Judicial Council of California . Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on August 31, 2012

Title
Jury Instructions: Additions, Revisions, and Revocations to Criminal Jury Instructions

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

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

Agenda Item Type
Action Required

Effective Date
August 31, 2012

Date of Report
July 19, 2012

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Executive Summary

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

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective August 31, 2012, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be published in the 2012 supplement of the *Judicial Council of California Criminal Jury Instructions (CALCRIM).*

A table of contents and the proposed additions and revisions to the criminal jury instructions are attached to this report at pages 6–98.

Previous Council Action

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

The council approved the last *CALCRIM* release at its February 2012 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to the following instructions: 101, 124, 318, 335, 336, 350, 510, 571, 840, 1151, 1400, 1401, 2040, 2624, 2843, 3404, 3426, 3470, 3517, 3518, 3519, 3590. It further recommends adoption of a new instruction, CALCRIM No. 2998, *Cruelty to Animals*.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 10 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of some of the pending proposals:

- **Determining Income Using the Bank Deposits Method**
  The committee proposes revising CALCRIM No. 2843, *Determining Income: Bank Deposits Method* in response to a comment received from a deputy district attorney. The commentator pointed out that the analog federal instructions, on which the California instructions are based, do not require proof of a defendant's income "not in a bank account." He also noted that there was no authority for such language. The committee agreed that the phrase was unnecessary.

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

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 10 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

- **Separation Admonition**
  Penal Code section 1122(a)(1) and Code of Civil Procedure section 1209(a)(6) now require the court to admonish jurors before each adjournment not to use electronic or wireless communication. Therefore the committee added such an admonition to CALCRIM No. 124, *Separation Admonition.*

- **In-Custody Informants**
  The legislature enacted Penal Code section 1111.5 requiring that the testimony of an in-custody informant be treated in a manner similar to that of an accomplice. The committee revised CALCRIM No. 336, *In-Custody Informant,* accordingly, borrowing heavily from CALCRIM Nos. 334–335 on accomplice testimony.

- **Character of Defendant**
  A judge noticed that the instructions for filling in the blanks for "insert character trait" in CALCRIM No. 350, *Character of Defendant,* could pose a problem if the trait in question were honesty. Character evidence must be relevant to the charged offense, and honesty may or may not be relevant. The committee addressed the problem by revising the instructions for filling in the blanks and adding an explanatory bench note and case cite.

- **Inflicting Injury on Spouse, Cohabitant, or Fellow Parent**
  The committee updated the bench notes of CALCRIM No. 840, *Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition,* to advise trial courts that in Penal Code section 273.5 the legislature enacted a new definition of "traumatic condition" that includes strangulation and suffocation.

- **Pandering**
  In response to a comment from the collective appellate defense projects, the committee revised the definition of "pandering" and "prostitution" in CALCRIM No. 1151, *Pandering,* to clarify how the act of pandering must be with "someone other than the defendant," under *People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159–1160. The previous revision had embedded this language in the definition of "prostitute" and the commentator noted that it would be more clear if embedded in the definition of "pandering." The committee agreed.

Threatening a Witness After Testimony or Information Given
The committee updated CALCRIM No. 2624, *Threatening a Witness After Testimony or Information Given,* to reflect the holding in *People v. Lowery* (2011) 52 Cal.4th 419, 427, and incorporate the "reasonable listener standard."

New Instruction
A committee member, Alameda County Deputy District Attorney Jason B. Chin, suggested drafting a new instruction to cover animal cruelty. In response the committee drafted CALCRIM No. 2953, *Animal Cruelty,* under Penal Code section 597(a).

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for comment from May 22 to June 26, 2012.

The committee is fortunate that it regularly receives comments from institutional commentators who take the time and effort to provide careful and often quite detailed comments. This time was no exception. The committee received comments from three institutional commentators and two individuals. The committee evaluated all comments and revised some of the instructions as a result. A chart with the text of all comments received and the committee's responses is attached at pages 99–128.

Of the comments received, most came from the defense bar regarding the proposed deletion of multiple repetitions (up to thirteen in one instruction) of the phrase "beyond a reasonable doubt" in the lesser included offense instructions, CALCRIM Nos. 3517–3519. The committee decided not to restore the deleted repetitions. It had already added a new, omnibus admonition about reasonable doubt at the end of each instruction, in addition to the admonitions that jurors always hear in the reasonable doubt instructions before and after trial, CALCRIM Nos. 103 and 220. Moreover, the deletions stemmed from feedback from the trial bench that the repetitions were tedious and annoying to jurors, in addition to being redundant.

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

Implementation Requirements, Costs, and Operational Impacts

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

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

Attachments

1. Full text of new and revised *CALCRIM* instructions, pp. 6–98.

2. Chart of comments, pp. 99–128.

CALCRIM Revisions for Council Approval, August 2012

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350	Character of Defendant
510, 3404	Accident Defense
571	Homicide Series
840	Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition
1151	Pandering
1400-1401	Criminal Street Gang Series
2040	Unauthorized Use of Personal Identifying Information
2624	Threatening a Witness After Testimony or Information Given
2843	Determining Income: Bank Deposits Method
3426	Voluntary Intoxication
3470	Right to Self-Defense or Defense of Another (Non-Homicide)
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3590	Final Instruction on Discharge of Jury

2998. Cruelty to Animals (Pen. Code, § 597(a))

The defendant is charged [in Count __] with cruelty to animals [in violation of Penal Code section 597(a)].

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

1. **The defendant (maimed[,]/ mutilated[,]/ tortured[,]/ [or] wounded a living animal/ [or] killed a living animal);**
2. **The defendant intended to (maim[,]/ mutilate[,]/ torture[,]/ [or] wound a living animal/ kill an animal);**
   AND
3. **The defendant acted maliciously.**

[*Torture* means every act, failure to act, or neglect that causes or permits unnecessary or unjustifiable physical pain or suffering.]

[*Maiming* means disabling or disfiguring an animal permanently or depriving it of a limb, organ, or other part of the body.]

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

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

The court will need to modify this instruction if Penal Code sections 597(b), 597(c) or 599(c) apply.

The committee concluded that the definition of "animal" provided in Penal Code section 599b, i.e., that it includes "every dumb creature," would not be helpful to a jury and that no definition of the word was necessary.

AUTHORITY

- Elements ▸ Pen. Code, § 597(a).
- Definition of Torture ▸ Pen. Code, § 599b
- Definition of Malicious ▸ Pen. Code, § 7
- Maiming ▸ See CALCRIM No. 800, *Aggravated Mayhem*
- General Intent Crime ▸ *People v. Alvarado (2005) 125 Cal.App.4th 1179*
- Cruelty ▸ *People v. Burnett* (2003) 110 Cal.App.4th 868
- Any Living Animal ▸ *People v. Thomason* (2003) 84 Cal.App.4th 1064

- ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 265.

2999–3099. Reserved for Future Use

101. Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)

Our system of justice requires that trials be conducted in open court with the parties presenting evidence and the judge deciding the law that applies to the case. It is unfair to the parties if you receive additional information from any other source, because that information may be unreliable or irrelevant and the parties will not have had the opportunity to examine and respond to it. Your verdict must be based only on the evidence presented during trial in this court and the law as I provide it to you.

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication. You must not talk about these things with other jurors, either, until you begin deliberating.

As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not allow anything that happens outside of the courtroom to affect your decision [unless I tell you otherwise]. During the trial, do not read, listen to, or watch any news report or commentary about the case from any source.

Do not use the Internet (, a dictionary/[, or _____<*insert other relevant source of information or means of communication*>]) in any way in connection with this case, either on your own or as a group. Do not investigate the facts or the law or do any research regarding this case. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

[If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom and during jury deliberations. An electronic device includes any data storage device. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you without delay.]

During the trial, do not speak to a defendant, witness, lawyer, or anyone associated with them. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

If you receive any information about this case from any source outside of the trial, even unintentionally, do not share that information with any other juror. If you do receive such information, or if anyone tries to influence you or any juror, you must immediately tell the bailiff.

Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

You must reach your verdict without any consideration of punishment.

I want to emphasize that you may not use any form of research or communication, including electronic or wireless research or communication, to research, share, communicate, or allow someone else to communicate with you regarding any subject of the trial. [If you violate this rule, you may be subject to jail time, a fine, or other punishment.]

When the trial has ended and you have been released as jurors, you may discuss the case with anyone. [But under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.]

New January 2006; Revised June 2007, April 2008, December 2008, April 2010, October 2010, April 2011, February 2012

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.) See also California Rules of Court, Rule 2.1035.

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880 [196 Cal.Rptr. 309, 671 P.2d 813].) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.

If there will be a jury view, give the bracketed phrase "unless I tell you otherwise" in the fourth paragraph. (Pen. Code, § 1119.)

AUTHORITY

- Statutory Admonitions ▸ Pen. Code, § 1122.
- Avoid Discussing the Case ▸ *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports ▸ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research ▸ *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].
- Court's Contempt Power for Violations of Admonitions ▸ Pen. Code, § 1122(a)(1); Code Civ. Proc. § 1209(a)(6) (effective 1/1/12).

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court's admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

> It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations . . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the second paragraph of this instruction.

Jury Misconduct

It is error to instruct the jury to immediately advise the court if a juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis. (*People v. Engelman* (2002) 28 Cal.4th 436, 449 [121 Cal.Rptr.2d 862, 49 P.3d 209].)

124. Separation Admonition

[You may be permitted to separate during recesses and at the end of the day. I will tell you when to return. Please remember, we cannot begin the trial until all of you are in place, so it is important to be on time.]

