~~1055~~, at p. 1065 ~~[232 Cal.Rptr.3d 51, 416 P.3d 42]~~ [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

~~*Penal Code Section 220*~~

~~A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense. (*People v. Rich* (2003) 109 Cal.App.4th 255, 261 [134 Cal.Rptr.2d 553].) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, “translates into an attempt to commit” a sexual offense. (*People v. Rich, supra*, 109 Cal.App.4th at p. 261.)~~

~~*Multiple Weapons*~~

~~There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [215 Cal.Rptr. 124] [defendant may only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [182 Cal.Rptr. 790] [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.~~

~~*Pepper Spray*~~

~~In *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678], the court upheld the jury’s determination that pepper spray was a deadly weapon.~~

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Punishment, §§ 400349, 411364, 388451.

5 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Criminal Trial, § 727758.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, Sentencing, § 91.31 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, Crimes Against the Person, §§ 142.20[7][c], 142.21[1][d][iii] (Matthew Bender).

3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly [or dangerous] weapon* is any object, instrument, or weapon that is [inherently deadly] [or] [dangerous] [or] [one that is] used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.

Someone *personally uses* a deadly [or dangerous] weapon if he or she intentionally [does any of the following]:

[1. Displays the weapon in a menacing manner(.;/)]

[OR]

[(2/1). Hits someone with the weapon(.;/)]

[OR]

[(3/2). Fires the weapon(.;/)]

[OR

(4/3). _____ <insert description of use>.]

<If there is an issue in the case over whether the defendant used the weapon “in the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, February 2013, September 2017,
September 2019, September 2020, March 2022, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give all of the bracketed “or dangerous” phrases if the enhancement charged uses both the words “deadly” and “dangerous” to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word “deadly.” (Pen. Code, § 12022.3.)

Give the bracketed phrase “inherently deadly” and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with “In deciding whether” if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the definition of “personally uses,” the court may give the bracketed item 3 if the case involves an object that may be “fired.”

If the case involves an issue of whether the defendant used the weapon “in the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996)

13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancements. Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.
- “Deadly Weapon” Defined. *People v. Aguilar*, *supra*, (1997) 16 Cal.4th 1023, at pp. 1028–1029 [~~68 Cal.Rptr.2d 655, 945 P.2d 1204~~]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses. *People v. Aguilar*, *supra*, (1997) 16 Cal.4th 1023, at pp. 1028–1029 [~~68 Cal.Rptr.2d 655, 945 P.2d 1204~~]; *People v. Godwin*, *supra*, (1996) 50 Cal.App.4th 1562, at pp. 1573–1574 [~~58 Cal.Rptr.2d 545~~].
- Personally Uses. *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(2).
- “In Commission of” Felony. *People v. Jones*, *supra*, (2001) 25 Cal.4th 98, at pp. 109–110 [~~104 Cal.Rptr.2d 753, 18 P.3d 674~~]; *People v. Masbruch*, *supra*, (1996) 13 Cal.4th 1001, at p. 1014 [~~55 Cal.Rptr.2d 760, 920 P.2d 705~~]; *People v. Taylor*, *supra*, (1995) 32 Cal.App.4th 578, at p. 582 [~~38 Cal.Rptr.2d 127~~].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon. *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].
- “Inherently Deadly” Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar*, *supra*, (1997) 16 Cal.4th 1023, at pp. 1028–1029 [~~68 Cal.Rptr.2d 655, 945 P.2d 1204~~].
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*, *supra*, (2018) 4 Cal.5th 1055, at p. 1065 [~~232 Cal.Rptr.3d 51, 416 P.3d 42~~] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

No Duty to Instruct on “Lesser Included Enhancements”

“[A] trial court’s sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on ‘lesser included enhancements.’ ” (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

Weapon Displayed Before Felony Committed

Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was “at least ... an aid in completing an essential element of the subsequent crimes. . . .”

(*People v. Masbruch*, *supra*, ~~(1996)~~ 13 Cal.4th ~~1001~~, at p. 1014 [~~55 Cal.Rptr.2d 760, 920 P.2d 705~~].)

Weapon Used Did Not Cause Death

In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. (*Ibid.*) The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be “a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime.” (*Ibid.*) [ellipsis and brackets omitted] Here, the court found that “[t]he knife was instrumental to the consummation of the murder and was used to advantage.” (*Ibid.*)

“One Strike” Law and Use Enhancement

Where the defendant’s use of a weapon has been used as a basis for applying the “one strike” law for sex offenses, the defendant may not also receive a separate enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

Assault and Use of Deadly Weapon Enhancement

“A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b).” (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

Robbery and Use of Deadly Weapon Enhancement

A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Crimes Against the Person, § 21440.

3 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Punishment, §§ 356408–417–357, 429361–430369.

5 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Criminal Trial, § 75827.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.30, 91.81[1][d] (Matthew Bender).

3149. Personally Used Firearm: Intentional Discharge Causing Injury or Death (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

If you find the defendant guilty of the crime[s] charged in Count[s] __[, [or of attempting to commit (that/those) crime[s]] or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally and intentionally discharged a firearm during that crime causing (great bodily injury/ [or] death). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;
2. The defendant intended to discharge the firearm;

AND

3. The defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct *natural and probable consequence* of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime (charged against/intended by) the defendant[of which the intentional discharge of a firearm was a *natural and probable consequence*]. A person is subject to prosecution if he or she committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant used the firearm “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised February 2012, September 2020, September 2022, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) If the defendant is charged with an enhancement for both intentional discharge *and* intentional discharge causing great bodily injury or death, the court may give CALCRIM No. 3150, *Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged*, instead of this instruction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with “An act causes . . .

.” If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with “There may be more than one cause” (*Id.* at pp. 335–338.)

