



Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688

courts.ca.gov/policy-administration/invitations-comment

INVITATION TO COMMENT

CALCRIM-2026-01

Criminal Jury Instructions: Additions and Revisions

Invitation to Comment Details

Proposed Rules, Forms, Standards, or Statutes

New and Revised Jury Instructions

Proposed by

Advisory Committee on Criminal Jury
Instructions

Hon. Jeffrey Ross, Chair

Action Requested

Review and Submit Comments by June 5,
2026, to invitations@jud.ca.gov

Proposed Effective Date

October 16, 2026

Contact

Kara Portnow, 415-865-4961

Kara.Portnow@jud.ca.gov

(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 It is circulated for comment purposes only.)

Summary

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

CALCRIM Proposed Changes: Invitation to Comment May 4–June 5, 2026

Instruction Number	Instruction Title
521	First Degree Murder
590	Gross Vehicular Manslaughter While Intoxicated
734	Special Circumstances: Murder by Poison
736	Special Circumstances: Killing by Street Gang Member
821	Child Abuse Likely to Produce Great Bodily Harm or Death
830 & 831	Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death; Abuse of Elder or Dependent Adult
850	Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness
1002 & 1003	Rape of Intoxicated Woman; Rape of Unconscious Woman
1120	Continuous Sexual Abuse
1124, 1125, 1126	Contacting Minor With Intent to Commit Certain Felonies; Arranging Meeting With Minor for Lewd Purpose; Going to Meeting With Minor for Lewd Purpose
1150	Pimping
1192 & 1193	Testimony on Rape Accommodation Syndrome; Testimony on Child Sexual Abuse Accommodation Syndrome
1400 & 1401	Active Participation in Criminal Street Gang; Felony or Misdemeanor Committed for Benefit of Criminal Street Gang
1600	Robbery
1704	Possession of Burglary Tools
2542	Carrying Firearm: Active Participant in Criminal Street Gang
2900	Vandalism
New 2903	Damaging Wireless Communication Device

Instruction Number	Instruction Title
3161	Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed
New 3237	Aggravating Factor: Probation, Mandatory Supervision, Postrelease Community Supervision, or Parole When Crime was Committed
3426 & 3428	Voluntary Intoxication; Mental Impairment: Defense to Specific Intent or Mental State
3590	Final Instruction on Discharge of Jury

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

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

<Give if multiple theories alleged.>

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

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

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

<A. Deliberation and Premeditation>

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

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

<B. Torture>

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

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

AND

4. The torture was a cause of death.]

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

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

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

<C. Lying in Wait>

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

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

AND

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

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind

equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

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

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

<D. Destructive Device or Explosive>

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

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

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

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

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

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

<E. Weapon of Mass Destruction>

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

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

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

<F. Penetrating Ammunition>

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

<G. Discharge From Vehicle>

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

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

AND

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

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

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

<H. Poison>

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

1. (He/She) deliberately gave _____ <insert name of victim> **poison;**

AND

2. When giving the poison, the defendant intended to kill _____ <insert name of victim> or to inflict injury likely to cause _____ <insert name of victim>'s death.

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

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

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

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.

*New January 2006; Revised August 2006, June 2007, April 2010, October 2010, February 2012, February 2013, February 2015, August 2015, September 2017, September 2022, September 2023, October 2026**

** 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. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

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

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

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

When instructing on murder by poison, give the bracketed definition of poison if there is a dispute over whether the substance is a poison. Give the bracketed

paragraph stating that the substance is a poison if the parties stipulate that the substance is a poison.

Do **not** modify this instruction to include the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]. -Although those factors may assist in appellate review of the sufficiency of the evidence to support findings of premeditation and deliberation, they neither define the elements of first degree murder nor guide a jury’s determination of the degree of the offense. (*People v. Moon* (2005) 37 Cal.4th 1, 31 [32 Cal.Rptr.3d 894, 117 P.3d 591]; *People v. Steele* (2002) 27 Cal.4th 1230, 1254 [120 Cal.Rptr.2d 432, 47 P.3d 225]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 [245 Cal.Rptr. 185, 750 P.2d 1342].)

AUTHORITY

- Types of Statutory First Degree Murder. Pen. Code, § 189.
- “Armor Piercing Ammunition” Defined. Pen. Code, § 16660.
- “Destructive Device” Defined. Pen. Code, § 16460.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death. *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22, 139 P.3d 492].
- Mental State Required for Implied Malice. *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- “Explosive” Defined. Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- “Weapon of Mass Destruction” Defined. Pen. Code, § 11417.
- Discharge From Vehicle. *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements. *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 582–585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- “Poison” Defined. *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- “Premeditation and Deliberation” Defined. *People v. Pearson* (2013) 56 Cal.4th 393, 443–444 [154 Cal.Rptr.3d 541, 297 P.3d 793]; *People v. Anderson, supra*, 70 Cal.2d at pp. 26–27; *People v. Bender* (1945) 27 Cal.2d

164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].

- Torture Requirements. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].
- Murder by Poison Requirements. *People v. Brown* (2023) 14 Cal.5th 453, 471 [305 Cal.Rptr.3d 127, 524 P.3d 1088].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, “leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation”]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

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

Torture—Instruction on Voluntary Intoxication

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

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger, supra*, 52 Cal.3d at p. 1239.)

Torture—Premeditated Intent to Inflict Pain

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

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

In *People v. Stanley, supra*, 10 Cal.4th at p. 794, the court approved this instruction regarding the length of time a person lies in wait: “[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.”

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

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 2024) Crimes Against the Person, § 23, 25417.

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

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 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, October 2026**

** 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.

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/infraction 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 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. Austry* (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 a **sua sponte** duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count, 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, 237 P.3d 474].) 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.)

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].
- 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]; but see *People v. Demacedo* (2025) 115 Cal.App.5th 1249, 1254–1258 [338 Cal.Rptr.3d 870] [Veh. Code, § 23153 not lesser included offense when offenses involve different victims].

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* (5th ed. 2024) Crimes Against the Person, §§ 165–176.

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).

734. Special Circumstances: Murder by Poison (Pen. Code, § 190.2(a)(19))

The defendant is charged with the special circumstance of murder by poison [in violation of Penal Code section 190.2(a)(19)].

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

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

AND

- 2. The defendant killed _____ <insert name of decedent> by the administration of poison.**

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

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

*New January 2006; Revised October 2026**

** 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 special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

Give the bracketed definition of poison if there is a dispute over whether the substance is a poison. Give the bracketed paragraph stating that the substance is a poison if the parties **stipulate/agree** that the substance is a poison.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(19).
- Special Circumstance Is Constitutional. *People v. Catlin* (2001) 26 Cal.4th 81, 159 [109 Cal.Rptr.2d 31, 26 P.3d 357].

- “Poison” Defined. *People v. Van Deleer* (1878) 53 Cal. 147, 149.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Punishment, §§ ~~632–633~~^{527–528}.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.13[19], 87.14 (Matthew Bender).

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

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

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

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

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

AND

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

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

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

<If criminal street gang has already been defined>

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

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

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

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

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

AND

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

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

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

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)(any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>;
2. At least one of those crimes was committed after September 26, 1988;
3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;
4. The crimes were committed on separate occasions, or by two or more members;
5. The crimes commonly benefitted a criminal street gang;

AND

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

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

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

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

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

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

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

*New January 2006; Revised August 2006, June 2007, February 2014, February 2016, March 2022, March 2023, September 2024, October 2026**

** 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 special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The effective date of this special circumstance was March 8, 2000.

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

On request, give the bracketed paragraph that begins with “If you find the defendant guilty of a crime in this case.” (*People v. Sengpadychith* (2001) 26

Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

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

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

Related Instructions

CALCRIM No. 562, *Transferred Intent*.

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

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(22).
- Specific Intent Required to Further Criminal Conduct by Gang Members. *People v. Cardenas* (2025) 18 Cal.5th 797, 825–826 [336 Cal.Rptr.3d 215, 574 P.3d 680]
- “Active Participation” Defined. *People v. Cardenas* (2025) 18 Cal.5th 797, 828–829 [336 Cal.Rptr.3d 215, 574 P.3d 680]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- “Criminal Street Gang” Defined. Pen. Code, § 186.22(f).
- “Collectively Engage” Defined. *People v. Clark* (2024) 15 Cal.5th 743, 755–756 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- “Organized” Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- Transferred Intent Under Penal Code Section 190.2(a)(22). *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- “Pattern of Criminal Gang Activity” Defined. Pen. Code, § 186.22(e), (g).
- Examples of Common Benefit. Pen. Code, § 186.22(g); *People v. Cortez* (2025) 114 Cal.App.5th 1201, 1211–1213 [337 Cal.Rptr.3d 455] [intra-gang punishment for financial transgressions].

- Non-Reputational Common Benefit Means Actual Benefit. *People v. Cooper* (2023) 14 Cal.5th 735, 743–744 [308 Cal.Rptr.3d 409, 529 P.3d 66] [“the question about a common benefit asks about how the specific predicate offense actually benefited the gang”]; *People v. Shively* (2025) 111 Cal.App.5th 460, 468–470 [332 Cal.Rptr.3d 855] [insufficient evidence of common benefit that was more than reputational].
- “Felonious Criminal Conduct” Defined. *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada*, *supra*, 23 Cal.4th at pp. 747–748.
- Separate Intent From Underlying Felony. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required. *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].
- Amendment to Penal Code Section 186.22 Definition of Criminal Street Gang Did Not Unconstitutionally Amend Penal Code Section 190.2(a)(22). *People v. Rojas* (2023) 15 Cal.5th 561, 580 [316 Cal.Rptr.3d 61, 539 P.3d 468].