Remember, do not talk about the case or about any of the people or any subject involved in it with anyone, including the other jurors. Do not do research, share information, or talk to each other or to anyone else about the facts of the case or anything else connected with the trial, and do not use any form of electronic or wireless communication~~, such as _____ <insert currently popular modes of electronic or wireless communication>~~ to do any of those things, either.

Do not make up your mind or express any opinion about the case or any issue connected with the trial~~about the verdict or any issue~~ until after you have discussed the case with the other jurors during deliberations.

New January 2006 [insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to admonish the jury "at each adjournment of the court before the submission of the cause to the jury." Pen. Code, § 1122(b). Adjournment means continuing proceedings to another court day, not every time the court calls a recess. *People v. Heishman* (1988) 45 Cal.3d 147, 174 [246 Cal.Rptr. 673, 691], citing *People v. Moore* (1971) 15 Cal.App.3d 851, 852-853 [93 Cal.Rptr. 447].

AUTHORITY

- Statutory Authority ▸ Pen. Code, § 1122(b).

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1] (Matthew Bender).

318. Prior Statements as Evidence

You have heard evidence of [a] statement[s] that a witness made before the trial. If you decide that the witness made (that/those) statement[s], you may use (that/those) statement[s] in two ways:

1. **To evaluate whether the witness's testimony in court is believable;**

   AND

2. **As evidence that the information in (that/those) earlier statement[s] is true.**

New January 2006

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1026 [251 Cal.Rptr. 643, 761 P.2d 103].) Use this instruction when a testifying witness has been confronted with a prior inconsistent statement.

If prior testimony of an unavailable witness was impeached with a prior inconsistent statement, use CALCRIM No. 319, *Prior Statements of Unavailable Witness*. (*People v. Williams* (1976) 16 Cal.3d 663, 668–669 [128 Cal.Rptr. 888, 547 P.2d 1000].) If the prior statements were obtained by a peace officer in violation of *Miranda*, give CALCRIM No. 356, Miranda-*Defective Statements*.

AUTHORITY

- Instructional Requirements ▸ *California v. Green* (1970) 399 U.S. 149, 158 [90 S.Ct. 1930, 26 L.Ed.2d 489]; *People v. Cannady* (1972) 8 Cal.3d 379, 385–386 [105 Cal.Rptr. 129, 503 P.2d 585]; see Evid. Code, §§ 770, 791, 1235, 1236.

This Instruction Upheld ▸ *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-367 [100 Cal.Rptr.3d 820]; *People v. Golde* (2008) 163 Cal.App.4th 101, 120 [77 Cal.Rptr.3d 120].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 157.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][b], Ch. 83, *Evidence*, § 83.13[3][e], [f], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

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If the crime[s] of _____ *<insert charged crime[s]>* **(was/were) committed, then _____** *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s] to (that/those) crime[s].**

You may not convict the defendant of _____ *<insert crime[s]>* **based on the (statement/ [or] testimony) of an accomplice alone. You may use the (statement]/ [or] testimony) of an accomplice to convict the defendant only if:**

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

New January 2006; Revised June 2007, April 2010

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

If a codefendant's testimony tends to incriminate another defendant, the court **must give** an appropriate instruction on accomplice testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562 [43 Cal.Rptr.3d 1, 133 P.3d 1076]; *citing People v. Box* (2000) 23 Cal.4th 1153, 1209 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Alvarez* (1996) 14 Cal.4th 155, 218 [58 Cal.Rptr.2d 385, 926 P.2d 365].) The court **must** also instruct on accomplice testimony when two co-defendants testify against each other and blame each other for the crime. (*Id.* at 218-219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817 793 P.2d 23].
- Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient ▸ *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].
- Testimony of Feigned Accomplice Need Not Be Corroborated ▸ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ▸ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- This Instruction Upheld ▸ *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-367 [100 Cal.Rptr.3d 820].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 98, 99, 105.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 654.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.02[5][b] (Matthew Bender).

336. In-Custody Informant

~~**The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.**~~
View the (statement/ [or] testimony) of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such (statement/ [or] testimony), you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such (statement/ [or] testimony), but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

~~**[An *in-custody informant* is someone[, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose testimony is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution.]**~~

<Give the following paragraph if the issue of whether a witness was an in-custody informant is in dispute>
[An *in-custody informant* is someone [, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose (statement/ [or] testimony)is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution. If you decide that a (declarant/ [or] witness) was not an in-custody informant, then you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.]

<Give the first bracketed phrase if the issue of whether a witness was an in-custody informant is in dispute>
[If you decide that a (declarant/ [or] witness) was an in-custody informant, then] (Y/)you may not convict the defendant of _____ *<insert charged crime[s]>* **based on the (statement/ [or] testimony) of that in-custody informant alone. [Nor may you find a special circumstance true/ [or] use evidence in aggravation based on the (statement/ [or] testimony) of that in-custody informant alone.]**

You may use the (statement/ [or] testimony) of an in-custody informant only if:

1. **The (statement/ [or] testimony) is supported by other evidence that you believe;**
2. **That supporting evidence is independent of the (statement/ [or] testimony) ;**
   AND
3. **That supporting evidence connects the defendant to the commission of the crime[s] [or to the special circumstance/ [or] to evidence in aggravation]. The supporting evidence is not sufficient if it merely shows that the charged crime was committed [or proves the existence of a special circumstance/ [or] evidence in aggravation.**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.]

[Do not use the (statement/ [or] testimony) of an in-custody informant to support the (statement/ [or/ testimony) of another in-custody informant unless you are convinced that _____ *<insert name of party calling in-custody informant as witness>* **has proven it is more likely than not that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.**

[A percipient witness is someone who personally perceived the matter that he or she testified about.]

<Insert the name of the in-custody informant if his or her statue is not in dispute>
[_____ *<insert name of witness>* **is an *in-custody informant.*]**

[_____ *<insert name of institution>* **is a correctional institution.]**

New January 2006 [insert date of Judicial Council approval].

BENCH NOTES

Instructional Duty
The court must give this instruction on request. (Pen. Code, § 1127a.)

The court should also be aware of the following statutory provisions relating to in-custody informants: Penal Code sections 1127a(c) [prosecution must disclose consideration given to witness]; 1191.25 [prosecution must notify victim of in-custody informant]; and 4001.1 [limitation on payments to in-custody informants and action that may be taken by in-custody informant].

If there is no issue over whether the witness is an in-custody informant and the parties agree, the court may instruct the jury that the witness "is an in-custody informant." If there is an issue over whether the witness is an in-custody informant, give the bracketed definition of the term.

The committee awaits guidance from courts of review on the issue of whether this instruction applies to witnesses other than those called by the People. Until the issue is resolved, the committee provides this version consistent with the language of the new statute.

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

Related Instruction
CALCRIM No. 337, *Witness in Custody or Physically Restrained.*

AUTHORITY

- Instructional Duty ▸ Pen. Code, §§ 1111.5, 1127a.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trials, § 653.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.32[2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03A, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b] (Matthew Bender).

350. Character of Defendant

You have heard character testimony that the defendant (is a _____ <*insert character trait relevant to crime[s] committed* > **person/ [or] has a good reputation for _____** <*insert character trait relevant to crime[s] committed* > **in the community where (he/she) lives or works).**

~~**You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.**~~

Evidence of the defendant's character for _____ <*insert character trait relevant to crime[s] committed* > **can by itself create a reasonable doubt [whether the defendant committed _____** *<insert name[s] of alleged offenses[s] and count[s], e.g., battery, as charged in Count 1>*]**. However, evidence of the defendant's good character may be countered by evidence of (his/her) bad character for the same trait. You must decide the meaning and importance of the character evidence.**

[If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.]

You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.

New January 2006, {insert date of council approval]

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on defendant's character; however, it must be given on request. (*People v. Bell* (1875) 49 Cal. 485, 489–490 [jury should be instructed that evidence of good reputation should be weighed as any other fact established and may be sufficient to create reasonable doubt of guilt]; *People v. Jones* (1954) 42 Cal.2d 219, 222 [266 P.2d 38] [character evidence may be sufficient to create reasonable doubt of guilt]; *People v. Wilson* (1913) 23 Cal.App. 513, 523–524 [138 P. 971] [court erred in failing to give requested instruction or any instruction on character evidence].)

AUTHORITY

- Instructional Requirements ▸ *People v. Bell* (1875) 49 Cal. 485, 489–490; *People v. Wilson* (1913) 23 Cal.App. 513, 523–524 [138 P. 971]; *People v. Jones* (1954) 42 Cal.2d 219, 222 [266 P.2d 38].
- Character Evidence Must Be Relevant to Offense Charged ▸ *People v. Taylor* (1986) 180 Cal.App.3d 622, 629, [225 Cal.Rptr. 733].
- Admissibility ▸ Evid. Code, §§ 1100–1102.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 53.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][d], [e][ii], Ch. 83, *Evidence*, § 83.12[1] (Matthew Bender).

RELATED ISSUES

No Discussion of Character Is Evidence of Good Character
The fact that the defendant's character or reputation has not been discussed or questioned among those who know him or her is evidence of the defendant's good character and reputation. (*People v. Castillo* (1935) 5 Cal.App.2d 194, 198 [42 P.2d 682].) However, the defendant must have resided in the community for a sufficient period of time and become acquainted with the community in order for his or her character to have become known and for some sort of reputation to have been established. (See Evid. Code, § 1324 [reputation may be shown in the community where defendant resides and in a group with which he or she habitually associates]; see also *People v. Pauli* (1922) 58 Cal.App. 594, 596 [209 P. 88] [witness's testimony about defendant's good reputation in community was inappropriate where defendant was a stranger in the community, working for a single employer for a few months, going about little, and forming no associations].)