The court should give the bracketed definition of “firearm” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the firearm “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

In element 3, give the bracketed phrase “who was not an accomplice to the crime” if there is evidence that the victim was an accomplice to the intended crime of which the intentional discharge of a firearm was a natural and probable consequence. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].)

If the court gives the bracketed phrase “who was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].)

Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancement. Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- “Firearm” Defined. Pen. Code, § 16520.

- “During Commission of” Felony. *People v. Jones, supra*, 25 Cal.4th at pp. 109–110; *People v. Masbruch, supra*, 13 Cal.4th at p. 1014; *People v. Taylor, supra*, 32 Cal.App.4th at p. 582.
- Proximate Cause. *People v. Jomo K. Bland, supra*, 28 Cal.4th at pp. 335–338.
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, 100 Cal.App.4th at pp. 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Accomplice Exception Attaches to Intended Crime. *People v. Flores, supra*, 129 Cal.App.4th at p. 182; *People v. Morales, supra*, 67 Cal.App.5th at pp. 340–341.

RELATED ISSUES

Need Not Personally Cause Injury or Death

“[Penal Code] Section 12022.53(d) requires that the defendant ‘intentionally and *personally* discharged a firearm’ (italics added), but only that he ‘proximately caused’ the great bodily injury or death. . . . The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things.” (*People v. Jomo K. Bland, supra*, 28 Cal.4th at p. 336 [italics in original].)

Person Injured or Killed Need Not Be Victim of Crime

In *People v. Oates* (2004) 32 Cal.4th 1048, 1052 [12 Cal.Rptr.3d 325, 88 P.3d 56], the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The court observed that “the phrase, ‘any person other than an accomplice,’ does not mean ‘the victim’ of the underlying crime.” (*Id.* at p. 1055.)

Multiple Enhancements for Single Injury

The court in *Oates* (*supra*, 32 Cal.4th at p. 1056) also held that the trial court was required to impose all five subdivision (d) enhancements because Penal Code section 12022.53(f) requires a court to impose the longest enhancement available. The court further found that Penal Code section 654 did not preclude imposition of multiple subdivision (d) enhancements due to “the long-recognized, judicially-created exception for cases involving multiple victims of violent crime.” (*Id.* at p. 1062.)

Multiple Enhancements May Not Be Imposed Based on Multiple Participants

In *People v. Cobb* (2004) 124 Cal.App.4th 1051, 1054, fn. 3 [21 Cal.Rptr.3d 869], the defendant and two others simultaneously shot at the decedent. The defendant was convicted of personally inflicting death by use of a firearm. (*Id.* at p. 1053; Pen. Code, § 12022.53(d).) In addition to the sentence for personally using a firearm, the trial court also imposed two sentences under Penal Code section 12022.53(e)(1) based on the other two participants having also fired at the decedent (*Ibid.*) The Court of Appeal reversed the latter two enhancements, holding that Penal Code section 12022.53(f) did not permit multiple sentence enhancements based on multiple participants in one crime. (*Id.* at p. 1058.)

Self-Defense and Imperfect Self-Defense

Penal Code section 12022.53(*l*) provides that “[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.” In *People v. Watie* (2002) 100 Cal.App.4th 866, 884 [124 Cal.Rptr.2d 258], the court held, “[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section’s application. It does not exempt imperfect self-defense.” Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (54th ed. 2024) Punishment, §§ 359419–360428.

5 Witkin & Epstein, California Criminal Law (54th ed. 2024) Criminal Trial, § 75827.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

3150. Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death—Both Charged (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegations that the defendant personally and intentionally discharged a firearm during (that/those) crime[s] and, if so, whether the defendant's act caused (great bodily injury/ [or] death). [You must decide whether the People have proved these allegations for each crime and return a separate finding for each crime.]

To prove that the defendant intentionally discharged a firearm, the People must prove that:

1. The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;

AND

2. The defendant intended to discharge the firearm.

If the People have proved both 1 and 2, you must then decide whether the People also have proved that the defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct *natural and probable consequence* of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if

nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime (charged against/intended by) the defendant[of which the intentional discharge of a firearm was a *natural and probable consequence*]. A person is subject to prosecution if he or she committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant used the firearm “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each of these allegations beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised February 2012, September 2020, September 2022, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) This instruction may be used when the defendant is charged with an enhancement both for intentional discharge *and* for intentional discharge causing great bodily injury or death. If only one of these enhancements is charged, do not use this instruction. Instead, give CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, or CALCRIM No. 3149,

Personally Used Firearm: Intentional Discharge Causing Injury or Death, whichever is appropriate.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with “An act causes” If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with “There may be more than one cause” (*Id.* at pp. 335–338.)

The court should give the bracketed definition of “firearm” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

In the paragraph following the elements, give the bracketed phrase “who was not an accomplice to the crime” if there is evidence that the victim was an accomplice to the intended crime of which the intentional discharge of a firearm was the natural and probable consequence. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].)

If the court gives the bracketed phrase “who was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancement. Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- “Firearm” Defined. Pen. Code, § 16520.
- “During Commission of” Felony. *People v. Jones, supra*, 25 Cal.4th at pp. 109–110; *People v. Masbruch, supra*, 13 Cal.4th at pp. 1014; *People v. Taylor, supra*, 32 Cal.App.4th at p. 582.
- Proximate Cause. *People v. Jomo K. Bland, supra*, 28 Cal.4th at pp. 335–338.
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, 100 Cal.App.4th at pp. 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Accomplice Exception Attaches to Intended Crime. *People v. Flores, supra*, 129 Cal.App.4th at p. 182; *People v. Morales, supra*, 67 Cal.App.5th at pp. 340–341.

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, and CALCRIM No. 3149, *Personally Used Firearm: Intentional Discharge Causing Injury or Death*.