RELATED ISSUES

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

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

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (54th ed. 2024) Punishment, § 628523.

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

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

821. Child Abuse Under Circumstances or Conditions Likely to Produce Great Bodily Harm or Death (Pen. Code, § 273a(a))

The defendant is charged [in Count __] with child abuse likely to produce (great bodily harm/ [or] death) [in violation of Penal Code section 273a(a)].

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 a child;]

<Alternative B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering;]

<Alternative C—while having custody, caused or permitted to suffer injury>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child's 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 a child, willfully caused or permitted the child to be placed in a situation where the child's person or health was endangered;]

[AND]

2. The defendant (inflicted pain or suffering on the child/ [or] caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce (great bodily harm/ [or] death)(;/.)

<Give element 3 when giving alternatives 1B, 1C or 1D>

[AND]

[3. The defendant was criminally negligent when (he/she) caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)(;/.)]

<Give element 4 when instructing on parental right to discipline>

[AND

4. The defendant did not act while reasonably disciplining a child.]

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

The phrase *likely to produce (great bodily harm/ [or] death)* means the probability of (great bodily harm/ [or] death) is high.

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

A *child* is any person under the age of 18 years.

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

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

[*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 is a gross departure from the way an ordinarily careful person would act in the same situation;
2. The person's acts amount to disregard for human life or indifference to the consequences of his or her acts;

AND

3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others.]

[A child does not need to actually suffer great bodily harm. But if a child does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

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 4 and CALCRIM No. 3405, *Parental Right to Punish a Child*.

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 a child to suffer. If it is alleged that the defendant had care or custody of a child and caused or permitted the child'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 a child and endangered the child's person or health. (See Pen. Code, § 273a(a).)

Give bracketed element 3 and the bracketed definition of "criminally negligent" if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (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].)

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

Give on request the bracketed paragraph stating that a child need not 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].)

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, § 273a(a); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].
- “Child” Defined. See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [in context of Pen. Code, § 273d].
- “Likely” Defined. *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1351-1352 [93 Cal.Rptr.3d 531] [questioning analysis of term in *People v. Wilson*]; *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 [41 Cal.Rptr.3d 919].
- “Great Bodily Harm or Injury” Defined. Pen. Code, § 12022.7(f); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519].
- “Willfully” Defined. Pen. Code, § ~~7(b), 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. 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, 47, 48–49 [119 Cal.Rptr. 780]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926] [criminal negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135 [253 Cal.Rptr. 1, 763 P.2d 852].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering. *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409]; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 361 [125 Cal.Rptr. 855]; *People v. Wright* (1976) 60 Cal.App.3d 6, 14 [131 Cal.Rptr. 311].

COMMENTARY

Any violation of Penal Code section 273a(a) must be willful. (*People v. Smith* (1984) 35 Cal.3d 798, 806 [678 P.2d 886]; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; but see *People v. Valdez* (2002) 27 Cal.4th 778, 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 Child Abuse. Pen. Code, §§ 664, 273a(a).
- Misdemeanor Child Abuse. Pen. Code, § 273a(b).

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. 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]].)

Prenatal Conduct

Penal Code section 273a does not apply to prenatal conduct endangering an unborn child. (*Reyes v. Superior Court* (1977) 75 Cal.App.3d 214, 217–218, 219 [141 Cal.Rptr. 912].)

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].) Child abuse may be a continuous course of conduct or a single, isolated incident. (*Ibid.*) 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. (*Ibid.*) See generally CALCRIM No. 3500, *Unanimity*.

SECONDARY SOURCES

[26](#) Witkin & Epstein, California Criminal Law (45th ed. 2024) Sex Offenses and Crimes Against Decency, §§ [207–219](#)~~161–168~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][a][v], 142.23[7] (Matthew Bender).

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

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. **It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.**

Great bodily harm means significant or substantial physical injury. It is an injury that is greater than 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, October 2026

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*, 9 Cal.4th at p. 212; 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*, 71 Cal.App.4th at p. 80 [in context of parallel child abuse statute].
- “Care” and “Custody” Have Ordinary Meanings. *People v. Molina* (2025) 114 Cal.App.5th 1059, 1063 [337 Cal.Rptr.3d 435].
- Sentence Enhancements. Pen. Code, § 368(b)(2) & (3); see *People v. Adams, supra*, 93 Cal.App.4th at p. 1198.
- “Willfully” Defined. Pen. Code, § 7(b), ~~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*, 10 Cal.App.4th at p. 114; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335]; see *People v. Valdez, supra*, 27 Cal.4th at pp. 788–789; *People v. Peabody, supra*, 46 Cal.App.3d at p. 47, pp. 48–49 [in context of parallel child abuse statute].
- Duty to Control Conduct of Person Inflicting Abuse. *People v. Heitzman, supra*, 9 Cal.4th at p. 212.
- 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*, 71 Cal.App.4th at p. 80 [both in context of parallel child abuse statute]; but see *People v. Valdez, supra*, 27 Cal.4th at p. 789 [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]; [see also *People v. Molina, supra*, 114 Cal.App.5th at p. 1070 \[nurse responsible for assessing victim for hospice care\].](#))

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 (5th ed. 2024) Sex Offenses and Crimes Against Decency, §§ 231–239.

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).

831. Abuse of Elder or Dependent Adult (Pen. Code, § 368(c))

The defendant is charged [in Count __] with (elder/dependent adult) abuse [in violation of Penal Code section 368(c)].

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

<Alternative 1A—inflicted pain>

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

<Alternative 1B—caused or permitted to suffer pain>

[1. The defendant allowed someone, whose conduct the defendant had a duty to supervise and control, to inflict unjustifiable physical pain or mental suffering on _____ <insert name or description of elder or dependent adult>;]

<Alternative 1C—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 that person or (his/her) health to be injured;]

<Alternative 1D—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 that person to be placed in a situation where (his/her) person or health was endangered;]

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

[AND]

3. 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 4 when giving alternative 1B and it is alleged the defendant permitted the suffering.>

[AND]

[4. 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 5 when giving alternative 1B, 1C, or 1D.>

[AND]

(4/5). 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. **It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.**

[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.]

[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 October 2026*

BENCH NOTES

Instructional Duty

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

Give alternative 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give alternative 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 alternative 1C. Finally, give alternative 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(c).)

Give bracketed element 4 if it is alleged under alternative 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 4 is given, also give the bracketed paragraph defining who has a “legal duty to supervise and control the conduct of a third person.”

Give bracketed element 5 regarding criminal negligence, and the bracketed definition of “criminal negligence,” if alternative 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 in *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 in *People v. Heitzman* (1994) 9 Cal.4th 189, 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].)

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(c).
- “Care” and “Custody” Have Ordinary Meanings. *People v. Molina* (2025) 114 Cal.App.5th 1059, 1063 [337 Cal.Rptr.3d 435].
- “Willfully” Defined. Pen. Code, § 7(b), ~~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* (1992) 10 Cal.App.4th 110, 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* (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, 47, 48–49 [119 Cal.Rptr. 780] [in context of parallel child abuse statute].
- Duty to Control Conduct of Person Inflicting Abuse. *People v. Heitzman* (1994) 9 Cal.4th 189, 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

See Commentary to CALCRIM No. 830, *Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death*.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 830, *Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Sex Offenses and Crimes Against Decency, §§ ~~231~~²³¹~~179~~¹⁷⁹–~~237~~²³⁷~~185~~¹⁸⁵.

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

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

832–839. Reserved for Future Use

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

You have heard testimony from _____ <insert name of expert> offered for the purposes of explaining the range of behaviors ~~regarding the effect of (battered women's syndrome/intimate partner battering victims, /_____ <insert other description used by expert for syndrome>)~~ possible misconceptions about those behaviors, and that those behaviors are not necessarily inconsistent with having been abused. You may consider this testimony only for these purposes.

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

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

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

New January 2006; Revised March 2017, April 2020, September 2022, October 2026

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give a similar limiting instruction (see CALCRIM No. 1193, *Testimony on Child Sexual Abuse Accommodation Syndrome*) when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736

[256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) -See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 92 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. -But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [9 Cal.Rptr.2d 431], which did find a sua sponte duty to give CALCRIM No. 1193.

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

Related Instructions

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

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

AUTHORITY

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

RELATED ISSUES

Assumptions Underlying Expert Testimony

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

Definition and Preferred Name

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

No Testimony on Actual State of Mind

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

SECONDARY SOURCES

1 Witkin, California Evidence (65th ed. 2024) Opinion Evidence, §§ 5449–572, 82.

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

1002. Rape of Intoxicated Person~~Woman~~ (Pen. Code, § 261(a)(3)~~7~~)

The defendant is charged [in Count __] with raping a person~~woman~~ while the~~person~~~~he~~ was intoxicated [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant had sexual intercourse with a person~~woman~~;
2. The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the person~~woman~~ from resisting;

AND

3. The defendant knew or reasonably should have known that the effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the person~~woman~~ from resisting.