Business Community
The community for purposes of reputation evidence may also be the defendant's business community and associates. (*People v. Cobb* (1955) 45 Cal.2d 158, 163 [287 P.2d 752].)

510. Excusable Homicide: Accident

The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone as a result of accident or misfortune. Such a killing is excused, and therefore not unlawful, if:

1. **The defendant was doing a lawful act in a lawful way;**

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

AND

3. **The defendant was acting without any unlawful intent.**

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

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

New January 2006 [insert date of council approval]

BENCH NOTES

Instructional Duty

The court has no **sua sponte** duty to instruct on accident. ~~(~~*People v. Anderson* (2011) 51 Cal.4th 989, 997~~-~~998 [125 Cal.Rptr.3d 408].) ~~has a **sua sponte** duty to instruct on lawful acts that excuse homicide when there is evidence supporting that defense. (See People v. Hampton (1929) 96 Cal.App. 157, 159–160 [273 P. 854] [court erred in refusing defendant's requested instruction]; People v. Slater (1943) 60 Cal.App.2d 358, 369 [140 P.2d 846]; People v. Bloyd (1987) 43 Cal.3d 333, 353–354 [233 Cal.Rptr. 368, 729 P.2d 802] [instruction not required when defendant argued the victim killed herself by accident].)~~

When this instruction is given, it should always be given in conjunction with CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged* or CALCRIM No. 580, *Involuntary Manslaughter: Lesser Included Offense*, unless vehicular manslaughter with ordinary negligence is charged. (*People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].) A lawful act can be the

basis of involuntary manslaughter, but only if that act is committed with *criminal* negligence ("in an unlawful manner or without due caution and circumspection"). (Pen. Code, § 192(b).) The level of negligence described in this instruction, 510, is *ordinary* negligence. While proof of ordinary negligence is sufficient to prevent a killing from being excused under Penal Code section 195, subd. 1, proof of ordinary negligence is not sufficient to find a defendant guilty of involuntary manslaughter under Penal Code section 192(b). (*People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926].)

Related Instructions
CALCRIM No. 3404, *Accident.*

AUTHORITY

- Excusable Homicide If Committed by Lawful Act ▸ Pen. Code, § 195, subd. 1.
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Instructing With Involuntary Manslaughter ▸ *People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].
- Misfortune as Accident ▸ *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 242.

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

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

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

RELATED ISSUES

Traditional Self-Defense
In *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1358–1359 [37 Cal.Rptr.2d 304], the court held that the claim that a killing was accidental bars the defendant from

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

3404. Accident (Pen. Code, § 195)

<General or Specific Intent Crimes>
[The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____** *<insert crime[s]>* **unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]**

<Criminal Negligence Crimes>
[The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) acted [or failed to act] accidentally without criminal negligence. You may not find the defendant guilty of _____** *<insert crime[s]>* **unless you are convinced beyond a reasonable doubt that (he/she) acted with criminal negligence. *Criminal negligence* is defined in another instruction.]**

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

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

~~When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)~~

~~Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)~~

When instructing on the defense of accident and misfortune, only the mental state relevant to the crime charged should be included in the instruction. (*People v. Lara* (1996) 44 Cal.App.4th 102, 109 [51 Cal.Rptr.2d 402] [trial court erred in instructing on criminal negligence in battery case because battery is a general intent crime].) Give the first paragraph if the defense is raised to a general or specific intent crime. Give the second paragraph if the defense is raised to a crime that is committed by criminal negligence. In either case, the court should insert the

specific crime in the space provided. If both intent and negligence crimes are charged, instruct with both paragraphs.

Related Instructions
If murder is charged, see CALCRIM No. 510, *Excusable Homicide: Accidental*.

AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 26(5), 195.
- Burden of Proof ▸ *People v. Black* (1951) 103 Cal.App.2d 69, 79 [229 P.2d 61]; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Misfortune as Accident ▸ *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 241.

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

RELATED ISSUES

Misfortune Defined
"'Misfortune' when applied to a criminal act is analogous [to] the word 'misadventure' and bears the connotation of accident while doing a lawful act." (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].)

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

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

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

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

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

AND

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

BUT

At least one of those beliefs was unreasonable.

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

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part by *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime "could only lead to an acquittal based on

justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

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

Related Instructions

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

CALCRIM 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.

CALCRIM 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM 3472, *Right to Self-Defense: May Not Be Contrived*.

AUTHORITY

- Elements ▸ Pen. Code, § 192(a).
- Imperfect Self-Defense Defined ▸ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others ▸ *People v. Randle~~Michaels~~* (200~~2~~5) ~~28~~35 Cal.4th ~~486, 529–531~~987, 990, 995-1000 [28 Cal.Rptr.3d 725, 731, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 415]. ~~[122 Cal.Rptr.2d 285, 49 P.3d 1032].~~
- Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim's Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense ▸ *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433].

- This Instruction Upheld ‣ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 210.

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

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

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Battered Woman's Syndrome
Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].)

Blakeley *Not Retroactive*
The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th

82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra,* 23 Cal.4th at p. 93.)

Inapplicable to Felony Murder

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

Fetus

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

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition (Pen. Code, § 273.5(a))

The defendant is charged [in Count __] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child) that resulted in a traumatic condition [in violation of Penal Code section 273.5(a)].

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

1. **The defendant willfully [and unlawfully] inflicted a physical injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child);**

[AND]

2. **The injury inflicted by the defendant resulted in a traumatic condition.**

<Give element 3 when instructing on self-defense or defense of another>
[AND

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

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

A *traumatic condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

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

[A person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each person for significant periods.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under law to be the natural father. _____ <*insert name of presumed father*> is presumed under law to be the natural father of _____ <*insert name of child*>.]

[A traumatic condition is the *result of* an injury if:

1. **The traumatic condition was the natural and probable consequence of the injury;**

2. **The injury was a direct and substantial factor in causing the condition;**

AND

3. **The condition would not have happened without the injury.**

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.]

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

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590-591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Give the bracketed paragraph that begins, "A traumatic condition is the *result of* an injury if . . . ."

If there is sufficient evidence that an alleged victim's injuries were caused by an accident, the court has a **sua sponte** duty to instruct on accident. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 [88 Cal.Rptr.2d 111].) Give CALCRIM No. 3404, *Accident*.

Give the bracketed language "[and unlawfully]" in element 1 if there is evidence that the defendant acted in self-defense.

Give the third bracketed sentence that begins "A person may cohabit simultaneously with two or more people," on request if there is evidence that the defendant cohabited with two or more people. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].)

Give on request the bracketed paragraph that begins "A person is considered to be the (mother/father)" if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [39 Cal.Rptr.2d 479] [parentage can be established without resort to any presumption].)

If the defendant is charged with an enhancement for a prior conviction for a similar offense within seven years and has not stipulated to the prior conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*. If the court has granted a bifurcated trial, see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If there is evidence that the traumatic condition resulted from strangulation or suffocation, consider instructing according to the special definition provided in Pen. Code, § 273.5(c).

AUTHORITY

- Elements ▸ Pen. Code, § 273.5(a).
- Traumatic Condition Defined ▸ Pen. Code, § 273.5(c); *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].

- Willful Defined ‣ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Cohabitant Defined ‣ *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force ‣ *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Duty to Define Traumatic Condition ‣ *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- Strangulation and Suffocation ‣ Pen. Code, § 273.5(c).
- General Intent Crime ‣ See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra, *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation ‣ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 63, 64.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment on Spouse ‣ Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47 Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting "traumatic condition"].
- Misdemeanor Battery ‣ Pen. Code, §§ 242, 243(a); see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Battery Against Spouse, Cohabitant, or Fellow Parent ‣ Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].

- Simple Assault ▸ Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

RELATED ISSUES

Continuous Course of Conduct
Penal Code section 273.5 is aimed at a continuous course of conduct. The prosecutor is not required to choose a particular act and the jury is not required to unanimously agree on the same act or acts before a guilty verdict can be returned. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224–225 [206 Cal.Rptr. 516].)

Multiple Acts of Abuse
A defendant can be charged with multiple violations of Penal Code section 273.5 when each battery satisfies the elements of section 273.5. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1140 [18 Cal.Rptr.2d 274].)

Prospective Parents of Unborn Children
Penal Code section 273.5(a) does not apply to a man who inflicts an injury upon a woman who is pregnant with his unborn child. "A pregnant woman is not a 'mother' and a fetus is not a 'child' as those terms are used in that section." (*People v. Ward* (1998) 62 Cal.App.4th 122, 126, 129 [72 Cal.Rptr.2d 531].)

Termination of Parental Rights
Penal Code section 273.5 "applies to a man who batters the mother of his child even after parental rights to that child have been terminated." (*People v. Mora* (1996) 51 Cal.App.4th 1349, 1356 [59 Cal.Rptr.2d 801].)