SECONDARY SOURCES

- 3 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Punishment, §§ ~~359419–360428~~.
- 5 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Criminal Trial, § ~~72758~~.
- 5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.30[5] (Matthew Bender).
- 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

3151–3159. Reserved for Future Use

**3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(d)(6),
1192.7(c)(8), 12022.7, 12022.8)**

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ *<insert name of injured person>* during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ *<insert name of injured person>* was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.

[Committing the crime of _____ *<insert sexual offense charged>* is not by itself the infliction of great bodily injury.]

[A person inflicts great bodily injury if the person sells, furnishes, administers, or gives a controlled substance to another person who uses the substance and, as a result, suffers a significant or substantial physical injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____ *<insert name of injured person>* if the People have proved that:

1. Two or more people, acting at the same time, assaulted _____ *<insert name of injured person>* and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ *<insert name of injured person>* during the group assault;

AND

[3A. The amount or type of physical force the defendant used on _____ <insert name of injured person> was enough that it alone could have caused _____ <insert name of injured person> to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ <insert name of injured person> was sufficient in combination with the force used by the others to cause _____ <insert name of injured person> to suffer great bodily injury.]

The defendant must have applied substantial force to _____ <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

- 1. He or she knew of the criminal purpose of the person who committed the crime;**

AND

- 2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, February 2015, September 2020, March 2022, March 2024, October 2025*

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar, supra*, 3 Cal.4th at p. 750; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily injury is not equivalent to a finding of great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancements. Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 12022.7, 12022.8.
- Great Bodily Injury Enhancements Do Not Apply to Conviction for Murder or Manslaughter. *People v. Cook* (2015) 60 Cal.4th 922, 924 [183 Cal.Rptr.3d 502].
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, 3 Cal.4th at pp. 749–750 [greater than minor or moderate harm].
- Personal Infliction by Furnishing Drugs. Pen. Code, § 12022.7(f)(2).
- Great Bodily Injury May Be Established by Pregnancy or Abortion. *People v. Cross* (2008) 45 Cal.4th 58, 68 [82 Cal.Rptr.3d 373, 190 P.3d 706].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar, supra*, 3 Cal.4th at p. 746.
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762, 139 P.3d 136].
- This Instruction Is Correct In Defining Group Beating. *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, 100 Cal.App.4th at pp. 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “During Commission of” Felony. *People v. Jones, supra*, 25 Cal.4th at pp. 109–110; *People v. Masbruch, supra*, 13 Cal.4th at p. 1014; *People v. Taylor, supra*, 32 Cal.App.4th at p. 582.
- This Instruction Correctly Omits Requirement of Intent to Inflict GBI. *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 [117 Cal.Rptr.3d 884].

RELATED ISSUES

Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with “the intent to inflict such injury.” (Stats. 1995, ch. 341, § 1;

see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

Instructions on Aiding and Abetting

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant’s gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. (*Ibid.*) The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

Enhancement May Be Applied Once Per Victim

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

Furnishing Drugs

~~In *People v. Ollo* (2021) 11 Cal.5th 682 [279 Cal.Rptr.3d 668, 487 P.3d 981], the defendant was charged with personally inflicting great bodily injury on a victim who had voluntarily ingested the drugs furnished by the defendant. The court held: “[T]he act of furnishing is not by itself sufficient to establish personal infliction. Whether a defendant who furnishes drugs personally inflicts such injury depends on the facts of the particular case. To determine whether a defendant personally inflicts such injury, fact finders and courts must examine the circumstances of the underlying offense and the defendant’s role in causing the injury that followed.” (11 Cal.5th at p. 685.)~~

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (54th ed. 2024) Punishment, §§ 350401-40351.

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. 91, *Sentencing*, § 91.35 (Matthew Bender).

3161. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed (Pen. Code, § 12022.7(b))

If you find the defendant guilty of the crime[s] charged in Count[s] __[, [or of attempting to commit (that/those) crime[s]] or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury that caused _____ *<insert name of injured person>* to become (comatose/ [or] permanently paralyzed). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. The defendant personally inflicted great bodily injury on _____ *<insert name of injured person>* during the commission [or attempted commission] of the crime;

[AND]

2. The defendant's acts caused _____ *<insert name of injured person>* to (become comatose due to brain injury/ [or] suffer permanent paralysis)(./;)

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND]

3. _____ *<insert name of injured person>* was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.

[**Paralysis** is a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.]

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily

injury on _____ <insert name of injured person> if the People have proved that:

- 1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);**
- 2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ <insert name of injured person> was enough that it alone could have caused _____ <insert name of injured person> to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ <insert name of injured person> was sufficient in combination with the force used by the others to cause _____ <insert name of injured person> to suffer great bodily injury.]

The defendant must have applied substantial force to _____ <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

- 1. He or she knew of the criminal purpose of the person who committed the crime;**

AND

- 2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

*New January 2006; Revised June 2007, December 2008, September 2020, March 2024, * October 2025*

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily injury is not equivalent to a finding of great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

If the case involves an issue of whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–~~

~~535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(b).
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, 3 Cal.4th at pp. 749–750 [greater than minor or moderate harm].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, 100 Cal.App.4th at pp. 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “During Commission of” Felony. *People v. Jones, supra*, 25 Cal.4th at pp. 109–110; *People v. Masbruch, supra*, 13 Cal.4th at p. 1014; *People v. Taylor, supra*, 32 Cal.App.4th at p. 582.

RELATED ISSUES

Coma Need Not Be Permanent

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378 [94 Cal.Rptr. 2d 814], the court held that an enhancement under Penal Code section 12022.7(b) was proper where the victim was maintained in a medically induced coma for two months following brain surgery necessitated by the assault.