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

A person is *prevented from resisting* if the person~~he or she~~ is so intoxicated that the person~~he or she~~ cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ <If appropriate, insert controlled substance> (is/are) [a] controlled substance[s].]

<Defense: Reasonable Belief Capable of Consent>

[The defendant is not guilty of this crime if the defendant actually and reasonably believed that the person~~woman~~ was capable of consenting to sexual intercourse, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the person~~woman~~ was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

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

Penal Code section 261, as amended by Assembly Bill 1171 (Stats. 2021, ch. 626), became effective on January 1, 2022. If the defendant's alleged act occurred before this date, the court should give the prior version of this instruction.

A space is provided to identify controlled substances, if the parties agree.

Defenses—Instructional Duty

There is no sua sponte duty to instruct on the defense of reasonable belief that the person was capable of consent. (*People v. Lujano* (2017) 15 Cal.App.5th 187 [223 Cal.Rptr.3d 105].)

Related Instructions

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

AUTHORITY

- Elements. Pen. Code, § 261(a)(3).
- “Consent” Defined. Pen. Code, § 261.6.
- Controlled Substances. Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- “Penetration” Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Anesthetic Effect. See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- General Intent and Knowledge Requirements. *People v. Linwood* (2003) 105 Cal.App.4th 59, 67–72 [129 Cal.Rptr.2d 73] [statute is not impermissibly vague and uses appropriate criminal negligence standard].
- “Prevented From Resisting” Defined. *People v. Lujano* (2017) 15 Cal.App.5th 187, 192–193 [223 Cal.Rptr.3d 105] [CALCRIM 1032 has correct definition]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315].

- Reasonable Belief in Capacity to Consent. *People v. Lujano* (2017) 15 Cal.App.5th 187, 191-192 [223 Cal.Rptr.3d 105]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471-472 [98 Cal.Rptr.2d 315].

Prior Version of This Instruction Upheld. *People v. Smith* (2010) 191 Cal.App.4th 199, 204–205 [120 Cal.Rptr.3d 52].

COMMENTARY

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

LESSER INCLUDED OFFENSES

- Attempted Rape of Intoxicated Person. Pen. Code, §§ 663, 261(a)(3).
- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242; *People v. Mirabal* (2025) 115 Cal.App.5th 708, 727–728 [338 Cal.Rptr.3d 289] ~~*People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38–39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].~~

RELATED ISSUES

Administering Drugs to Assist Commission of Felony

A person who administers to someone else any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating agent, with the intent to enable or assist himself or herself or any other person to commit a felony is guilty of a felony. (Pen. Code, § 222.)

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

SECONDARY SOURCES

6 Witkin & Epstein, California Criminal Law (54th ed. 2024) Sex Offenses and Crimes Against Decency, §§ 1–118, 1821, 20, 229178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ -142.20[1][a], [5], 142.23[1][e] (Matthew Bender).

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

1003. Rape of Unconscious PersonWoman (Pen. Code, § 261(a)(4))

The defendant is charged [in Count __] with raping a personwoman who was unconscious of the nature of the act [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant had sexual intercourse with a personwoman;
2. The personwoman was unable to resist because the personshe was unconscious of the nature of the act;

AND

3. The defendant knew that the personwoman was unable to resist because the personshe was unconscious of the nature of the act.

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

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

New January 2006; Revised August 2012, August 2013, March 2022, October 2026

BENCH NOTES

Instructional Duty

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

Penal Code section 261, as amended by Assembly Bill 1171 (Stats. 2021, ch. 626), became effective on January 1, 2022. If the defendant's alleged act occurred before this date, the court should give the prior version of this instruction.

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

Related Instructions

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

AUTHORITY

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

COMMENTARY

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

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

LESSER INCLUDED OFFENSES

- Attempted Rape of Unconscious Person~~Woman~~. Pen. Code, §§ 663, 261(a)(4).
- Assault. Pen. Code, § 240.

- Battery. Pen. Code, § 242. There is a split in authority whether battery under Penal Code section 242 is a lesser included offense. (Compare *People v. Hernandez* (2011) 200 Cal.App.4th 1000, 1006 [133 Cal.Rptr.3d 229] [battery is not a lesser included offense of rape of an unconscious person] with *People v. Miranda* (2021) 62 Cal.App.5th 162, 167 [276 Cal.Rptr.3d 503] [battery is a lesser included offense of rape of an unconscious person].)

Assault with intent to commit rape under Penal Code section 220(a)(1) is not a lesser included offense. *People v. Gallardo* (2025) 116 Cal.App.5th 479, 486–487 [339 Cal.Rptr.3d 327].

RELATED ISSUES

Advance Consent

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

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 20~~2412~~) Sex Offenses and Crimes Against Decency, §§ 1–8, 178.

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

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

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, * October 2026**

** 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. Hill* (2025) 115 Cal.App.5th 58, 62 [337 Cal.Rptr.3d 713]; *People v. Adames* (1997) 54 Cal.App.4th 198, 208 [62 Cal.Rptr.2d 631].

- Actual Arousal Not Required. *People v. McCurdy, supra*, 60 Cal.App. at p. 502.
- 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].
- Lewd and Lascivious Conduct Theory Requires Specific Intent. *People v. Canales* (2024) 106 Cal.App.5th 1230, 1244 [327 Cal.Rptr.3d 678]; *People v. Garcia* (2014) 229 Cal.App.4th 302, 313, fn. 3 [177 Cal.Rptr.3d 231].
- 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*, 51 Cal.App.4th at pp. 1284–1285, 1287.)

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. Hill, supra*, 115 Cal.App.5th at pp. 71–72; *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*, 14 Cal.App.4th at pp. 1313–1314; 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* (5th ed. 2024) Sex Offenses and Crimes Against Decency, §§ 76–81, 229.

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).

1124. Contacting Minor With Intent to Commit Certain Felonies (Pen. Code, § 288.3(a))

The defendant is charged [in Count __] with (contacting/[or] attempting to contact) a minor with the intent to commit _____ <insert enumerated offense from statute> [in violation of Penal Code section 288.3(a)].

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

1. The defendant (contacted or communicated with/ [or] attempted to contact or communicate with) a minor;
2. When the defendant did so, (he/she) intended to commit _____ <insert enumerated offense from statute> involving that minor;

AND

3. [The defendant knew or reasonably should have known that the person was a minor(;/.)]

[OR]

[The defendant believed that the person was a minor.]

A *minor* is a person 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.]

Contacting or communicating with a minor includes direct and indirect contact or communication. [That contact or communication may take place personally or by using (an agent or agency/ [or] any print medium/ [or] any postal service/ [or] a common carrier/ [or] communication common carrier/ [or] any electronic communications system/ [or] any telecommunications/ [or] wire/ [or] computer/ [or] radio communications [device or system]).]

To decide whether the defendant intended to commit <specify sex offense[s] listed in Pen. Code, § 288.3(a)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

New August 2009; Revised March 2017, September 2020, October 2026*

* 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.

The court has a **sua sponte** duty to define the elements of the underlying/target sex offense. (See *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432 and *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].)

AUTHORITY

- Elements and Enumerated Offenses. Pen. Code, § 288.3(a).
- Calculating Age. Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Attempted Contact or Communication Does Not Require Minor Victim. *People v. Korwin* (2019) 36 Cal.App.5th 682, 688 [248 Cal.Rptr.3d 763].
- Specific Intent Required. *People v. Ismaiel* (2025) 116 Cal.App.5th 1221, 1231 [339 Cal.Rptr.3d 914]; *People v. Keister* (2011) 198 Cal.App.4th 442, 449 [129 Cal.Rptr.3d 566].

LESSER INCLUDED OFFENSES

Attempted oral copulation is not a necessarily included offense of Penal Code section 288.3 under the statutory elements test, because luring can be committed without a direct act. (*People v. Medelez* (2016) 2 Cal.App.5th 659, 663, 206 Cal.Rptr.3d 402].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2024~~12~~) Sex Offenses and Crimes Against Decency, §§ 8467, 229178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:17, 12:18 (The Rutter Group).

1125. Arranging Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(a)(1))

The defendant is charged [in Count __] with arranging a meeting with a minor for a lewd purpose [while having a prior conviction] [in violation of Penal Code section 288.4(a)(1)].

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

1. The defendant arranged a meeting with (a minor / [or] a person (he/she) believed to be a minor);
2. When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;

[AND]

3. At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior).

A *minor* is a person 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.]

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

*New August 2009; Revised April 2010, February 2013, August 2016, March 2017, October 2026**

** 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.

The court has a **sua sponte** duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(a)(1), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: -Defendant 21 or Older*.

Do not give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

Whether the defendant suffered a prior conviction for an offense listed in subsection (c) of section 290 is not an element of the offense and is subject to a severed jury trial. (Pen. Code, § 288.4(a)(2).) See CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

There is no sua sponte duty to instruct that the “motivated by” element of the offense must have been a substantial factor in its commission. (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 106-109, 206 Cal.Rptr.3d 83].)