1151. Pandering (Pen. Code, § 266i)

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

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

<Alternative 1A—persuaded/procured>

[1. The defendant (persuaded/procured) _____ *<insert name>* **to be a prostitute(;/.)]**

< Alternative 1B—promises/threats/violence used to cause person to become prostitute>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ *<insert name>* **to become a prostitute(;/.)]**

<Alternative 1C—arranged/procured a position>

[1. The defendant (arranged/procured a position) for _____ *<insert name>* **to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]**

<Alternative 1D—promises/threats/violence used to cause person to remain>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ *<insert name>* **to remain as a prostitute in a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]**

<Alternative 1E—used fraud>

[1. The defendant used fraud, trickery, or duress [or abused a position of confidence or authority] to (persuade/procure) _____ *<insert name>* **to (be a prostitute/enter any place where prostitution is encouraged or allowed/enter or leave California for the purpose of prostitution)(;/.)]**

<Alternative 1F—received money>

[1. The defendant (received/gave/agreed to receive/agreed to give) money or something of value in exchange for (persuading/attempting to persuade/procuring/attempting to procure) _____ *<insert name>* **to (be a prostitute/enter or leave California for the purpose of prostitution)(;/.)]**

[AND]

2. The defendant intended to influence _____ *<insert name>* **to be a prostitute(;/.)**

<Give element 3 when defendant charged with pandering a minor.>
[AND

3. _____ *<insert name>* **was (over the age of 16 years old/under the age of 16) at the time the defendant acted.]**

[It does not matter whether _____ *<insert name>* **was (a prostitute already/ [or] an undercover police officer).]**

A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person ~~with someone other than the defendant~~ in exchange for money [or other compensation]. Pandering requires that ~~the~~an intended act of prostitution be with someone other than the defendant. 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.

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

[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, February 2012

BENCH NOTES

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

In element 1, give the appropriate alternative A-F depending on the evidence in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [117 P.2d 437] [statutory alternatives are not mutually exclusive], disapproved on other grounds in *People v. Dillon* (19830 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (19750 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].)

The committee included "persuade" and "arrange" as options in element one because the statutory language, "procure," may be difficult for jurors to understand.

Give bracketed element 3 if it is alleged that the person procured, or otherwise caused to act, by the defendant was a minor "over" or "under" the age of 16 years. (Pen. Code, § 266i(b).)

Give the bracketed paragraph defining duress on request if there is sufficient evidence that duress was used to procure a person for prostitution. (Pen. Code, § 266i(a)(5); see *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] [definition of "duress"].)

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

Defenses—Instructional Duty
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, § 266i.
- 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] [lewd act requires touching between prostitute and customer].

- Procurement Defined ‣ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].
- Proof of Actual Prostitution Not Required ‣ *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532 [59 Cal.Rptr. 559].
- Duress Defined ‣ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- 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].
- Specific Intent Crime ‣ *People v. Zambia* (2011) 51 Cal.4th 965, 980 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- Victim May [Appear to] Be a Prostitute Already ‣ *People v. Zambia* (2011) 51 Cal.4th 965, 981 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- Pandering Requires Services Procured for Person Other Than Defendant ‣ *People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160 [119 Cal.Rptr.3d 901].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 70–78.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Attempted Pandering ‣ Pen. Code, §§ 664, 266i; *People v. Charles* (1963) 218 Cal.App.2d 812, 819 [32 Cal.Rptr. 653]; *People v. Benenato* (1946) 77 Cal.App.2d 350, 366–367 [175 P.2d 296], disapproved on other grounds in *In re Wright* (1967) 65 Cal.2d 650, 654–655, fn. 3 [56 Cal.Rptr. 110, 422 P.2d 998].

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

See Related Issues section to CALCRIM No. 1150, *Pimping*.

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;**

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.**

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

   [OR]

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

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

AND

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

[If 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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

Defenses—Instructional Duty

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

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

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

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

AUTHORITY

- Elements ▸ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined ▸ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined ▸ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor ▸ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined ▸ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59; *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony ▸ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▸ *People v. Salcido* (2007) 149 Cal.App.4th 356.
- Temporal Connection Between Active Participation and Felonious Criminal Conduct ▸ *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104, 111].

Secondary Sources
2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28.

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

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran, supra,* 97 Cal.App.4th at 1458 [original italics].) The "felonious criminal conduct" need not be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-59.)

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Conspiracy
Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and

who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182 and CALCRIM No. 415, *Conspiracy*.)

Labor Organizations or Mutual Aid Activities

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

Related Gang Crimes

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

Unanimity

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

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

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

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

To prove this allegation, the People must prove that:

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

   AND

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

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

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

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

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

AND

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

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

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

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

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

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

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

   [OR]

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

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

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

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

AND

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

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

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

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

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

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

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

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

New January 2006; Revised August 2006, June 2007, April 2008, December 2008

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

AUTHORITY

- Enhancement ▸ Pen. Code, § 186.22(b)(1).
- "For the Benefit of, at the Direction of, or in Association With Any Criminal Street Gang" Defined ▸ *People v. Albillar* (2010) 51 Cal.4th 47, 59-64 [119 Cal.Rptr.3d 415].
- Specific Intent Defined ▸ *People v. Albillar* (2010) 51 Cal.4th 47, 64-68 [119 Cal.Rptr.3d 415].
- Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required ▸ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▸ *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].

Secondary Sources

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

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

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

RELATED ISSUES

Commission On or Near School Grounds

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

Enhancements for Multiple Gang Crimes

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

Wobblers

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

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

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

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

2040. Unauthorized Use of Personal Identifying Information (Pen. Code, § 530.5(a))

The defendant is charged [in Count __] with the unauthorized use of someone else's personal identifying information [in violation of Penal Code section 530.5(a)].

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

1. **The defendant willfully obtained someone else's personal identifying information;**

2. **The defendant willfully used that information for an unlawful purpose;**

AND

3. **The defendant used the information without the consent of the person whose identifying information (he/she) was using.**

Personal identifying information **means _____***<insert relevant items from Pen. Code, § 530.55(b)>* **or an equivalent form of identification.**

[As used here, *person* means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity, or any other legal entity.]

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

An *unlawful purpose* includes unlawfully (obtaining/[or] attempting to obtain) (credit[,]/[or] goods[,]/[or] services[,]/[or] real property[,]/ [or] medical information) ~~in the name of the other person~~ without the consent of th~~e~~at other person [[or] _____ <*insert other unlawful purpose*>].

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.

New January 2006; Revised August 2006, June 2007, August 2009, April 2010

BENCH NOTES

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

In the definition of personal identifying information, give the relevant items based on the evidence presented.

The definition of unlawful purpose is not limited to acquiring information for financial motives, and may include any unlawful purpose for which the defendant may have acquired the personal identifying information, such as using the information to facilitate violation of a restraining order. (See, e.g., *People v. Tillotson* (2007) 157 Cal.App.4th 517, 533 [69 Cal.Rptr.3d 42].)

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(a).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(a).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 209.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1], [4][h] (Matthew Bender).

2624. Threatening a Witness After Testimony or Information Given (Pen. Code, § 140(a))

The defendant is charged [in Count __] with (using force/ [or] threatening to use force) against a witness [in violation of Penal Code section 140(a)].

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

1. _____ *<insert name/description of person allegedly targeted>* **gave (assistance/ [or] information) to a (law enforcement officer/public prosecutor) in a (criminal case/juvenile court case);**

[AND]

2. **The defendant willfully (used force/ [or] threatened to use force or violence against** _____ *<insert name/description of person allegedly targeted>*/ **[or] threatened to take, damage, or destroy the property of** _____ *<insert name/description of person allegedly targeted>***) because (he/she) had given that (assistance/[or] information).**

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

[AND]

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

[OR]

[(3./4.) A reasonable listener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful taking, damage or destruction of property rather than just an expression of jest or frustration.]

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

[An officer or employee of (a/an) (local police department[,]/ [or] sheriff's office[,]/ [or] _____ <*insert title of agency of peace officer enumerated in Pen. Code, § 13519(b)*>**) is a *law enforcement officer*.]**

[A lawyer employed by (a/an/the) (district attorney's office[,]/ [or] Attorney General's office[,]/ [or] city (prosecutor's/attorney's) office) to prosecute cases is a *public prosecutor*.]

[The People do not need to prove that the threat was communicated to _____ <*insert name/description of person allegedly targeted*> **or that (he/she) was aware of the threat.]**

New January 2006

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, § 140(a).
- Witness Defined ▸ Pen. Code, § 136(2).
- Victim Defined ▸ Pen. Code, § 136(3).
- Public Prosecutor Defined ▸ Gov. Code, §§ 26500, 12550, 41803.
- Law Enforcement Officer Defined ▸ Pen. Code, § 13519(b).
- General Intent Offense ▸ *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306].
- Threat Need Not Be Communicated to Target ▸ *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4].
- Reasonable Listener Standard ▸ *People v. Lowery* (2011) 52 Cal.4th 419, 427 [128 Cal.Rptr.3d 648].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 9.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02; Ch. 142, *Crimes Against the Person,* § 142.11A[1][a] (Matthew Bender).

COMMENTARY

Penal Code section 140 does not define "threat." (Cf. Pen. Code, §§ 137(b), 76 [both statutes containing definition of threat].) In *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306], the Court of Appeal held that threatening a witness under Penal Code section 140 is a general intent crime. According to the holding of *People v. McDaniel, supra*, 22 Cal.App.4th at p. 284, there is no requirement that the defendant intend to cause fear to the victim or intend to affect the victim's conduct in any manner. In *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4], the court held that the threat does not need to be communicated to the intended target in any manner. The committee has drafted this instruction in accordance with these holdings. However, the court may wish to consider whether the facts in the case before it demonstrate a sufficiently "genuine threat" to withstand First Amendment scrutiny. (See *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

2625–2629. Reserved for Future Use

2843. Determining Income: Bank Deposits Method

In this case, the People are [also] using what is called the *bank deposits method* to try to prove that the defendant had unreported taxable income. I will now explain the bank deposits method.