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (45th ed. 2012) Punishment, §§ 350401–354406.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

3162. Great Bodily Injury: Age of Victim (Pen. Code, § 12022.7(c) & (d))

If you find the defendant guilty of the crime[s] charged in Count[s] __[, [or of attempting to commit (that/those) crime[s]] or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on someone who was (under the age of 5 years/70 years of age or older). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. The defendant personally inflicted great bodily injury on _____ *<insert name of injured person>* during the commission [or attempted commission] of the crime;

[AND]

2. At that time, _____ *<insert name of injured person>* was (under the age of 5 years/70 years of age or older)(./;)

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND]

3. _____ *<insert name of injured person>* was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.

[Committing the crime of _____ *<insert sexual offense charged>* is not by itself the infliction of great bodily injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily

injury on _____ *<insert name of injured person>* if the People have proved that:

- 1. Two or more people, acting at the same time, assaulted _____ *<insert name of injured person>* and inflicted great bodily injury on (him/her);**
- 2. The defendant personally used physical force on _____ *<insert name of injured person>* during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ *<insert name of injured person>* was enough that it alone could have caused _____ *<insert name of injured person>* to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ *<insert name of injured person>* was sufficient in combination with the force used by the others to cause _____ *<insert name of injured person>* to suffer great bodily injury.

The defendant must have applied substantial force to _____ *<insert name of injured person>*. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

- 1. He or she knew of the criminal purpose of the person who committed the crime;**

AND

- 2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved

New January 2006; Revised June 2007, December 2008, September 2020, March 2024, * October 2025

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault. If the court gives bracketed element 3 instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar, supra*, 3 Cal.4th at p. 750; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily

injury is not equivalent to a finding of great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

If the case involves an issue of whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancements. Pen. Code, § 12022.7(c) & (d).
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, 3 Cal.4th at pp. 749–750 [greater than minor or moderate harm].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar, supra*, 3 Cal.4th at p. 746.
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, 100 Cal.App.4th at pp. 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “During Commission of” Felony. *People v. Jones, supra*, 25 Cal.4th at pp. 109–110; *People v. Masbruch, supra*, 13 Cal.4th at p. 1014; *People v. Taylor, supra*, 32 Cal.App.4th at p. 582.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Punishment, §§ ~~350401~~–~~354406~~.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

3163. Great Bodily Injury: Domestic Violence (Pen. Code, § 12022.7(e))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ <insert name of injured person> during the commission [or attempted commission] of that crime, under circumstances involving domestic violence. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <insert name of injured person> was not an accomplice to the crime.]

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.

Domestic violence means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person with whom the defendant is having or has had a dating relationship[,]/ [or] person who was or is engaged to the defendant).

Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]

[Committing the crime of _____ *<insert sexual offense charged>* is not by itself the infliction of great bodily injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____ *<insert name of injured person>* if the People have proved that:

1. Two or more people, acting at the same time, assaulted _____ *<insert name of injured person>* and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ *<insert name of injured person>* during the group assault;

AND

[3A. The amount or type of physical force the defendant used on _____ *<insert name of injured person>* was enough that it alone could have caused _____ *<insert name of injured person>* to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ *<insert name of injured person>* was sufficient in combination with the force used by the others to cause _____ *<insert name of injured person>* to suffer great bodily injury.]

The defendant must have applied substantial force to _____ *<insert name of injured person>*. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant inflicted the injury “during the commission of” the offense, see Bench Notes.>

[The person who was injured does not have to be a person with whom the defendant had a relationship.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

*New January 2006; Revised June 2007, December 2008, September 2020, March 2024, * October 2025*

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault.

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar, supra*, 3 Cal.4th at p. 750; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily

injury is not equivalent to a finding of great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

If the case involves an issue of whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(e).
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, 3 Cal.4th at pp. 749–750 [greater than minor or moderate harm].
- “Dating Relationship” Defined. Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required. *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar, supra*, 3 Cal.4th at p. 746.
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- “During Commission of” Felony. *People v. Jones, supra*, 25 Cal.4th at pp. 109–110; *People v. Masbruch, supra*, 13 Cal.4th at p. 1014; *People v. Taylor, supra*, 32 Cal.App.4th at p. 582.

RELATED ISSUES

Person Who Suffers Injury Need Not Be “Victim” of Domestic Abuse

Penal Code section 12022.7(e) does not require that the injury be inflicted on the “victim” of the domestic violence. (*People v. Truong* (2001) 90 Cal.App.4th 887, 899 [108 Cal.Rptr.2d 904].) Thus, the enhancement may be applied where “an angry husband physically abuses his wife and, as part of the same incident, inflicts great bodily injury upon the man with whom she is having an affair.” (*Id.* at p. 900.)

See also the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (45th ed. 2024) Punishment, §§ 350401–354406.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

3164–3174. Reserved for Future Use

3177. Sex Offenses: Sentencing Factors—Torture (Pen. Code, § 667.61(d)(3))

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, you must then decide whether[, for each crime,] the People have proved the additional allegation that, while committing that crime, the defendant also committed torture. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

- 1. During the commission of the crime, the defendant inflicted great bodily injury on someone else;**

AND

- 2. When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, or persuasion or for any sadistic purpose.**

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.**

[It is not required that a victim actually suffer pain.]

[Someone acts for the purpose of *extortion* if he or she intends to (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone acts for the purpose of *extortion* if he or she (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act. An *official act* is an act that an officer does in his or her official capacity using the authority of his or her public office.]

[Someone acts with a *sadistic purpose* if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself.]