AUTHORITY

- Elements and Enumerated Offenses. Pen. Code, § 288.4.
- “Lewd” Defined. See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Calculating Age. -Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Specific Intent Required. *People v. Ismaiel* (2025) 116 Cal.App.5th 1221, 1231 [339 Cal.Rptr.3d 914]; *People v. Fromuth* (2016) 2 Cal.App.5th 91, 105–106 [206 Cal.Rptr.3d 83].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2024) Sex Offenses and Crimes Against Decency, §§ [8366](#), [229178](#).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:17, 12:18 (The Rutter Group).

1126. Going to Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(b))

The defendant is charged [in Count __] with going to a meeting with a minor for a lewd purpose [in violation of Penal Code section 288.4(b)].

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

1. The defendant arranged a meeting with (a minor/ [or] a person (he/she) believed to be a minor);
2. When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;
3. At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior);

AND

4. The defendant went to the arranged meeting place at or about the arranged time.

<Give the bracketed language at the beginning of the following sentence if instructing on other offenses mentioning children for which the definition given here does not apply.>

[For the purposes of this instruction,] (A/a) *child* or *minor* is a person 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.]

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

*New August 2009; Revised April 2010, February 2013, August 2016, March 2017, October 2026**

** 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.

Do not give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Valenti* (2016) 243 Cal. App. 4th 1140, 1165 [197 Cal.Rptr. 3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

~~It is unclear how violations of Pen. Code, § 288.4(b), which involve actually going to an arranged meeting, correlate to violations of Pen. Code, § 288.4(a) (cf. CALCRIM No. 1125, *Arranging Meeting With Minor for Lewd Purpose*). Violations of section 288.4(a) may be lesser included offenses of violations of section 288.4(b). In the alternative, a violation of section 288.4(b) could be characterized as sentence enhancement of a violation of section 288.4(a). This matter must be left to the trial court's discretion until courts of review provide guidance.~~

The court has a **sua sponte** duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(b), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

There is no *sua sponte* duty to instruct that the “motivated by” element of the offense must have been a substantial factor in its commission. (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 106-109 [206 Cal.Rptr.3d 83].)

AUTHORITY

- Elements and Enumerated Offenses. Pen. Code, § 288.4.
- “Lewd” Defined. See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

- Calculating Age. -Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849—850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Meaning of Child and Minor. *People v. Yuksel* (2012) 207 Cal.App.4th 850, 854-855 [143 Cal.Rptr.3d 823].
- Specific Intent Required. *People v. Ismaiel* (2025) 116 Cal.App.5th 1221, 1231 [339 Cal.Rptr.3d 914]; *People v. Fromuth* (2016) 2 Cal.App.5th 91, 105–106 [206 Cal.Rptr.3d 83].

LESSER INCLUDED OFFENSES

- Arranging Meeting With Minor for Lewd Purpose. Pen. Code, § 288.4(a). (See *People v. Ramirez* (2019) 43 Cal.App.5th 538, 547 [256 Cal.Rptr.3d 733].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 202412) Sex Offenses and Crimes Against Decency, §§ 8366, 229178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:17, 12:18 (The Rutter Group).

1150. Pimping (Pen. Code, § 266h)

The defendant is charged [in Count _____] with pimping [in violation of Penal Code section 266h].

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

1. The defendant knew that _____ *<insert name>* was a prostitute;

[AND]

<Alternative 2A—money earned by prostitute supported defendant>

[2. The (money/proceeds) that _____ *<insert name>* earned as a prostitute supported defendant, in whole or in part(;/.)]

<Alternative 2B—money loaned by house manager supported defendant>

[2. Money that was (loaned to/advanced to/charged against) _____ *<insert name>* by a person who (kept/managed/was a prostitute at) the house or other place where the prostitution occurred, supported the defendant in whole or in part(;/.)]

<Alternative 2C—defendant asked for payment>

[2. The defendant asked for payment or received payment for soliciting prostitution customers for _____ *<insert name>*(;/.)]

<Give element 3 when defendant charged with pimping a minor.>

[AND]

3. _____ *<insert name>* was a minor (over the age of 16 years/under the age of 16 years) when (he/she) engaged in the prostitution.]

A prostitute is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other compensation]. A lewd act means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

[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 April 2011, October 2026**

** 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.

In element 2, use the appropriate alternative A–C depending on the evidence in the case.

Give element 3 if it is alleged that the prostitute was a minor. Punishment is enhanced if the minor is under the age of 16 years. (Pen. Code, § 266h(b).)

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

Defenses—Instructional Duty

If necessary for the jury’s understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

AUTHORITY

- Elements. Pen. Code, § 266h.
- **“Prostitution”** Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195] [lewd act requires touching between prostitute and customer].
- General Intent Crime. *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22].
- Proof Person Is a Prostitute. *People v. James* (1969) 274 Cal.App.2d 608, 613 [79 Cal.Rptr. 182].
- **“Solicitation”** Defined. *People v. Smith* (1955) 44 Cal.2d 77, 78–80 [279 P.2d 33].

- Good Faith Belief That Minor Is 18 No Defense to Pimping and Pandering. *People v. Branch* (2010) 184 Cal.App.4th 516, 521-522 [109 Cal.Rptr.3d 412].
- Money Need Not Be Used Solely for the Purpose of Support. *People v. Jackson* (1980) 114 Cal. App. 3d 207, 210 [170 Cal.Rptr. 476]; *People v. Navarro* (1922) 60 Cal.App. 180, 182 [212 P. 403].
- Amount of Money Received Irrelevant. *People v. Jackson, supra*, 114 Cal. App. 3d at p. 210.

COMMENTARY

Solicitation

In deciding there was sufficient evidence of solicitation, the court in *People v. Phillips* (1945) 70 Cal.App.2d 449, 453 [160 P.2d 872], quoted the following definitions:

“[S]olicit” is defined as: “To tempt ...; to lure on, esp. into evil, ... to bring about ...; to seek to induce or elicit” (Webster’s New International Dictionary (2d ed.)). “... to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; ... to try to obtain... . While it does imply a serious request, it requires no particular degree of importunity, entreaty, imploration or supplication.” (58 C.J. 804–805.)

General Intent

The three ways of violating Penal Code section 266h are all general intent crimes, as held in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22]:

[D]eriving support with knowledge that the other person is a prostitute is all that is required for violating the section in this manner. No specific intent is required... . Receiving compensation for soliciting with knowledge that the other person is a prostitute is the only requirement under the first alternative of violating section 266h by solicitation. Under the second alternative to pimping by soliciting (soliciting compensation), ... if the accused has solicited for the prostitute and has solicited compensation even though he had not intended to receive compensation, he would nevertheless be guilty of pimping. Pimping in all its forms is not a specific intent crime.

LESSER INCLUDED OFFENSES

- Attempted Pimping. Pen. Code, §§ 664, 266h; see *People v. Osuna* (1967) 251 Cal.App.2d 528, 531 [59 Cal.Rptr. 559].
- There is no crime of aiding and abetting prostitution. *People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].

RELATED ISSUES

House of Prostitution

One room of a building or other place is sufficient to constitute a house of prostitution, and one person may keep such a place to which others resort for purposes of prostitution. (*People v. Frey* (1964) 228 Cal.App.2d 33, 53 [39 Cal.Rptr. 49]; see *Aguilera v. Superior Court* (1969) 273 Cal.App.2d 848, 852 [78 Cal.Rptr. 736].)

Receiving Support

~~A conviction for living or deriving support from a prostitute's earnings does not require evidence that the defendant received money directly from the prostitute, or that the defendant used money received from the prostitution solely to pay his or her own living expenses. (*People v. Navarro* (1922) 60 Cal.App. 180, 182 [212 P. 403].)~~

Unanimity Instruction Not Required

Pimping is a crime “of a continuous ongoing nature and [is] therefore not subject to the requirement that the jury must agree on the specific act or acts constituting the offense.” (*People v. Dell* (1991) 232 Cal.App.3d 248, 265–266 [283 Cal.Rptr. 361]; *People v. Lewis* (1978) 77 Cal.App.3d 455, 460–462 [143 Cal.Rptr. 587] [living or deriving support from prostitute's earnings is an ongoing continuing offense].) Proof of an ongoing relationship between the defendant and the prostitute is not required. (*People v. Jackson* (1980) 114 Cal.App.3d 207, 209–210 [170 Cal.Rptr. 476].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Sex Offenses and Crimes Against Decency, §§ ~~104–107 et seq.~~~~82–84.~~

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[2] (Matthew Bender).

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

1192. Expert Testimony on Adult Sexual Assault Victims Rape Trauma Syndrome

You have heard testimony from _____ <insert name of expert> **offered for the purposes of explaining the range of behaviors of adult sexual assault victims, possible misconceptions about those behaviors, and that those behaviors are not necessarily inconsistent with having been sexually assaulted regarding rape trauma syndrome. You may consider this testimony only for those purposes.**

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

_____'s <insert name of expert> **testimony about the behaviors of adult sexual assault victims rape trauma syndrome** is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged]. ~~You may consider this evidence only in deciding whether or not _____'s <insert name of alleged rape victim> conduct was consistent with the conduct of someone who has been raped, and in evaluating the believability of the alleged victim~~

New January 2006; Revised April 2020, September 2022, October 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on rape trauma syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [8 Cal.Rptr.2d 431] [**sua sponte** duty in context of child sexual abuse accommodation syndrome (CSAAS)]; *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 2019) Sua Sponte Instructions, § 2.163; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] [**instruction on CSAAS only required on request**].) Several courts of review have concluded there is no sua sponte duty to give a similar limiting instruction (see CALCRIM No. 1193, *Testimony on Child Sexual Abuse Accommodation Syndrome*) when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [**instruction required only on request**].) See also *People v. Humphrey* (1996)

13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 92 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [9 Cal.Rptr.2d 431], which did find a sua sponte duty to give CALCRIM No. 1193.