If the People prove that: (a) the defendant engaged in an activity that produced taxable income, (b) the defendant periodically deposited money in bank accounts in (his/her) name or under (his/her) control, and (c) the money deposited did not come from nontaxable sources, then you may but are not required to conclude that these bank deposits are taxable income. Nontaxable sources of the bank deposits include gifts, inheritances, loans, or redeposits or transfers of funds between accounts. If you have a reasonable doubt about whether the People have proved (a), (b), or (c), you must find that the People have not proved under the bank deposits method that the defendant had unreported taxable income.

In order to prove that the defendant had *unreported* taxable income [using the bank deposits method], the People must also prove that the defendant's total taxable bank deposits were substantially greater than the income that the defendant reported on (his/her) tax return for _____ *<insert year alleged>***.**

[There is another factor you may consider in deciding whether the People have proved that the defendant had unreported taxable income under the bank deposits method. If the People have proved beyond a reasonable doubt that: (1) during the year, the defendant spent money from funds not deposited in any bank and (2) those expenditures would not be valid tax deductions, then you may but are not required to conclude that the defendant received money or property during the year. If the People also prove beyond a reasonable doubt that the money or property received did not come from nontaxable sources, then you may but are not required to conclude that the money or property was also taxable income. If you have a reasonable doubt about whether the People have proved any of these factors, you may not take the expenditures into account in applying the bank deposits method.]

In order to rely on the bank deposits method of proving taxable income, the People must prove the defendant's cash on hand at the starting point with reasonable certainty. Here the starting point is January 1, _____ *<insert year alleged>***. *Cash on hand* is cash that the defendant had in (his/her) possession**

at the starting point ~~that was not in a bank account~~. The People do not need to show the exact amount of the cash on hand at the starting point, but the People's claimed cash~~-~~ on ~~-~~ hand figure must be reasonably certain.

In deciding whether the claimed ~~cash on hand~~cash on hand figure has been proved with reasonable certainty and whether the People have proved that any money or property the defendant received during the year did not come from nontaxable sources, consider whether law enforcement agents sufficiently investigated all reasonable "leads" concerning the existence and value of other assets and sources of nontaxable income. Law enforcement agents must investigate all reasonable leads that arise during the investigation or that the defendant suggests regarding assets and income. This duty to reasonably investigate applies only to leads that arise during the investigation or to explanations the defendant gives during the investigation. Law enforcement agents are not required to investigate every conceivable asset or source of nontaxable funds.

If you have a reasonable doubt about any of the following:

A. Whether the investigation reasonably pursued or refuted the defendant's explanations or other leads regarding defendant's assets or income during the year,

B. Whether the People have proved the defendant's cash on hand at the beginning of _____ <*insert year alleged*> to a reasonable degree of certainty,

OR

C. Whether the People have proved that the defendant's total bank deposits, together with any nondeductible expenditures the defendant made during the year, were substantially more than the income that the defendant reported on (his/her) tax return for _____ <*insert year alleged*>,

then you must find that the People have not proved under the bank deposits method that the defendant had unreported taxable income.

[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] __].]

New January 2006

BENCH NOTES

Instructional Duty

If the prosecution is relying on the bank deposits method, the court has a **sua sponte** duty to give this instruction. (See *Holland v. United States* (1954) 348 U.S. 121, 129 [75 S.Ct. 127, 99 L.Ed. 150]; *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 999.)

The court **must also give** the appropriate instruction on the elements of the offense charged.

Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving CALCRIM No. 2846, *Proof of Unreported Taxable Income: Must Still Prove Elements of Offense*.

AUTHORITY

- Bank Deposits Method Explained ▸ *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 997, fn. 4; see also Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.3 (2003); Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.07.
- Sua Sponte Duty to Instruct on Method ▸ *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 999.
- Requirements for Proof ▸ *United States v. Conaway* (5th Cir. 1993) 11 F.3d 40, 43–44; *United States v. Abodeely* (8th Cir. 1986) 801 F.2d 1020, 1024; *United States v. Boulet* (5th Cir. 1978) 577 F.2d 1165, 1167.

3426. Voluntary Intoxication (Pen. Code, § 22)

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

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

[Do not consider evidence of intoxication in deciding whether _____ <*insert non-target offense*> **was a natural and probable consequence of _____** <*insert target offense*>**.]**

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request . (*People v. Ricardi* (1992) 9

Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary intoxication and its effect on the defendant's required mental state. (Pen. Code, § 22; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [relevant to mental state in aiding and abetting].)

Voluntary intoxication may not be considered for general intent crimes. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1127–1128 [77 Cal.Rptr.2d 428, 959 P.2d 735]; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [104 Cal.Rptr.2d 738, 18 P.3d 660]; see also *People v. Hood* (1969) 1 Cal.3d 444, 451 [82 Cal.Rptr. 618, 462 P.2d 370] [applying specific v. general intent analysis and holding that assault type crimes are general intent; subsequently superceded by amendments to Penal Code Section 22 on a different point].)

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

Give the bracketed paragraph beginning, "Do not consider evidence of intoxication," when instructing on aiding and abetting liability for a non-target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

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

Related Instructions
CALCRIM No. 3427, *Involuntary Intoxication*.
CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.
CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

AUTHORITY

- Instructional Requirements ‣ Pen. Code, § 22; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].

Secondary Sources

1 Witkin & Epstein, California Criminal Law 3d (2000) Defenses, § 26.

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).

RELATED ISSUES

Implied Malice
"[E]vidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433], quoting *People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. 6 [61 Cal.Rptr.2d 39].)

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

Premeditation and Deliberation
"[T]he trial court has no sua sponte duty to instruct that voluntary intoxication may be considered in determining the existence of premeditation and deliberation." (*People v. Hughes* (2002) 27 Cal.4th 287, 342 [116 Cal.Rptr.2d 401, 39 P.3d 432], citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1018 [68 Cal.Rptr.2d 648, 945 P.2d 1197] [counsel not ineffective for failing to request instruction specifically relating voluntary intoxication to premeditation and deliberation].)

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense
Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is

governed by Penal Code section 22, rather than by section 26 and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 [79 Cal.Rptr.2d 408, 966 P.2d 442] ["if the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication [citation]."].)

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

Self-defense is a defense to _____<*insert list of pertinent crimes charged*>. **The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:**

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

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

AND

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

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

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

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

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

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

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

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

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ *<insert crime(s) charged>***.**

New January 2006; Revised June 2007, April 2008, August 2009, February 2012

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the

defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.)

Related Instructions
CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.
CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.
CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.
CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self–Defense*.

AUTHORITY

- Instructional Requirements ▸ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518].

- Burden of Proof ‣ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ‣ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ‣ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]).
- No Duty to Retreat ‣ *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Temporary Possession of Firearm by Felon in Self-Defense ‣ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ‣ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Inmate Self-Defense ‣ *People v. Saavedra* (2007) 156 Cal.App.4th 561 [67 Cal.Rptr.3d 403].
- Reasonable Belief ‣ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

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

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

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

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

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

3517. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Receives Guilty and Not Guilty Verdict Forms for Greater and Lesser Offenses (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you which charges are affected by this instruction:]

[_____ <*insert crime*> **is a lesser crime of**
_____ <*insert crime*> **[charged in Count ___.]]**
[_____ <*insert crime*> **is a lesser crime of**
_____ <*insert crime*> **[charged in Count ___.]]**
[_____ <*insert crime*> **is a lesser crime of**
_____ <*insert crime*> **[charged in Count ___.]]**

It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

<*Give the following paragraphs if the jury has separate guilty and not guilty forms for both greater and lesser offenses pursuant to* Stone v. Superior Court. >
[[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive verdict forms of guilty and not guilty for the greater crime and also verdict forms of guilty and not guilty for the lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

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

2. **If all of you cannot agree whether the People have ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of the greater crime, inform me only that you cannot reach an agreement and do not complete or sign any verdict form [for that count].**

3. **If all of you agree that the People have not ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of the greater crime and you also agree that the People have ~~proved beyond a reasonable doubt~~proved that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the lesser crime.**

4. **If all of you agree the People have not ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the lesser crime.**

5. **If all of you agree the People have not proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me only that you cannot reach an agreement about the lesser crime.]**

<Give the following paragraphs if the jury has a combined verdict form for both greater and lesser offenses.>

[[For (the/any) charge with a lesser crime,] (Y/y)ou will receive a form for indicating your verdict on both the greater crime and the lesser crime. The greater crime is listed first. When you have reached a verdict, have the foreperson complete the form, sign, and date it. Follow these directions before writing anything on the form.

1. **If all of you agree that the People have ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of the greater crime as charged, (write "guilty" in the blank/circle the word "guilty"/check the box for "guilty") for that crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime.**

2. **If all of you cannot agree whether the People have ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of the greater crime as charged, inform me only that you cannot reach an agreement and do not write anything on the verdict form.**

3. **If all of you agree that the People have not ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of the greater crime and you also agree that the People have ~~proved beyond a reasonable doubt~~proved that (he/she) is guilty of the lesser crime, (write "not guilty" in the blank/circle the words "not guilty"/check the box for "not guilty") for the greater crime and (write "guilty" in the blank/circle the word "guilty"/check the box for "guilty") for the lesser crime. You must not (write/circle/check) anything for the lesser crime unless you have (written/circled/checked) "not guilty" for the greater crime.**

4. **If all of you agree that the People have not ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of either the greater or the lesser crime, (write "not guilty" in the blank/circle the words "not guilty"/check the box for "not guilty") for both the greater crime and the lesser crime.**

5. **If all of you agree that the People have not ~~proved beyond a reasonable doubt~~proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, (write "not guilty" in the blank/circle the words "not guilty"/check the box for "not guilty") for the greater crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime, and inform me only that you cannot reach an agreement about that crime.]**

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense.>
[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<*insert crime*>**, which is a lesser crime of _____**<*insert crime*>.]