<If there is an issue in the case over whether the torture was inflicted "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised September 2020, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Unlike murder by torture, the crime of torture under Penal Code section 206 does not require that the intent to cause pain be premeditated or that any cruel or extreme pain be prolonged. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1205 [68 Cal.Rptr.2d 619]; *People v. Vital* (1996) 45 Cal.App.4th 441, 444 [52 Cal.Rptr.2d 676].) Torture as defined in section 206 focuses on the mental state of the perpetrator and not the actual pain inflicted. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904].) Give the bracketed sentence stating that “It is not required that a victim actually suffer pain” on request if there is no proof that the alleged victim actually suffered pain.

“Extortion” need not be defined for purposes of torture. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1564 [18 Cal.Rptr.2d 395]; but see *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628] [term should be defined for kidnapping under Pen. Code, § 209].) Nevertheless, either of the bracketed definitions of extortion, and the related definition of “official act,” may be given on request if any of these issues are raised in the case. (See Pen. Code, § 518 [defining “extortion”]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining “official act”].) Extortion may also be committed by using “the color of official right” to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition of the term].) It appears that this type of extortion would rarely occur in the context of torture, so it is excluded from this instruction.

“Sadistic purpose” may be defined on request. (See *People v. Barrera, supra*, 14 Cal.App.4th at p. 1564; *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712] [approving use of phrase in torture-murder and special circumstances torture-murder instructions].)

If the case involves an issue of whether the defendant inflicted the injury “during the commission of” the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor’s erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- One-Strike Sex Offense Statute—Torture Factor. Pen. Code, § 667.61(d)(3).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(j); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Elements of Torture. Pen. Code, § 206.
- “Extortion” Defined. Pen. Code, § 518.
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); see, e.g., *People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904] [broken and smashed teeth, split lip, and facial cut sufficient evidence of great bodily injury].
- Cruel Pain Equivalent to Extreme or Severe Pain. *People v. Aguilar*, *supra*, ~~(1997)~~ 58 Cal.App.4th ~~1196~~, at p. 1202 ~~[68 Cal.Rptr.2d 619]~~.
- Intent. *People v. Hale*, *supra*, ~~(1999)~~ 75 Cal.App.4th ~~94~~, at pp. 106–107 ~~[88 Cal.Rptr.2d 904]~~; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042–1043 [84 Cal.Rptr.2d 5]; see *People v. Aguilar*, *supra*, ~~(1997)~~ 58 Cal.App.4th ~~1196~~, at pp. 1204–1206 ~~[68 Cal.Rptr.2d 619]~~ [neither premeditation nor intent to inflict prolonged pain are elements of torture].
- “Sadistic Purpose” Defined. *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712]; *People v. Aguilar*, *supra*, ~~(1997)~~ 58 Cal.App.4th ~~1196~~, at pp. 1202–1204 ~~[68 Cal.Rptr.2d 619]~~; see *People v. Healy* (1993) 14 Cal.App.4th 1137, 1142 [18 Cal.Rptr.2d 274] [sexual element not required].
- “During Commission of” Felony. *People v. Jones*, *supra*, ~~(2001)~~ 25 Cal.4th ~~98~~, at pp. 109–110 ~~[104 Cal.Rptr.2d 753, 18 P.3d 674]~~; *People v. Masbruch*,

~~*supra.* (1996) 13 Cal.4th 1001, at p. 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705];~~
~~*People v. Taylor, supra, (1995) 32 Cal.App.4th 578, at p. 582 [38 Cal.Rptr.2d*~~
~~*127].*~~

RELATED ISSUES

See the Related Issues section of CALCRIM No. 810, *Torture*.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (45th ed. 2024) Punishment, §§ 459.543–463.550.

5 Witkin & Epstein, California Criminal Law (45th ed. 2024) Criminal Trial, § 758.27.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.102[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.15 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 13:9 (The Rutter Group).

3218. Value of Stolen Property Sold, Exchanged, or Returned (Pen. Code, § 12022.10)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,], [or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of _____ *<insert lesser offense[s]>*, you must then decide whether the People have proved the additional allegation that the defendant (sold[,]/[or] exchanged[,]/[or] returned) property for value that had been obtained through [an] act[s] of (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business and the value of that property was more than \$_____ *<insert amount alleged>*.

To prove this allegation, the People must prove that:

1. In the commission [or attempted commission] of the crime[s], the defendant

<defendant acted alone>

[[sold[,]/[or] exchanged[,]/[or] returned) property/[or] attempted to (sell[,]/[or] exchange[,]/[or] return) property] for value;

[OR]

<defendant acted in concert>

[acted together with another person who (sold[,]/[or] exchanged[,]/[or] returned) property for value[or] [who attempted to (sell[,]/[or] exchange[,]/[or] return property] for value;

2. This property had been obtained through [an] act[s] of (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business;
3. At the time of the [attempted] (sale[,]/[or] exchange[,]/[or] return) of the property for value, the defendant knew that the property had been obtained though [an] act[s] of (shoplifting[,]/[or] theft[,]/[or] burglary) from a retail business;

AND

4. The [combined] value of the property was greater than \$_____ *<insert amount alleged>*.

[In deciding the value of the property, you may add together the value of property in Count[s] _____ <specify all counts that jury may use to compute cumulative total loss> to determine whether the total value was more than \$ _____ <insert amount alleged> if the People prove that the crimes arose from a common scheme or plan.]

[When computing the property value according to this instruction, do not count any property more than once simply because it is mentioned in more than one count, if the property mentioned in those counts refers to the same property with respect to the same victim.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.10.

3219. Acting in Concert to Take, Damage, or Destroy Property (Pen. Code, § 12022.65)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether the People have proved the additional allegation that the defendant acted together with two or more persons to (take[,]/[or] attempt to take[,]/[or] damage[,]/[or] destroy) any property.