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

Related Instructions

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

AUTHORITY

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

COMMENTARY

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

SECONDARY SOURCES

- 1 Witkin, California Evidence (~~65~~⁶th ed. 20~~24~~¹²) Opinion Evidence, § 5~~83~~.
- 3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).
- 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][d] (Matthew Bender).

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

1193. Expert Testimony on Child Sexual Abuse Victims Abuse Accommodation Syndrome

You have heard testimony from _____ *<insert name of expert>* offered for the purposes of explaining regarding the range of behaviors of child sexual abuse victims, possible misconceptions about those behaviors, and that those behaviors are not necessarily inconsistent with having been abused child sexual abuse accommodation syndrome. You may consider this testimony only for these purposes.

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

_____’s *<insert name of expert>* testimony about the behaviors of child sexual abuse victims ~~child sexual abuse accommodation syndrome~~ is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged]. You may consider this evidence only in deciding whether or not _____’s ~~*<insert name of alleged victim of abuse>* conduct was consistent with the conduct of someone who has been molested, and in evaluating the believability of the alleged victim.~~

*New January 2006; Revised August 2016, April 2020, March 2021, September 2022, September 2024, * October 2026*

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

BENCH NOTES

Instructional Duty

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

958–959 [9 Cal.Rptr.2d 431], which did find a sua sponte duty to give this instruction.

Related Instructions

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

AUTHORITY

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

COMMENTARY

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

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

RELATED ISSUES

Expert Testimony Regarding Parent’s Behavior

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

SECONDARY SOURCES

1 Witkin, California Evidence (~~56~~²⁴th ed. 20~~12~~¹²) Opinion Evidence, §§ ~~594-561~~.

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

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

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

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

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

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

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

AND

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

OR

- b. aiding and abetting a felony offense.

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

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

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

<If criminal street gang has already been defined.>

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

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

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

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

AND

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

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

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

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

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of) (any combination of two or more of the following crimes/[,] [or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>*;**
- 2. At least one of those crimes was committed after September 26, 1988;**

3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;
4. The crimes were committed on separate occasions or were personally committed by two or more members;
5. The crimes commonly benefitted a criminal street gang;

AND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

AND

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

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

*New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013, February 2014, August 2014, February 2016, March 2022, March 2023, September 2024, October 2026**

** 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 definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278]].)

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

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

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

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

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

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

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

AUTHORITY

- Elements. Pen. Code, § 186.22(a).
- “Active Participation” Defined. *People v. Cardenas* (2025) 18 Cal.5th 797, 828–829 [336 Cal.Rptr.3d 215, 574 P.3d 680]; *People v. Castenada*, *supra*, 23 Cal.4th at p. 747.
- “Criminal Street Gang” Defined. Pen. Code, § 186.22(f).
- “Collectively Engage” Defined. *People v. Clark* (2024) 15 Cal.5th 743, 755–756 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- “Organized” Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- “Pattern of Criminal Gang Activity” Defined. Pen. Code, § 186.22(e), (g).
- Examples of Common Benefit. Pen. Code, § 186.22(g); *People v. Cortez* (2025) 114 Cal.App.5th 1201, 1211–1213 [337 Cal.Rptr.3d 455] [intra-gang punishment for financial transgressions].
- ~~•~~ Non-Reputational Common Benefit Means Actual Benefit. *People v. Cooper* (2023) 14 Cal.5th 735, 743–744 [308 Cal.Rptr.3d 409, 529 P.3d 66] [“the question about a common benefit asks about how the specific predicate offense actually benefited the gang.”]; *People v. Shively* (2025) 111 Cal.App.5th 460, 468–470 [332 Cal.Rptr.3d 855] [insufficient evidence of common benefit that was more than reputational].
- “Willfully” Defined. Pen. Code, § 7(b)(1).
- Applies to Both Perpetrator and Aider and Abettor. *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada*, *supra*, 23 Cal.4th at pp. 749–750.

- “Felonious Criminal Conduct” Defined. *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green, supra*, 227 Cal.App.3d at p. 704.
- Separate Intent From Underlying Felony. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Temporal Connection Between Active Participation and Felonious Criminal Conduct. *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Conspiracy to Commit This Crime. *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required. *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

COMMENTARY

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

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

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

RELATED ISSUES

Conspiracy

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

Labor Organizations or Mutual Aid Activities

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

Related Gang Crimes

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

Unanimity

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

SECONDARY SOURCES

2 Witkin & Epstein, Cal. Criminal Law (54th ed. 2024) Crimes Against Public Peace and Welfare, §§ 5431–8146.

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

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

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

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

To prove this allegation, the People must prove that:

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

AND

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

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

<If criminal street gang has already been defined>

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

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

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

AND

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

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

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

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

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of) (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>*;**
- 2. At least one of those crimes was committed after September 26, 1988;**
- 3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;**

4. The crimes were committed on separate occasions or were personally committed by two or more members;
5. The crimes commonly benefitted a criminal street gang;

AND

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

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

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

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

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

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

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

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

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

New January 2006; Revised August 2006, June 2007, April 2008, December 2008, August 2012, February 2013, August 2013, February 2014, February 2016, March 2022, March 2023, September 2024, October 2026*

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

Related Instructions

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

AUTHORITY

- Enhancement. Pen. Code, § 186.22(b)(1).

- Specific Intent Required to Further Criminal Conduct by Gang Members. *People v. Cardenas* (2025) 18 Cal.5th 797, 825–826 [336 Cal.Rptr.3d 215, 574 P.3d 680].
- “Specific Intent” Defined. *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; see also *People v. Cardenas* (2025) 18 Cal.5th 797, 827–828 [336 Cal.Rptr.3d 215, 574 P.3d 680] [finding sufficient evidence of intent to benefit criminal street gang].
- “Criminal Street Gang” Defined. Pen. Code, § 186.22(f).
- “Collectively Engage” Defined. *People v. Clark* (2024) 15 Cal.5th 743, 755–756 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- “Organized” Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- “Pattern of Criminal Gang Activity” Defined. Pen. Code, § 186.22(e), (g); see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- “To Benefit, Promote, Further, or Assist” Defined. Pen. Code, § 186.22(g).
- Examples of Common Benefit. Pen. Code, § 186.22(g); *People v. Cortez* (2025) 114 Cal.App.5th 1201, 1211–1213 [337 Cal.Rptr.3d 455] [intra-gang punishment for financial transgressions].
- Non-Reputational Common Benefit Means Actual Benefit. *People v. Cooper* (2023) 14 Cal.5th 735, 743–744 [308 Cal.Rptr.3d 409, 529 P.3d 66] [“the question about a common benefit asks about how the specific predicate offense actually benefited the gang.”]; *People v. Shively* (2025) 111 Cal.App.5th 460, 468–470 [332 Cal.Rptr.3d 855] [insufficient evidence of common benefit that was more than reputational].
- Active or Current Participation in Gang Not Required. *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- “Primary Activities” Defined. *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member. *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138–1139 [150 Cal.Rptr.3d 533].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.

- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required. *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].
- Evidence Required for Gang Member Acting Alone. *People v. Renteria* (2022) 13 Cal.5th 951, 969 [297 Cal.Rptr.3d 344, 515 P.3d 77].

RELATED ISSUES

Commission On or Near School Grounds

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

Enhancements for Multiple Gang Crimes

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

Wobblers

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

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

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

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

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

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

SECONDARY SOURCES

2 Witkin & Epstein, Cal. Criminal Law (~~45~~²⁰²⁴th ed. 20~~24~~¹²) Crimes Against Public Peace and Welfare, §§ ~~74–7540~~.

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

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

1600. Robbery (Pen. Code, § 211)

The defendant is charged [in Count _____] with robbery [in violation of Penal Code section 211].

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

1. The defendant took property that was not (his/her) own;
2. The property was in the possession of another person;
3. The property was taken from the other person or (his/her) immediate presence;
4. The property was taken against that person's will;
5. The defendant used force or fear to (take/ [or] retain/ [or] resist an attempt to regain) the property or to prevent the person from resisting;

AND

6. When the defendant used force or fear, (he/she) intended (to deprive the owner of the property permanently/ [or] to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).

The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

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

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

[A person *takes* something when he or she gains possession of it and moves it

some distance. The distance moved may be short.]

[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[A (store/ [or] business) (employee/ _____ <insert description>) who is on duty has possession of the (store/ [or] business) owner's property.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

An act is accomplished by *fear* if the other person is actually afraid. The other person's actual fear may be inferred from the circumstances.