New January 2006; Revised August 2006; June 2007, February 2012

BENCH NOTES

Instructional Duty

If lesser included crimes are not charged separately and the jury receives only one verdict form for each count, the court should use CALCRIM 3518 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519.
In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a **sua sponte** duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give CALCRIM No. 3518 in place of this instruction.

Do not give this instruction for charges of murder or manslaughter; instead give the appropriate homicide instruction for lesser included offenses: CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide,* CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count;* Not To Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses, CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide,* or CALCRIM No. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses.*

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

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

AUTHORITY

- Lesser Included Offenses—Duty to Instruct ‣ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ‣ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ‣ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Retrial on Greater ‣ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ‣ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ‣ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Acquittal of Greater Does Not Bar Retrial of Lesser

Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

Lesser Included Offenses Barred by Statute of Limitations

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. *(Ibid.)*

3518. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Is Given Only One Not Guilty Verdict Form for Each Count (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you which charges are affected by this instruction:]

[_____ <*insert crime*> is a lesser crime of _____ <*insert crime*> [charged in Count ___.]]
[_____ <*insert crime*> is a lesser crime of _____ <*insert crime*> [charged in Count ___.]]
[_____ <*insert crime*> is a lesser crime of _____ <*insert crime*> [charged in Count ___.]]

It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

[[For count[s] ___,] (Y/you) will receive (a/multiple) verdict form[s]. Follow these directions before you give me any completed and signed final verdict form. Return any unused verdict forms to me, unsigned.

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

2. **If all of you agree the People have not proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater crime and also agree the People have proved ~~beyond a reasonable doubt~~ that (he/she) is guilty of (the/a) lesser crime, complete and sign the verdict form for guilty of the lesser crime. Do not complete or sign any other verdict form[s] [for that count].**

3. **If all of you agree the People have not proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty.**

4. **If all of you cannot agree whether the People have proved ~~beyond a reasonable doubt~~ that the defendant is guilty of a charged or lesser crime, inform me only that you cannot reach agreement [as to that count] and do not complete or sign any verdict form [for that count].]**

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense.>
[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<*insert crime*>**, which is a lesser crime of _____**<*insert crime*>**.]**

New January 2006; Revised August 2006, June 2007, April 2010, Revised February 2012

BENCH NOTES

Instructional Duty

If lesser crimes are not charged separately and the jury receives separate not guilty and guilty verdict forms for each count, the court should use CALCRIM 3517 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519.

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a **sua sponte** duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of lesser included offense unless it has concluded that defendant is not guilty of greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render verdict of partial acquittal on greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347,

919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].**)**
In *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses to follow the procedure suggested in *Stone,* the court should give CALCRIM No. 3517 in place of this instruction.

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Not Guilty Forms for Each Level of Homicide,* or CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Only One Not Guilty Verdict Form for Each Count (Homicide).*

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

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

AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▸ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ▸ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ▸ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].

- Conviction of Lesser Precludes Retrial on Greater ‣ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ‣ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ‣ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Acquittal of Greater Does Not Bar Retrial of Lesser

When the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

Lesser Included Offenses Barred by Statute of Limitations

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. *(Ibid.)*

3519 . Deliberations and Completion of Verdict Forms: Lesser Offenses—For Use When Lesser Included Offenses and Greater Crimes Are Separately Charged (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you which charges are affected by this instruction:]

[_____ <*insert crime*>, as charged in Count ____, is a lesser crime to _____ <*insert crime*> [as charged in Count ___.]]
[_____ <*insert crime*>, as charged in Count ____, is a lesser crime to _____ <*insert crime*> [as charged in Count ___.]]
[_____ <*insert crime*>, as charged in Count ____, is a lesser crime to _____ <*insert crime*> [as charged in Count ___.]]

It is up to you to decide the order in which you consider each greater and lesser crime and the relevant evidence, but I can accept a verdict of guilty of the lesser crime only if you have found the defendant not guilty of the greater crime.

[[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive verdict forms of guilty and not guilty for [each/the] greater crime and lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

1. **If all of you agree the People have proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any verdict form for the [corresponding] lesser crime.**

2. **If all of you cannot agree whether the People have proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater crime, inform me of your disagreement and do not complete or sign any verdict form for that crime or the [corresponding] lesser crime.**

3. If all of you agree the People have not proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater crime and also agree the People have proved ~~beyond a reasonable doubt~~ that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the [corresponding] lesser crime. Do not complete or sign any other verdict forms [for those charges].

4. If all of you agree the People have not proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the [corresponding] lesser crime.

5. If all of you agree the People have not proved ~~beyond a reasonable doubt~~ that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me about your disagreement on the lesser crime.]

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense.>

[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<*insert crime*>, which is a lesser crime of _____<*insert crime*>.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a sua sponte duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of

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

Whenever greater and lesser included crimes are separately charged the court must use this instruction instead of CALCRIM 3517 or 3518.

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Not Guilty Forms for Each Level of Homicide,* or CALCRIM No. 641, *Procedure Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Only One Not Guilty Verdict Form for Each Count (Homicide).*

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

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- Lesser Included Offenses—Duty to Instruct ▸ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
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- Conviction of Lesser Precludes Retrial on Greater ‣ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ‣ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ‣ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

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Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. *(Ibid.)*

3520–3529. Reserved for Future Use

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.

~~**Please immediately report to the court any unreasonable contact, made without your consent, by the lawyers in this case, their representatives, or the defendant[s].**~~

~~**A lawyer, representative, or defendant who violates these rules violates 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.]

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

New January 2006

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 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 14 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."

AUTHORITY

- Statutory Authority. ▸ Code Civ. Proc., §§ 206, 237.
- Jury Tampering. ▸ Pen. Code, § 116.5.

Secondary Sources

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

3591–3599. Reserved for Future Use

CALCRIM Summer 2012 Invitation to Comment
New and Revised CALCRIM Instructions
All comments are verbatim.

Instruction	Commentator	Comment	Response
101	Helios J. Hernandez Riverside County Superior Court Judge	The language about electronics is in paragraph 5. The first sentence is O.K. The second sentence should be deleted. The jurors are given the clerk's phone number, but it is not common for jurors to give out the clerk's number as an emergency number. Having participated in several hundred jury trials, the clerk has never received an emergency call for a juror. If there was an emergency, and if the message went to the clerk, the clerk would do the right thing and inform the judge and the judge would then do the right thing order the clerk to inform the juror privately. Therefore, the second sentence is unnecessary and addresses a virtually nonexistent problem and should be deleted. Instead the following sentence should appear as the second sentence, "When the jury takes a break, jurors may turn on your devices and check your messages." This paragraph should also appear in the concluding instruction, 3550 CalCrim. In addition, paragraph seven of the proposed CalCrim 101 should be amended by deleting the last word in the paragraph and adding the following, "courtroom deputy or the clerk." The last paragraph in the proposed CalCrim 101 should be deleted. The language about selling your story to the mass media belongs in the final discharge instruction, CalCrim 3590. And, in fact, it is already there. Attached is a modified version of CalCrim 101 that I use. It includes language about Twitter, Facebook, etc. It also includes CalCrim 124.	All of these comments address matters falling outside the scope of the draft of CALCRIM No. 101 that circulated for public comment. The committee will consider them at its next scheduled meeting.

Instruction	Commentator	Comment	Response
		Cal Crim 101 – Basic Rules *Modified (11/30/2011)* I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial. During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. You must not talk about these things with the other jurors either, until the time comes for you to begin your deliberations. You must not make up your mind about the issues in this case until you have discussed them in the jury room with the other jurors. As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room, and only when all jurors are present. You must not allow anything	

Instruction	Commentator	Comment	Response
		that happens outside of the courtroom to affect your decision unless I tell you otherwise. During the trial, do not read, listen to, or watch any news report or commentary about the case. Do not do any research on your own or as a group. Do not use a dictionary, an encyclopedia, the Bible, the Internet, or other materials. Do not use Facebook, You Tube, Twitter or any electronic methods in relation to this trial. Do not investigate the facts or law, conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. We will provide notebooks for you before opening statements. You may take notes. However, do not let note taking distract you from paying attention in court. Your notes are for your use in refreshing your memory. You may take your notebooks into the deliberation room with you. If there is a conflict among jurors as to what was said by a witness, you may request read back by the court reporter. The court	

Instruction	Commentator	Comment	Response
		reporter's read back must prevail. A copy of the jury instructions will be given to you when you commence your deliberations. When we recess for a break or for the day, leave your notebooks on your chair. We will safeguard them. Return to the area just outside the courtroom at the time I give to you. *(Cal Crim 101 Modified – 11/30/2011)* During the trial, do not speak to any party, witness, or lawyer involved in the trial. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation. In addition, you must report the incident to my deputy or my clerk. If you receive any information about this case from any source outside of the trial, even unintentionally, do not share that information with any other juror. If you do receive such information, or if anyone tries to	

Instruction	Commentator	Comment	Response
		influence you or any juror, you must immediately tell the deputy or my clerk. The attorneys and court staff may seem unfriendly. It is not that they are not friendly; it is because I have instructed them to avoid speaking to or being in the same place as jurors. We do this not only to avoid improprieties, but also to avoid the appearance of improprieties. Conversely, the attorneys and staff may seem friendly with each other. We see each other on a regular basis and we try to keep a courteous working relationship. Rest assured that each attorney gives their very best efforts in advocating for their side. Some words or phrases that may be used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in the instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in the instructions are to be applied using their ordinary, everyday meanings.	