To prove this allegation, the People must prove that:

In the commission [or attempted commission] of the crime, the defendant acted together with two or more other people to (take[,]/[or] attempt to take[,]/[or] damage[,]/[or] destroy) property.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

AUTHORITY

- Enhancement. Pen. Code, § 12022.65.

3220. Amount of Loss (Pen. Code, § 12022.6)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether the People have proved the additional allegation that the value of the property **[(taken[,]/ [or] damaged[,]/ [or] destroyed)]** was more than \$ _____ *<insert amount alleged>*.

To prove this allegation, the People must prove that:

<Alternative A: took, damaged, or destroyed property>

- 1. In the commission [or attempted commission] of the crime, the defendant (took[,]/ [or] damaged[,]/ [or] destroyed) property;**
- ~~**2. When the defendant acted, (he/she) intended to (take[,]/ [or] damage[,]/ [or] destroy) the property;**~~

AND

- 23. The [total] loss caused by the defendant's (taking[,]/ [or] damaging[,]/ [or] destroying) the property was greater than \$ _____ *<insert amount alleged>*.1**

[If you find the defendant guilty of more than one crime, you may add together the loss suffered by each victim in Count[s] _____ *<specify all counts that jury may use to compute cumulative total loss>* to determine whether the total losses to all the victims were more than \$ _____ *<insert amount alleged>* if the People prove that:

- A. The defendant ~~intended to and did~~ (~~tookake~~[,]/ [or] damagedd[,]/ [or] destroyed) property in each crime;**

AND

- B. The losses arose from a common scheme or plan.]**

~~**[The value of property is the fair market value of the property.]**~~

[When computing the amount of loss according to this instruction, do not count any taking, damage, or destruction more than once simply because it is

mentioned in more than one count, if the taking, damage, or destruction mentioned in those counts refers to the same taking, damage, or destruction with respect to the same victim.]

<Alternative B: Penal Code section 496 violation(s)>

[The property value and/or loss amount was greater than \$ *<insert amount alleged>*.]

[If you find the defendant guilty of more than one felony violation of receiving stolen property, you may combine the stolen property value and/or loss amount in Count[s] *<specify all counts that jury may use to compute cumulative total loss>* to determine whether the total value and/or loss amount was more than \$ *<insert amount alleged>* if the People prove that the crimes arose from a common scheme or plan.]

[The value of property is the fair market value of the property.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised August 2009, April 2010, August 2016; Revoked March 2021; Restored and Revised October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

~~The court **must** insert the alleged amounts of loss in the blanks provided so that the jury may first determine whether the statutory threshold amount exists for any single victim, and then whether the statutory threshold amount exists for all victims or for all losses to one victim cumulatively.~~

Alternative A applies to taking, damaging, or destroying property in the commission or attempted commission of any felony. Alternative B applies to felony violations of Penal Code section 496. In the introductory paragraph, give the bracketed language about property taken, damaged, or destroyed only when instructing with Alternative A. **Do not** use the bracketed language about attempt and lesser crimes when instructing with Alternative B.

Penal Code section 12022.6 sunset on January 1, 2018. In 2024, Proposition 36 reenacted this statute but with several differences, including new threshold amounts and the addition of property values or loss for felony violations of Penal Code section 496. Many of the cases cited in the authority section interpret the prior version of the statute but may still be relevant.

AUTHORITY

- Enhancement. Pen. Code, § 12022.6.
- Value Is Fair Market Value. *People v. Swanson* (1983) 142 Cal.App.3d 104, 107–109 [190 Cal.Rptr. 768].
- ~~Definition of “Loss” of Computer Software. Pen. Code, § 12022.6(e).~~
- Defendant Need Not Intend to Permanently Deprive Owner of Property. *People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].
- Victim Need Not Suffer Actual Loss. *People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr. 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].
- Defendant Need Not Know or Reasonably Believe Value of Item Exceeded Amount Specified. *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606–607 [188 Cal.Rptr. 63].
- Aggregation of Amount Based on Common Scheme or Plan. Pen. Code, § 12022.6(b).
- ~~Great Taking Enhancement Encompasses Liability of Aiders and Abettors. *People v. Acosta* (2014) 226 Cal.App.4th 108, 123–126 [171 Cal.Rptr.3d 774].~~

RELATED ISSUES

“Take”

As used in the prior version of Penal Code section 12022.6, “take” does not have the same meaning as in the context of theft. (*People v. Kellett, supra, (1982)* 134 Cal.App.3d 949, at pp. 958–959 ~~[185 Cal.Rptr. 1]~~.) The defendant need not intend to permanently deprive the owner of the property so long as the defendant intends to take, damage, or destroy the property. (*Ibid.*) Moreover, the defendant need not actually steal the property but may “take” it in other ways. (*People v. Superior Court (Kizer)* (1984) 155 Cal.App.3d 932, 935 [204 Cal.Rptr. 179].) Thus, the enhancement may be applied to ~~the crime of receiving stolen property (*ibid.*) and to~~ the crime of driving a stolen vehicle (*People v. Kellett, supra*, 134 Cal.App.3d at pp. 958–959).

“Loss”

As used in the prior version of Penal Code section 12022.6, “loss” does not require that the victim suffer an actual or permanent loss. (*People v. Bates*, ~~*supra*, (1980)~~ 113 Cal.App.3d ~~481~~, at pp. 483–484 [~~169 Cal.Rptr. 853~~]; *People v. Ramirez*, ~~*supra*, (1980)~~ 109 Cal.App.3d ~~529~~, at pp. 539–540 [~~167 Cal.Rptr. 174~~].) Thus, the enhancement may be imposed when the defendant had temporary possession of the stolen property but the property was recovered (*People v. Bates*, *supra*, 113 Cal.App.3d at pp. 483–484), and when the defendant attempted fraudulent wire transfers but the bank suffered no actual financial loss (*People v. Ramirez*, *supra*, 109 Cal.App.3d at pp. 539–540).