[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

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

*New January 2006; Revised August 2009, October 2010, April 2011, August 2013, August 2014, March 2017, September 2018, March 2022, February 2025; October 2026**

** 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 5.

There is no sua sponte duty to define the terms “possession,” “fear,” “force,” and “immediate presence.” (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees*.

Give the bracketed definition of “against a person’s will” on request.

If the use of force or fear is not contemporaneous with the original taking, the court should use the “retain” or “resist an attempt to regain” options in element 5. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 686–687 [130 Cal.Rptr.3d 590, 259 P.3d 1186]; *People v. Gomez* (2008) 43 Cal.4th 249, 255–265 [74 Cal.Rptr.3d 123, 179 P.3d 917]; *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*.

AUTHORITY

- Elements. Pen. Code, § 211.
- “Fear” Defined. Pen. Code, § 212; see *People v. Collins* (2021) 65 Cal.App.5th 333, 340–341 [279 Cal.Rptr.3d 407]; *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- “Immediate Presence” Defined. *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Force When No Physical Touching. *People v. Mendez-Torres* (2025) 113 Cal.App.5th 1007, 1019 [336 Cal.Rptr.3d 298].
- Intent. *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. See *People v. Avery, supra*, 27 Cal.4th at pp. 57–58 [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- “Possession” Defined. *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee. *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].

- Constructive Possession by Subcontractor/Janitor. *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].
- Constructive Possession by Person With Special Relationship. *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369–1370 [109 Cal.Rptr.3d 479].
- Felonious Taking Not Satisfied by Theft by False Pretense. *People v. Williams* (2013) 57 Cal.4th 776, 784–789 [161 Cal.Rptr.3d 81, 305 P.3d 1241].
- Constructive Possession and Immediate Presence of Funds in Account of Robbery Victims Using ATM. *People v. Mullins* (2018) 19 Cal.App.5th 594, 603 [228 Cal.Rptr.3d 198].

COMMENTARY

The instruction includes definitions of “possession,” “fear,” and “immediate presence” because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

“Possession” was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele, supra*, 33 Cal.App.4th at p. 1461 [defining possession], disapproved on other grounds in *People v. Rodriguez, supra*, 20 Cal.4th at pp. 13–14; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

“Fear” was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. “Force” was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia, supra*, 234 Cal.App.3d at p. 1709 [“force is a factual question to be determined by the jury using its own common sense”].)

“Immediate presence” was defined in the instruction because its definition is related to the use of force and fear and to the victim’s ability to control the property. This definition may not be readily apparent to jurors.

LESSER INCLUDED OFFENSES

- Attempted Robbery. Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft. Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443;

People v. Ortega (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].

- Grand Theft Automobile. Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft. Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior. Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

RELATED ISSUES

Asportation—Felonious Taking

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

Claim of Right

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt,

liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

Fear

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413]; *People v. Collins, supra*, 65 Cal.App.5th at p. 341.)

Force—Amount

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that force employed by pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) If the defendant did not physically touch the victim, any amount of force that overcomes the victim's physical resistance is sufficient. (*People v. Mendez-Torres, supra*, 113 Cal.App.5th at p. 1019.) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

Force—When Applied

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes, supra*, 147 Cal.App.3d at pp. 27–28.)

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster, supra*, 54 Cal.3d at pp. 440–442) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

Multiple Victims

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

Value

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green, supra*, 27 Cal.3d at p. 57, disapproved on other grounds in *People v. Hall, supra*, 41 Cal.3d at p. 834, fn. 3.)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against Property, §§ 8593–94.

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

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

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

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

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

AND

3. When the defendant possessed the (picklock[s],/ [or]crow[bar][s],/ [or]keybit[s],/ [or]screwdriver[s],/ [or]vise grip[s],/ [or]pliers[,]/ [or]water-pump pliers[,]/ [or]slidehammer[s],/ [or]slim jim[s],/ [or]tension bar[s],/ [or]lock pick gun[s],/ [or]tubular lock pick[s],/ [or]bump key[s],/ [or]floor-safe door puller[s],/ [or]master key[s],/ [or]ceramic or porcelain spark plug chips or pieces/ [or] key (programming device/duplicating device)/ [or] signal extender/ [or] _____ <insert other instrument or tool>), (he/she)

intended to commit [a](theft/ [or] _____ <insert one or more felonies>) within a (building/railroad car/aircraft/vessel/trailer coach/vehicle).

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

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

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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

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

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

New September 2022; *Revised October 2026*

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

- Elements. Pen. Code, § 466(a).
- Intent Requirement. *In re H.W.* (2019) 6 Cal.5th 1068, 1076 [245 Cal.Rptr.3d 51, 436 P.3d 941].
- Statute Prohibits Constructive Possession. *People v. Bay* (2019) 40 Cal.App.5th 126, 133 [253 Cal.Rptr.3d 26].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- “Key Programming Device” or “Key Duplicating Device” Defined. Pen. Code, § 466(b)(1).
- “Signal Extender” Defined. Pen. Code, § 466(b)(2).
- “Vehicle” Defined. Veh. Code, § 670.
- “Trailer Coach” Defined. Veh. Code, § 635.
- “Aircraft” Defined. Public Utilities Code, § 21012.

COMMENTARY

Other Instrument or Tool

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

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

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

To prove this allegation, the People must prove that:

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

AND

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

OR

- b. Aiding and abetting a felony offense.

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

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

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

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

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

AND

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

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

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

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

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

- 1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of) (any combination of two or more of the following crimes/[,] [or] two or more occurrences of [one or more of the following crimes]:) _____ <insert one or more crimes listed in Pen. Code, § 186.22(e)(1)>;**
- 2. At least one of those crimes was committed after September 26, 1988;**

3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the currently charged offense;
4. The crimes were committed on separate occasions or were personally committed by two or more members;
5. The crimes commonly benefitted a criminal street gang;

AND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

AND

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

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

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

*New January 2006; Revised August 2006, June 2007, December 2008, February 2012, August 2013, February 2014, February 2016, March 2022, March 2023, September 2024, October 2026**

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to

give the bracketed paragraph that begins with “If you conclude that defendant was present.” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

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

Related Instructions

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

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

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

AUTHORITY

- Factors. Pen. Code, §§ 25400(c)(3), 25850(c)(3)
- Sentencing Factors, Not Elements. *People v. Hall*, *supra*, 67 Cal.App.4th at p. 135.
- Elements of Gang Factor. Pen. Code, § 186.22(a); *People v. Robles*, *supra*, 23 Cal.4th at p. 1115.
- “Active Participation” Defined. [*People v. Cardenas* \(2025\) 18 Cal.5th 797, 828–829 \[336 Cal.Rptr.3d 215, 574 P.3d 680\]](#); *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- “Criminal Street Gang” Defined. Pen. Code, § 186.22(f).
- “Collectively Engage” Defined. *People v. Clark* (2024) 15 Cal.5th 743, 755–756 [318 Cal.Rptr.3d 152, 542 P.3d 1085].
- “Organized” Defined. *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 326–333 [319 Cal.Rptr.3d 100]; *People v. Campbell* (2023) 98 Cal.App.5th 350, 380–381 [316 Cal.Rptr.3d 638].
- “Pattern of Criminal Gang Activity” Defined. Pen. Code, §§ 186.22(e), (g).
- Examples of Common Benefit. Pen. Code, § 186.22(g); [*People v. Cortez* \(2025\) 114 Cal.App.5th 1201, 1211–1213 \[337 Cal.Rptr.3d 455\] \[intra-gang punishment for financial transgressions\]](#).
- [Non-Reputational Common Benefit Means Actual Benefit. *People v. Cooper* \(2023\) 14 Cal.5th 735, 743–744 \[308 Cal.Rptr.3d 409, 529 P.3d 66\] \[“the](#)

question about a common benefit asks about how the specific predicate offense actually benefited the gang.”]; *People v. Shively* (2025) 111 Cal.App.5th 460, 468–470 [332 Cal.Rptr.3d 855] [insufficient evidence of common benefit that was more than reputational].

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

RELATED ISSUES

Gang Expert Cannot Testify to Defendant’s Knowledge or Intent

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

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

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

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against Public Peace and Welfare, §§ ~~5431–8146~~, ~~23104~~, ~~29849–29950~~.

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

2900. Vandalism (Pen. Code, § 594)

The defendant is charged [in Count __] with vandalism [in violation of Penal Code section 594].

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

1. The defendant maliciously (defaced with graffiti or with other inscribed material[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property;

[AND]

2. The defendant (did not own the property/owned the property with someone else)(;/.)

<See Bench Notes regarding when to give element 3.>

[AND]

3. The amount of damage caused by the vandalism was \$400 or more.]

[Amount of damage includes the repair or replacement cost for the vandalized property.]

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

Graffiti or other inscribed material includes an unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.

New January 2006; Revised June 2007, February 2013, August 2013, September 2019, October 2026

BENCH NOTES

Instructional Duty

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

If the defendant is charged with a felony for causing \$400 or more in damage and the court is *not* instructing on the misdemeanor offense, give element 3. If the court *is* instructing on both the felony and the misdemeanor offenses, give CALCRIM No. 2901, *Vandalism: Amount of Damage*, with this instruction. (Pen. Code, § 594(b)(1).) The court should also give CALCRIM No. 2901 if the defendant is charged with causing more than \$10,000 in damage under Penal Code section 594(b)(1).