CALCRIM Summer 2012 Invitation to Comment
New and Revised CALCRIM Instructions
All comments are verbatim.

Instruction	Commentator	Comment	Response
		Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be. Do not let bias, sympathy, prejudice, penalty, or public opinion influence your decision.	
101	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
124	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	We agree with the proposed changes. However, the bench note should cite Penal Code section 1122, subdivision (b) as the source for the quotation in the first sentence.	The committee agrees with this comment and has made the suggested change.
124	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
318	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public	Agree with proposed changes.	No response required.

Instruction	Commentator	Comment	Response
	Defender		
336	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	Although the instruction is currently in existence, this proposal essentially rewrites it, except for a few sentences at the end. We have the following concerns: <u>Hearsay testimony</u> We suggest a modification to the bench notes to assist the trial court when an out-of-court statement by an informant is admitted. Like Penal Code section 1111 on accomplice testimony, Penal Code sections 1111.5 and 1127a address the potential unreliability of a witness who has a motive to cooperate with police and so falsely to implicate the defendant. Thus, the instructions implementing Penal Code section 1111 provide helpful guidance. (CALCRIM Nos. 334 [dispute whether witness is accomplice] and 335 [no dispute whether witness is accomplice].) As the RELATED ISSUES part of the bench note to CALCRIM No. 334 discusses, the California Supreme Court has held that in some circumstances section 1111 applies to out-of-court statements. The note to CALCRIM No. 335 cross-references that discussion. We recommend that the note to No. 336 do the same. The trial court should give the instruction and use "statement" if the corroboration requirement applies to an	The committee agrees to supplement the bench note regarding out-of-court statements by an informant by adding a cross-reference to CALCRIM No. 334. It agrees to add a definition of "percipient witness" but disagrees with the other suggestions. In particular, it is reluctant to interpret the term "evidence in aggravation" without further guidance from courts of review.

Instruction	Commentator	Comment	Response
		informant's out-of-court statement admitted in evidence. Legalistic terminology Will a jury know what a "percipient witness" is? A "declarant"? Our hunch is no. "Percipient witness" can be rendered "witness who personally perceived the matter he or she testified about." "Declarant" might be deleted and replaced simply by the name of the declarant. To make the sentence easier to understand, we suggest it be broken into shorter ones. Thus: [An in-custody informant is someone whose (statement/ [or] testimony)is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution. An in-custody informant for purposes of this instruction does not include (a/an) (codefendant[,]/ [or] witness who personally perceived the matter (he/she) testified about[,]/ [or] accomplice[,]/ [or] coconspirator).] If you decide that _____ *< insert name of witness or*	

Instruction	Commentator	Comment	Response
		declarant > was not an in-custody informant, then you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.] Evidence in aggravation What is meant by "evidence in aggravation" as used in Penal Code section 1111.5? Evidence pertaining to a higher degree, such as premeditation? Evidence introduced to prove an enhancement? Impeachment? Penalty phase factors (Pen. Code, § 190.3)? We could not find any cases construing section 1111.5, which is quite new. We doubt a jury would find the phrase self-evident. (We don't.) If the committee cannot pin down the legislative intent, perhaps a bench note can point out the lack of clarity. It could then tell the trial court to decide and explain the concept to the jury in the specific context of the case. The instruction can be altered when appellate law has sorted out the meaning.	
336	Helios J. Hernandez Riverside County Superior Court Judge	The proposed second sentence of the second paragraph is misleading. As proposed the second sentence says that if the jury determines that a witness is not an "in-custody informant", then the jury is to evaluate the witness's statement as they would evaluate the testimony of any other	The committee disagrees with this comment and notes that the paragraph in question is in brackets and therefore optional, to be given in the court's discretion.

Instruction	Commentator	Comment	Response
		witness. This implies that if the jury determines that the witness is an "in-custody informant", then that person's testimony is to be evaluated using some standard which is not the normal standard used for all other witnesses. The standard for evaluating witnesses is contained in CalCrim 226. This instruction applies to all witnesses. Instructions, such as 336, highlight ways of evaluating a particular type of witness's testimony. But in no case is CalCrim 226 over ruled. Any implication that it is not applicable to a witness's testimony is incorrect. Therefore, the second sentence of the proposed second paragraph should be deleted.	
336	Los Angeles County Public Defender – Appellate Branch By: Albert Menaster, Head Deputy	The proposed revision to CALCRIM 336 includes the following language: You may use the (statement [or] testimony) of an in-custody informant only if: 1, The (statement [or] testimony) is supported by other evidence that you believe; 2, That supporting evidence is independent of the (statement [or] testimony); AND 3, That supporting evidence tends to connect the defendant to the commission of the crime[s] [or to the special circumstance [or] to evidence in aggravation], The supporting evidence is not sufficient if it merely shows that the charged crime was committed [or proves the existence of a special circumstance	The committee disagrees with the first point. Many instructions refer to belief and it is a different concept from proof or burden of proof. The committee agrees with the comment about the "tends to connect" language and has made the proposed revision to conform to the language of the statute.

Instruction	Commentator	Comment	Response
		[or] evidence in aggravation], Section 1 of the foregoing proposed revision states that the statement or testimony of an in-custody informant may be used if the trier of fact "believes" the statement or testimony, The proposed instruction fails to set forth any standard of proof: is the "belief" required belief beyond a reasonable doubt, belief by clear and convincing evidence, belief that it is more likely true than not, or only a possibility or scintilla of belief? Based on the totality of statutory language, it is reasonable to infer that Penal Code section 1111.5's standard of proof is preponderance of the evidence, Therefore, Section 1 of the proposed revision should read: "1. The (statement [or] testimony) is supported by other evidence that you believe to be more likely than not to be true;" Section 3 of the foregoing proposed revision states, in part, that "[t]hat supporting evidence *tends to connect* the defendant to the commission of the crime[s]…." (Emphasis added,) Penal Code section 1111.5 requires that supporting evidence "be corroborated by other evidence that *connects* the defendant with the commission of the offense…." (Emphasis added,) The proposed instruction's "tends to connect" language, in lieu of the statute's "connect" language, erroneously waters down Penal Code section 1111.5. Therefore, section 3 of the proposed revision should be modified to read, in relevant part:	

Instruction	Commentator	Comment	Response
		"3, That supporting evidence connects the defendant to the commission of the crime[s]…."	
336	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
350	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
510	Los Angeles County Public Defender – Appellate Branch By: Albert Menaster, Head Deputy	The amended use note should include the italicized language to more accurately reflect the court's holding: The court has no sua sponte duty to instruct on accident. *A trial court's responsibility to instruct on accident generally extends no further than the obligation to provide, upon request,* a *pinpoint instruction relating the evidence to the mental element required for the charged crime. (People v Anderson* (2011) 51 Cal.4th 989, 997-998.)	The committee prefers to refer the court to the *Anderson* case because the court will need to read the case and analyze the nuances in each instance.
510	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes only if modified. Comments: To more accurately represent the holding in *Anderson*, the first line under the Instructional Duty heading should read: "The court has a sua sponte duty to instruct on the requisite mental element of the offense. The court has no obligation to instruct on accident other than to provide an appropriate pinpoint	The committee prefers to refer the court to the *Anderson* case because the court will need to read the case and analyze the nuances in each instance.

Instruction	Commentator	Comment	Response
		instruction upon request by the defense."	
510, 3404	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	We agree with changing the bench note to reflect *People v. Anderson* (2011) 51 Cal.4th 989, 997-998. However, the note should be somewhat more nuanced than a bare, "The court has no sua sponte duty to instruct on accident," citing *Anderson*. Although it is difficult to conceive of circumstances where the claim of accident would *not* be rebutting an element of the crime, culpable intent in particular, throughout the discussion of that issue, the court in *Anderson* did make a persistent effort to qualify its holding with such language: > [A] trial court has no obligation to provide a sua sponte instruction on accident where, as here, the defendant's theory of accident is an attempt to negate the intent element of the charged crime. (*People v. Anderson*, *supra*, 51 Cal.4th at p. 992.) "'[W]hen a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense	The committee prefers to refer the court to the *Anderson* case because the court will need to read the case and analyze the nuances in each instance.

Instruction	Commentator	Comment	Response
		invoking *sua sponte* instructional duties . . . .' (51 Cal.4th at p. 998.) [In the cited cases.] the defense of accident was raised to rebut the mental element of the crime or crimes with which the defendant was charged. Consequently, assuming the jury received complete and accurate instructions on the requisite mental element of the offense, the obligation of the trial court in each case to instruct on accident extended no further than to provide an appropriate pinpoint instruction upon request by the defense. (51 Cal.4th at p. 998.) We disapprove [specified inconsistent Court of Appeal cases], to the extent they hold a *sua sponte* instruction on accident is required when the defense is raised to negate the intent or mental element of the charged crime. (51 Cal.4th at p. 998, fn. 3.) Similarly, *People v. Jennings* (2010) 50 Cal.4th 616, 674, as quoted in *Anderson*, noted: "*Generally*, the claim that a homicide was committed through misfortune or accident 'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime.'" (Emphasis added.) The use of the	

Instruction	Commentator	Comment	Response
		word "generally" implies there may be exceptions. The bench note should restate the principles announced in *Anderson* as precisely as it can, to help the trial court spot nuances and avoid error. It would also be helpful guidance to the trial court for the bench note to reflect what the Supreme Court said throughout its opinion: a "pinpoint" instruction on accident must be given on request if supported by the evidence. We suggest something along these lines: > The court has no *sua sponte* duty to instruct on accident when that theory is used to show the defendant lacked a specific mental state necessary to the crime; such an instruction is a "pinpoint" one, which must be given on request if supported by the evidence. (*People v. Anderson* (2011) 51 Cal.4th 989, 997-998.) [2]Apparently the committee considered a lengthier quotation from *Anderson*, because the proposed bench note to CALCRIM No. 3404 shows such language in strikeout, even though that is not currently part of the bench note. The invitation to comment has no explanation for the committee's decision.	