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

(Self-defense/[or] defense of another) is a defense to _____ *<insert list of pertinent crimes charged>*. The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ *<insert name of third party>*) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];
2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was (imminent danger of bodily injury to (himself/herself/ [or] someone else)/ [or] an imminent danger that (he/she/ [or] someone else) would be touched unlawfully). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

<The following definition may be given if requested.>

[Danger is *imminent* if, when the defendant used force, the danger actually existed or the defendant reasonably believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.]

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar

knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The slightest touching can be unlawful 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 defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ *<insert name of victim>* threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ *<insert name of victim>* had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ *<insert name of victim>*, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/ _____ *<insert crime>*) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that at least one of the three elements of (self-defense/ [or] defense of another) listed above is not met in this case~~the defendant did not act in lawful (self-defense/ [or] defense of another)~~. If the People have not met this burden, you must find the defendant not guilty of _____ *<insert crime(s) charged>*.

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].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self-Defense*.

AUTHORITY

- Instructional Requirements. *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance. Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers, supra*, 61 Cal.App.4th at p. 335.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey, supra*, 13 Cal.4th at p. 1089).
- No Duty to Retreat. *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Temporary Possession of Firearm by Felon in Self-Defense. *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases. *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Inmate Self-Defense. *People v. Saavedra* (2007) 156 Cal.App.4th 561 [67 Cal.Rptr.3d 403].
- Reasonable Belief. *People v. Humphrey, supra*, 13 Cal.4th at p. 1082; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. “The common law does not take account of a person’s mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds ‘the mentally deranged or insane defendant accountable for his negligence as if the

person were a normal, prudent person.’ (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)” (*Ibid.*; see also Rest.2d Torts, § 283B.)

Reasonable Person Standard and Physical Limitations

A defendant’s physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

See also the Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Defenses, §§ ~~6875~~, ~~781–7380~~, ~~9486–8795~~.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11, 73.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings*, § 124.04 (Matthew Bender).

3477. Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury (Pen. Code, § 198.5)

The law presumes that the defendant reasonably feared imminent death or great bodily injury to (himself/herself)[, or to a member of (his/her) family or household,] if:

1. An intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;
2. The defendant knew [or reasonably believed] that an intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;
3. The intruder was not a member of the defendant's household or family;

AND

4. The defendant used force intended to or likely to cause death or great bodily injury to the intruder inside the home.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than ~~minor or~~ moderate harm.]

The People have the burden of overcoming this presumption. This means that the People must prove that the defendant did not have a reasonable fear of imminent death or injury to (himself/herself)[, or to a member of his or her family or household,] when (he/she) used force against the intruder. If the People have not met this burden, you must find the defendant reasonably feared death or injury to (himself/herself)[, or to a member of his or her family or household].

New January 2006; Revised March 2017, September 2020, October 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on presumptions relevant to the issues of the case. (See *People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370]; but see *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1327 [68

Cal.Rptr.2d 681] [presumption not relevant because defendant was not a resident]; *People v. Owen* (1991) 226 Cal.App.3d 996, 1005 [277 Cal.Rptr. 341] [jury was otherwise adequately instructed on pertinent law].)

Give this instruction when there is evidence that a resident had a reasonable expectation of protection against unwanted intruders. *People v. Grays* (2016) 246 Cal.App.4th 679, 687-688 [202 Cal.Rptr.3d 288].

~~The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)~~

AUTHORITY

- Instructional Requirements. Pen. Code, § 198.5; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494–1495 [8 Cal.Rptr.2d 513].
- Rebuttable Presumptions Affecting Burden of Proof. Evid. Code, §§ 601, 604, 606.
- Definition of Residence. *People v. Grays*, *supra*, ~~(2016)~~ 246 Cal.App.4th ~~679~~, at pp. 687-688 [~~202 Cal.Rptr.3d 288~~].

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Defenses, § 837~~6~~.
- 3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11[1], 73.13 (Matthew Bender).

3478–3499. Reserved for Future Use

3516. Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited

<Give this paragraph when the law does not specify which crime must be sustained or dismissed if the defendant is found guilty of both.>

[The defendant is charged in Count __ with _____ <insert name of alleged offense > and in Count __ with _____ <insert name of alleged offense >. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]

<Give the following paragraph when the defendant is charged with both theft and receiving stolen property offenses based on the same incident.>

[The defendant is charged in Count __ with _____ <insert theft offense> and in Count __ with _____ <insert receiving stolen property offense>.

You must first decide whether the defendant is guilty of _____ <insert name of theft offense>. If you find the defendant guilty of _____ <insert name of theft offense>, you must return the verdict form for _____ <insert name of receiving stolen property offense> unsigned. If you find the defendant not guilty of _____ <insert theft offense > you must then decide whether the defendant is guilty of _____ <insert name of receiving stolen property offense>.]

*New January 2006; Revised June 2007, October 2010, April 2011, October 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction where the defendant is charged in the alternative with multiple counts for a single event. (See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].) —This instruction applies only to those cases in which the defendant may be legally convicted of only one of the alternative charges. —See dual conviction list in *Related Issues* section below.

If the evidence raises the issue whether the same act or single event underlies both a theft conviction and a receiving stolen property conviction, this may be a question for the jury and the instruction should be modified accordingly.

If the defendant is charged with both theft and receiving stolen property, and the jury informs the court that it cannot reach a verdict on the theft count, the court may then instruct the jury to consider the receiving stolen property count.

If the defendant is charged with multiple counts for separate offenses, give CALCRIM No. 3515, *Multiple Counts: Separate Offenses*.

If the case involves separately charged greater and lesser offenses, the court should give CALCRIM No. 3519.