In element 2, give the alternative language “owned the property with someone else” if there is evidence that the property was owned by the defendant jointly with someone else. (*People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722] [Pen. Code, § 594 includes damage by spouse to spousal community property].)

AUTHORITY

- Elements. Pen. Code, § 594.
- “Malicious” Defined. Pen. Code, § 7(b), ~~subd. (4)~~; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Factual Nexus Required Between Damage Amount and Defendant’s Conduct. *People v. Jimenez* (2025) 117 Cal.App.5th 602, 609 [340 Cal.Rptr.3d 351].
- Damage to Jointly Owned Property. *People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722].
- Wrongful Act Need Not Be Directed at Victim. *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1282 [139 Cal.Rptr.3d 637].
- This Instruction Upheld. *People v. Carrasco* (2012) 209 Cal.App.4th 715, 722–723 [147 Cal.Rptr.3d 383].
- General Intent Crime. *People v. Moore* (2018) 19 Cal.App.5th 889, 895-896 [228 Cal.Rptr.3d 261].

LESSER INCLUDED OFFENSES

This offense is a misdemeanor unless the amount of damage is \$400 or more. (Pen. Code, § 594(b)(1) & (2)(A).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. When instructing on both the felony and misdemeanor, the court must provide the jury with a verdict form on which the jury will indicate if the amount of damage has or has not been proved to be \$400 or more. If the jury finds that the damage has not been proved to be \$400 or more, then the offense should be set at a misdemeanor.

RELATED ISSUES

Lack of Permission Not an Element

The property owner's lack of permission is not an element of vandalism. (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1014 [34 Cal.Rptr.2d 864].)

Damage Need Not Be Permanent

To “deface” under Penal Code section 594 does not require that the defacement be permanent. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 944 [102 Cal.Rptr.2d 511] [writing on a glass window with a marker pen was defacement under the statute].)

Damage to Jail or Prison Property

Penal Code section 4600 prohibits willfully and intentionally damaging or destroying any jail, prison or public property within those facilities. In *People v. Jimenez*, the court reversed a felony vandalism conviction under Penal Code section 594(a), finding that the Legislature intended that damage to jail property should be exclusively prosecuted under Penal Code section 4600. (*People v. Jimenez, supra*, 117 Cal.App.5th at pp. 613–614.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024) Crimes Against Property, §§ 29877–306285.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[2], Ch. 144, *Crimes Against Order*, § 144.03[2] (Matthew Bender).

2903. Damaging Wireless Communication Device (Pen. Code, § 591.5)

The defendant is charged [in Count __] with (removing[,]/ [or] injuring[,]/ [or] destroying[,]/ [or] damaging[,]/ [or] obstructing the use of) a wireless communication device with intent to prevent the device from being used to summon assistance or to notify law enforcement [or any public safety agency] of a crime [in violation of Penal Code section 591.5].

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

1. The defendant unlawfully (removed[,]/ [or] injured[,]/ [or] destroyed[,]/ [or] damaged/ [or] obstructed the use of) a wireless communication device;
2. When the defendant acted, (he/she) intended to prevent _____ *<insert name/description of person>* from using the device to summon assistance or to notify law enforcement [or any public safety agency] of a crime;

AND

3. The defendant did so maliciously.

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.

New October 2026

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements. Pen. Code, § 591.5.
- “Maliciously” Defined. Pen. Code, § 7(b)(4); *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].

- “Obstruct” Not Unconstitutionally Vague. *Kreiling v. Field* (9th Cir. 1970) 431 F.2d 502, 504.

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 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, October 2026**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give **anthis** 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].)

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.
- [Paralysis Need Not Be Caused by Neurological Injury. *People v. Feise* \(2025\) 115 Cal.App.5th 454, 461 \[338 Cal.Rptr.3d 47\].](#)

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 (5th ed. 2024) Punishment, §§ 401–406.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

3237. Aggravating Factor: Probation, Mandatory Supervision, Postrelease Community Supervision, or Parole When Crime was Committed

<nonbifurcated trial>

[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 _____ *<insert name of defendant>* was on (probation/mandatory supervision/postrelease community supervision/parole) when the defendant committed the crime.]

<bifurcated trial>

[The People have alleged that _____ *<insert name of defendant>* was on (probation/mandatory supervision/postrelease community supervision/parole) when the defendant committed the crime.]

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 2026

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *People v. Wiley* (2025) 17 Cal.5th 1069, 1086 [333 Cal.Rptr.3d 635, 570 P.3d 436]; *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify the crime(s) to which the aggravating factor pertains if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, §

1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. California Rules of Court, rule 4.421(b)(4).
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Parole Status and Prior Performance on Parole Are Distinct Aggravating Factors. *People v. Yim* (2007) 152 Cal.App.4th 366, 369 [60 Cal.Rptr.3d 887].

COMMENTARY

Aggravating Factors Relating to the Defendant

Each of the instructions for aggravating factors related to the manner in which the defendant committed one or more charged crimes includes language informing the jury that they may not find the aggravating factor allegation true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime. (See CALCRIM Nos. 3224–3233; see also Cal. Rules of Court, rule 4.421(a) [setting forth aggravating factors “relating to the crime”].) This instructional language is derived from case law holding that “[t]he essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary.” (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; see also *People v. Black, supra*, 41 Cal.4th at p. 817, overruled on other grounds by *People v. Wiley, supra*, 17 Cal.5th at p. 1085.)

California Rules of Court, rule 4.421(b) sets forth additional aggravating factors “relating to the defendant.” The published cases addressing the requirement that aggravating factors should only be found true where the defendant’s conduct was “distinctively worse than an ordinary commission of the underlying crime” all address aggravating factors “relating to the crime.” In the absence of any published case law applying this rule to aggravating factors “related to the defendant”—which generally involve indicia of recidivism—the committee has not included any instructional language directing the jury to evaluate whether aggravating factors “related to the defendant” render the defendant’s conduct “distinctively worse than an ordinary commission of the underlying crime.”

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3426. Voluntary Intoxication (Pen. Code, § 29.4)

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <insert specific ~~intent or~~ mental state required, e.g., "the intent to permanently deprive the owner of his or her property" or "knowledge that . . ." or "the intent to do the act required">.

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

In connection with the charge of _____ <insert first charged offense requiring specific intent or mental state>, the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with _____ <insert specific ~~intent or~~ mental state required, e.g., "the intent to permanently deprive the owner of his or her property" or "knowledge that . . .">. If the People have not met this burden, you must find the defendant not guilty of _____ <insert first charged offense requiring specific ~~intent or~~ mental state>.

<Repeat this paragraph for each offense requiring ~~specific intent or~~ a specific mental state.>

You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to _____ <insert general intent offense[s]>.]

New January 2006; Revised August 2012, August 2013, February 2015, March 2019, September 2024, * October 2026*

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (*People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d

1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary intoxication and its effect on the defendant's formation of any required specific mental state. (Pen. Code, § 29.4; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [relevant to mental state in aiding and abetting].)

Voluntary intoxication may not be considered for general intent crimes. (*People v. Mendoza, supra*, 18 Cal.4th at pp. 1127–1128; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [104 Cal.Rptr.2d 738, 18 P.3d 660]; see also *People v. Hood* (1969) 1 Cal.3d 444, 451 [82 Cal.Rptr. 618, 462 P.2d 370] [applying specific vs. general intent analysis and holding that assault type crimes are general intent; subsequently superseded by amendments to former Penal Code section 22 [now Penal Code section 29.4] on a different point].) Crimes requiring criminal negligence are general intent crimes. (*People v. Midell* (2025) 113 Cal.App.5th 1060, 1082 [336 Cal.Rptr.3d 537].)

A split in authority exists as to whether the jury may consider the effect of voluntary intoxication on a defendant's subjective knowledge. (Compare *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property] with *People v. Suazo* (2023) 95 Cal.App.5th 681, 696–703 [313 Cal.Rptr.3d 649] [disagreeing with Reyes] and *People v. Berg* (2018) 23 Cal.App.5th 959, 964–967 [233 Cal.Rptr.3d 629] [same].)

If both specific and general intent crimes are charged, the court must specify the general intent crimes in the bracketed portion of the last sentence and instruct the jury that voluntary intoxication is not a defense to those crimes. (*People v. Aguirre* (1995) 31 Cal.App.4th 391, 399–402 [37 Cal.Rptr.2d 48]; *People v. Rivera* (1984) 162 Cal.App.3d 141, 145–146 [207 Cal.Rptr. 756].)

If the defendant claims unconsciousness due to involuntary intoxication as a defense to driving under the influence, see *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317–1323 [149 Cal.Rptr.3d 167].

The court may need to modify this instruction if given with CALCRIM No. 362, *Consciousness of Guilt*. (*People v. Wiidanen* (2011) 201 Cal.App.4th 526, 528, 533 [135 Cal.Rptr.3d 736].)

Evidence of voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3d 732, 415 P.3d 789].)

Related Instructions

CALCRIM No. 3427, *Involuntary Intoxication*.

CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.

CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

AUTHORITY

- Instructional Requirements. Pen. Code, § 29.4; *People v. Castillo, supra*, 16 Cal.4th at p. 1014; *People v. Saille, supra*, 54 Cal.3d at p. 1119.
- Effect of Prescription Drugs. *People v. Mathson, supra*, 210 Cal.App.4th at p. 1328, fn. 32.

RELATED ISSUES

Implied Malice

“[E]vidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought.” (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433], quoting *People v. Reyes, supra*, 52 Cal.App.4th at p. 984, fn. 6.)

Intoxication Based on Mistake of Fact Is Involuntary

Intoxication resulting from trickery is not “voluntary.” (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [194 Cal.Rptr. 633] [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Premeditation and Deliberation

“[T]he trial court has no sua sponte duty to instruct that voluntary intoxication may be considered in determining the existence of premeditation and deliberation.” (*People v. Hughes* (2002) 27 Cal.4th 287, 342 [116 Cal.Rptr.2d 401, 39 P.3d 432], citing *People v. Saille, supra*, 54 Cal.3d at p. 1120; see *People v. Castillo, supra*, 16 Cal.4th at p. 1018 [counsel not ineffective for failing to request instruction specifically relating voluntary intoxication to premeditation and deliberation].)

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense

Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 29.4, rather than by section 26 and may only be offered to negate specific intent. (*People v. Suazo* (2023) 95 Cal.App.5th 681, 703–704 [313 Cal.Rptr.3d 649] [no error in refusing to instruct on unconsciousness resulting from voluntary intoxication in gross vehicular

manslaughter and fleeing-the-scene allegations]; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 [79 Cal.Rptr.2d 408, 966 P.2d 442] [“if the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication [citation].”].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~5~~⁴th ed. 20~~24~~¹²) Defenses, §§ ~~33–~~^{2–4239}.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings*, § 124.04 (Matthew Bender).

**3428. Mental Impairment: Defense to ~~Specific Intent or~~Wrongful
Mental State (Pen. Code, § 28)**

You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the ~~intent or~~ mental state required for that crime.

The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required ~~intent or~~ mental state, specifically: _____ <insert specific ~~intent or~~ mental state required, e.g., “malice aforethought,” “the intent to permanently deprive the owner of his or her property,” or “knowledge that . . .”>. If the People have not met this burden, you must find the defendant not guilty of _____ <insert name of alleged offense>.

<Repeat this paragraph for each offense requiring ~~specific intent or~~ a specific mental state.>

[Do not consider evidence of mental (disease[,]/ [or] defect[,]/ [or] disorder) when deciding if _____ <insert name of nontarget offense> was a natural and probable consequence of _____ <insert name of target offense>.]

New January 2006; Revised March 2017, October 2026

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on mental impairment as a defense to specific intent or mental state; however, the trial court must give this instruction on request. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) The jury may consider evidence of mental impairment and its effect on the defendant’s ~~ability to~~ formation of any required specific mental state ~~required for the offense charged~~. (Pen. Code, § 28; *People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [voluntary intoxication relevant to mental state in aiding and abetting].)

Evidence of mental impairment may not be considered for general-~~intent~~ crimes, ~~unless there is an element, such as knowledge, that requires a specific mental state.~~

(*People v. Reyes, supra*, 52 Cal.App.4th at pp. 983–985; *People v. Mendoza, supra*, 18 Cal.4th at pp. 1131–1134 [aiding and abetting].)

Evidence of mental impairment may not be considered for crimes requiring criminal negligence. (*People v. Midell (2025)* 113 Cal.App.5th 1060, 1082 [336 Cal.Rptr.3d 537].)

A split in authority exists as to whether a knowledge element makes a crime a general intent or specific intent crime. (Compare *People v. Reyes (1997)* 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [knowledge element makes receiving stolen property a specific intent crime] with *People v. Suazo (2023)* 95 Cal.App.5th 681, 696–703 [313 Cal.Rptr.3d 649] [disagreeing with *Reyes*] and *People v. Berg (2018)* 23 Cal.App.5th 959, 964–967 [233 Cal.Rptr.3d 629] [same].)

In all cases, the court must insert the specific ~~intent or~~ mental state required and the offense for which the mental state is an element. (See *People v. Hill (1967)* 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

Give the bracketed paragraph that begins with “You must not consider evidence of mental” when instructing on aiding and abetting liability for a nontarget offense. (*People v. Mendoza, supra*, 18 Cal.4th at p. 1134.)

In an attempted murder case, it was error to insert “intent to kill” instead of “express malice” as the required intent in paragraph two of this instruction. (See *People v. Ocegueda (2016)* 247 Cal.App.4th 1393, 1407 [203 Cal.Rptr.3d 233].)

The court may need to modify this instruction to ensure it does not prohibit the jury from considering evidence of a defendant’s mental illness or impairment for a purpose other than deciding whether defendant possessed the required mental state for murder. (*People v. McGehee (2016)* 246 Cal.App.4th 1190, 1205 [201 Cal.Rptr.3d 714].) -For example, giving this unmodified instruction with CALCRIM No. 362, *Consciousness of Guilt: False Statements*, could be error if a defendant’s false statements were the product of mental illness or impairment. (~~*Ibid*~~*ibid.*).

AUTHORITY

- Statutory Authority. Pen. Code, § 28; see also Pen. Code, §§ 25, 29.
- Instructional Requirements. *People v. Saille, supra, (1991)* 54 Cal.3d ~~1103~~, at p. 1119 [~~2 Cal.Rptr.2d 364, 820 P.2d 588~~].
- Mental States—Knowledge. *People v. Reyes, supra, (1997)* 52 Cal.App.4th ~~975~~, at pp. 983–985 [~~61 Cal.Rptr.2d 39~~].
- Mental States—Aiding and Abetting. *People v. Mendoza, supra, (1998)* 18 Cal.4th ~~1114~~, at pp. 1131–1134 [~~77 Cal.Rptr.2d 428, 959 P.2d 735~~].

RELATED ISSUES

Scope of Expert Testimony

Penal Code section 29 provides that an expert testifying about a defendant's mental illness "shall not testify as to whether the defendant had or did not have the required mental states." (Pen. Code, § 29.) In *People v. Coddington* (2000) 23 Cal.4th 529, 582–583 [97 Cal.Rptr.2d 528, 2 P.3d 1081], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [108 Cal.Rptr.2d 409, 25 P.3d 618], the Supreme Court held that the trial court improperly restricted the scope of the expert testimony when the court refused to permit "hypothetical questions regarding the effect of mental defect or illness on a person's ability to deliberate or premeditate." (*Id.* at p. 582.) "An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (*Id.* at pp. 582–583 [italics original]; see also *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364–1365 [58 Cal.Rptr.2d 294] [discussing appropriate scope of expert testimony].)

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Defenses, § 109.
- 3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.03 (Matthew Bender).
- 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings*, § 124.04 (Matthew Bender).

3590. Final Instruction on Discharge of Jury

You have now completed your jury service in this case. On behalf of all the judges of the court, please accept my thanks for your time and effort.

Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone.

[I remind you that under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.]

Let me tell you about some rules the law puts in place for your convenience and protection.

The lawyers in this case, the defendant[s], or their representatives may now talk to you about the case, including your deliberations or verdict. Those discussions must occur at a reasonable time and place and with your consent.

Please tell me immediately if anyone unreasonably contacts you without your consent.

Anyone who violates these rules is violating a court order and may be fined.

[I order that the court's record of personal juror identifying information, including names, addresses, and telephone numbers, be sealed until further order of this court.

If, in the future, the court is asked to decide whether this information will be released, notice will be sent to any juror whose information is involved. You may oppose the release of this information and ask that any hearing on the release be closed to the public. The court will decide whether and under what conditions any information may be disclosed.]

[Service on a jury trial [that involves evidence of violence] may cause stress and/or trauma. Before you leave the courthouse, (you may request/the court will provide) written information about mental health awareness, including stress relief and symptoms that may be experienced following exposure to trauma.]

Again, thank you for your service. You are now excused.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on discharge of the jury. (Code Civ. Proc., § 206.) The court may give the bracketed portions about accepting payment and sealing personal juror identifying information at its discretion. (*Id.*, § 237.)

Code of Civil Procedure section 237(a)(2) requires the court to seal the personal identifying information of jurors in a criminal case following the recording of the jury's verdict. Access to the sealed records may be permitted on a showing of good cause in a petition to the court, as provided by subdivisions (b) through (d).

Section 2.3014 of the California Standards of Judicial Administration states that “it is appropriate for the trial judge to thank jurors for their public service, but the judge’s comments should not include praise or criticism of the verdict or the failure to reach a verdict.”

Give the bracketed paragraph that begins with “Service on a jury trial” if the case involved a violent felony offense or if the court otherwise decides to give this advisement. (Civ. Code Proc., § 242.) Select the parenthetical option that applies to the court’s procedure or modify accordingly. See the Judicial Council’s Juror Mental Health and Wellness flyer (at courts.ca.gov/system/files/file/juror-mental-health-and-wellness-flyer_0.pdf.)

AUTHORITY

- Statutory Authority. Code Civ. Proc., §§ 206, 237.
- Jury Tampering. Pen. Code, § 116.5.
- Requirement to Distribute Mental Health Awareness Materials. Code Civ. Proc., § 242.

SECONDARY SOURCES

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4][c] (Matthew Bender).