~~Because the law is unclear in this area, the court~~ has a sua sponte duty must decide whether to give this instruction if the defendant is charged with specific sexual offenses for the same time period as and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. (*People v. Martinez* (2024) 105 Cal.App.5th 178, 184 [325 Cal.Rptr.3d 700].) ~~If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss.~~

AUTHORITY

- Prohibition Against Dual Conviction. *People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48]; *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Allen*, supra, ~~(1999)~~ 21 Cal.4th 846, at p. 851 ~~[89 Cal.Rptr.2d 279, 984 P.2d 486]~~; *People v. Jaramillo*, supra, ~~(1976)~~ 16 Cal.3d 752, at p. 757 ~~[129 Cal.Rptr. 306, 548 P.2d 706]~~.
- Instructional Requirements. See *People v. Allen*, supra, ~~(1999)~~ 21 Cal.4th 846, at p. 851 ~~[89 Cal.Rptr.2d 279, 984 P.2d 486]~~; *People v. Jaramillo*, supra, ~~(1976)~~ 16 Cal.3d 752, at p. 757 ~~[129 Cal.Rptr. 306, 548 P.2d 706]~~.
- Conviction of Receiving Stolen Property Not Possible if Defendant Convicted of Theft. *People v. Ceja* (2010) 49 Cal.4th 1, 3-4 [108 Cal.Rptr.3d 568, 229 P.3d 995].

RELATED ISSUES

Dual Conviction May Not Be Based on Necessarily Included Offenses

“[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.” (*People v. Ortega*, supra, ~~(1998)~~ 19 Cal.4th 686, at p. 692 ~~[80 Cal.Rptr.2d 489, 968 P.2d 48]~~ [emphasis in original, citations and internal quotation marks omitted]; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [16 Cal.Rptr.3d 902, 94 P.3d 1098].) “In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether all the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense.” (*People v. Montoya*, supra, 33 Cal.4th at p. 1034 [internal quotation marks and citation omitted].)

Dual Conviction—Examples of Offense Where Prohibited or Permitted

The courts have held that dual conviction is *prohibited* for the following offenses:

- Robbery and theft. *People v. Ortega*, supra, ~~(1998)~~ 19 Cal.4th 686, at p. 699 ~~[80 Cal.Rptr.2d 489, 968 P.2d 48]~~.
- Robbery and receiving stolen property. *People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587 [267 Cal.Rptr. 66].
- Theft and receiving stolen property. *People v. Jaramillo*, supra, ~~(1976)~~ 16 Cal.3d 752, at p. 757 ~~[129 Cal.Rptr. 306, 548 P.2d 706]~~.
- Battery and assault. See *People v. Ortega*, supra, ~~(1998)~~ 19 Cal.4th 686, at p. 693 ~~[80 Cal.Rptr.2d 489, 968 P.2d 48]~~.
- Forgery and check fraud. *People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66].
- Forgery and credit card fraud. *People v. Cobb* (1971) 15 Cal.App.3d 1, 4 [93 Cal.Rptr. 152].

The courts have held that dual conviction is *permitted* for the following offenses (although dual punishment is not):

- Burglary and theft. *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [27 Cal.Rptr.2d 839].
- Burglary and receiving stolen property. *People v. Allen* (1999) 21 Cal.4th 846, 866 [89 Cal.Rptr.2d 279, 984 P.2d 486].
- Carjacking and grand theft. *People v. Ortega*, supra, ~~(1998)~~ 19 Cal.4th 686, at p. 693 ~~[80 Cal.Rptr.2d 489, 968 P.2d 48]~~.
- Carjacking and robbery. *People v. Ortega*, supra, ~~(1998)~~ 19 Cal.4th 686, at p. 700 ~~[80 Cal.Rptr.2d 489, 968 P.2d 48]~~.

- Carjacking and unlawful taking of a vehicle. *People v. Montoya*, supra, (2004) 33 Cal.4th 1031, at p. 1035 [~~16 Cal.Rptr.3d 902, 94 P.3d 1098~~].
- Murder and gross vehicular manslaughter while intoxicated. *People v. Sanchez*, supra, (2001) 24 Cal.4th 983, at p. 988 [~~103 Cal.Rptr.2d 698, 16 P.3d 118~~].
- Murder and child abuse resulting in death. *People v. Malfavon* (2002) 102 Cal.App.4th 727, 743 [125 Cal.Rptr.2d 618].

Joy Riding and Receiving Stolen Property

A defendant cannot be convicted of both joy riding (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), unless the record clearly demonstrates that the joy riding conviction is based exclusively on the theory that the defendant drove the car, temporarily depriving the owner of possession, not on the theory that the defendant stole the car. (*People v. Allen*, supra, (1999) 21 Cal.4th 846, at p. 851 [~~89 Cal.Rptr.2d 279, 984 P.2d 486~~]; *People v. Jaramillo*, supra, (1976) 16 Cal.3d 752, at pp. 758–759 [~~129 Cal.Rptr. 306, 548 P.2d 706~~]; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252 [273 Cal.Rptr. 212].)

Accessory and Principal

In *People v. Prado* (1977) 67 Cal.App.3d 267, 273 [136 Cal.Rptr. 521], and *People v. Francis* (1982) 129 Cal.App.3d 241, 248 [180 Cal.Rptr. 873], the courts held that the defendant could not be convicted as both a principal and as an accessory after the fact for the same offense. However, later opinions have criticized these cases, concluding, “there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime.” (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324 [19 Cal.Rptr.2d 423]; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816 [25 Cal.Rptr.2d 676]; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536, fn. 6 [26 Cal.Rptr.2d 323].)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4⁵th ed. 20~~12~~24) Criminal Trial, § 7~~27~~58.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).