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New and Revised CALCRIM Instructions
All comments are verbatim.

Instruction	Commentator	Comment	Response
		[3]The *Anderson* case involved a claim of accident to rebut a culpable mental state. Accident may also be invoked on the question of causation. (E.g., *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308; *People v. Black* (1951) 103 Cal.App.2d 69, 78-79.)	
571	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes. Comments: If the changes proposed for CALCRIM 571 are made, the same changes should be made to CALCRIM 604.	No response required.
840	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	We agree with the sole proposed change, which adds a reference to the definition of strangulation or suffocation in Penal Code section 273.5. This is a rather long statute, however, and we think it would be helpful to the user to specify "Penal Code section 273.5 subdivision (c)," especially since the heading to the instruction refers only to subdivision (a). Indeed, we would recommend removing the reference to subdivision (a) from the heading.	The committee agrees with this comment and has made the suggested revision.
840	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
1151	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	We definitely agree with this change. The old language was confusing – especially in such situations as when the defendant is charged with both soliciting an act of prostitution for himself and pandering. The qualification	No response required.

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Instruction	Commentator	Comment	Response
		"with some other person" logically belongs with the definition of pandering, not the definition of prostitute.	
1151	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
1400	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
1401	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
2040	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
2190	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	The proposal would add a bench note directing the trial court to *People v. Wells* (2012) 204 Cal.App.4th 743 if there is evidence of involuntary unconsciousness. A request for depublication is pending at this time. If *Wells* remains published, we agree with the proposal. Regardless of *Wells'* publication status, that case does call attention to a problem in the text and bench notes of the 2100 instruction.	This comment goes beyond the scope of the instructions that circulated for public comment. The committee will consider it at its next scheduled meeting.

Instruction	Commentator	Comment	Response
		The court found fault with this sentence: "If the defendant was under the influence of a drug, then it is not a defense that something else also impaired his ability to drive a vehicle." It said that when the defense is unconsciousness caused by something *other than* voluntary intoxication, it is improper to tell the jury the defendant's also being under the influence of an intoxicating substance automatically precludes the defense. The court also discussed this statement in the bench notes: "Give the bracketed sentence stating that 'it is not a defense that something else also impaired (his/her) ability to drive' if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep." (No authorities cited.) The court pointed out this is correct as to the matter of being under the influence, but not correct to the extent it implies that unconsciousness due to such a problem is not a defense to the element of committing a criminal act while driving. (*Wells, supra*, 204 Cal.App.4th at p. 752.) We think the *Wells* court has correctly pointed out problems in CALCRIM No. 2100. There may be related problems in CALCRIM Nos. 3425 (unconsciousness) and 3427 (involuntary intoxication), as well. The time frame for the current invitation to comment does not permit full exploration of these matters. We would be happy to research	

Instruction	Commentator	Comment	Response
		the issues and develop proposed solutions for an upcoming comment cycle.	
2624	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes only if modified. Comments: The instruction includes the term "reasonable listener" but fails to instruct the jury to use an objectively reasonable person standard. Therefore, the Committee should consider revising paragraphs 3 and 4 as follows: [3. A reasonable person in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful force or violence rather than just an expression of jest or frustration;] [OR] [(3./4.) A reasonable person in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful taking, damage or destruction of property rather than just an expression of jest or frustration.]	The committee finds nothing in the statute or the Supreme Court's interpretation of the statute supporting the commentator's definition of "reasonable listener."
2843	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	Without an explanation of why the proposal is being made, this is hard to evaluate.	A commentator identified the deleted language as superfluous and unsupported by authority, and the committee agreed with the commentator.

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New and Revised CALCRIM Instructions
All comments are verbatim.

Instruction	Commentator	Comment	Response
2843	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Disagree with proposed changes. Comments: The instruction was adopted in 2006. Since its adoption, there have been no cases or other authorities holding that the instruction is incorrect. Therefore, there is no justification for making the proposed changes to the instruction.	A commentator identified the deleted language as superfluous and unsupported by authority, and the committee agreed with the commentator.
2998	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	This new instruction seems adequate. Under AUTHORITY, the notes might mention *People v. Alvarado* (2005) 125 Cal.App.4th 1179 [violation of this statute is a general intent crime]; *People v. Burnett* (2003) 110 Cal.App.4th 868 [construing "cruelly"]; and/or *People v. Thomason* (2003) 84 Cal.App.4th 1064 [construing "any living animal"]. These cases might help a trial court in responding to a request for a pinpoint instruction or answering a question from the jury.	The committee agrees to add the suggested cases to the AUTHORITY section.
2998	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
3404	Los Angeles County Public Defender – Appellate Branch By: Albert Menaster, Head Deputy	The amended use note should include the italicized language to more accurately reflect the court's holding: The court has no sua sponte duty to instruct on accident. *A trial court's responsibility to instruct on accident generally extends no further than the obligation to provide, upon request,* a *pinpoint instruction relating the evidence to the mental element required for*	The committee prefers to refer the court to the *Anderson* case because the court will need to read the case and analyze the nuances in each instance.

Instruction	Commentator	Comment	Response
		the charged crime. (People v. *Anderson* (2011) 51 Cal.4th 989, 997-998.)	
3426	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
3470	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes. In addition, the Committee should add a use note that CALCRIM 3470, and not CALCRIM 505, should be used where the charge is an involuntary manslaughter. See, for example, People v. Thompson (Cal. App. 4th Dist. Apr. 25, 2011) 2011 Cal. App. Unpub. LEXIS 3045: Appellant renews his claim that CALCRIM No. 3470 was the appropriate instruction in this case. Because assault was an essential element of the charged offense, he contends the jury should have been instructed he had the right to self-defense, so long as he reasonably believed he was in imminent danger of being touched unlawfully, as opposed to being killed or greatly injured… The Attorney General does not dispute that, from a purely legal perspective, CALCRIM No. 3470 is a more fitting instruction than CALCRIM No. 505 when, as here, the defendant relies on self-defense to a homicide charge that is premised on the commission of non-homicide offense.	No response required, except to note that the additional proposal falls outside the scope of the current proposal. The committee will consider it at its next scheduled meeting.

CALCRIM Summer 2012 Invitation to Comment
New and Revised CALCRIM Instructions
All comments are verbatim.

Instruction	Commentator	Comment	Response
3590	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Agree with proposed changes.	No response required.
3517, 3518, 3519	Appellate Defenders, Inc. By: Elaine Alexander, Executive Director San Diego	This proposal would delete individual references to "beyond a reasonable doubt" in each lesser included offense instruction and replace them with a single statement: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." We recommend the committee adhere to the "if it ain't broke, don't fix it" principle. The instructions are correct as is, and we tend to think the change would make them less user-friendly. First, a minor point: the language of the proposed replacement sentence is inappropriate for the context. In these instructions, the judge is not telling the jury what the People must prove; the judge is explaining what to do *if* the jury has found the People have or have not proved something (or cannot agree on the matter). Better language would be: "Whenever I mention your decision as to what the People have or have not proved, I mean you have found the People have or have not proved it beyond a reasonable doubt." More importantly, we are concerned the changes diminish the instructions'	The committee disagrees with this comment because of feedback it has received from the trial bench that jurors find the repetition of the phrase "beyond a reasonable doubt" tedious and stultifying (potentially 13 times in CALCRIM No. 3517).

Instruction	Commentator	Comment	Response
		effectiveness in guiding juries through the labyrinth of included-offense determinations.[1] Economy of words is normally a virtue, and we can see why a casual reader going through the instructions, or a trial judge or committee member or commentator reading them in one sitting, would prefer the revision. It is esthetically cleaner. However, the instructions are for *juries* and should set forth principles in a way most likely to be *applied* correctly. Some repetition of critical principles is valuable when difficult, indeed intricate, concepts are involved. These instructions have to guide juries in applying the burden of proof in a variety of complex situations, with results that can range from "guilty" to "not guilty" to "hung" on greater, and then the same on lesser, and sometimes then again on still lesser charges. Juries cannot follow the lesser included offense instructions holistically: they must proceed analytically, step-by-step, through the various stages in a precise, prescribed order and take action or stop at certain points if they reach a certain decision. The current instructions, with their repeated mention of the burden of proof and the need for unanimity, help them do this, by making the	

[1]Case law is full of examples of errors by juries, and even judges, in dealing with included offenses. The bench notes to the instructions mention a number of such cases, and there are many more.

Instruction	Commentator	Comment	Response
		directions for each step more or less self-contained. Mentioning the burden of proof only once in this complex process, as almost an afterthought, increases the chances the jury will overlook or forget it and so misunderstand its duties. In short, we think the current repetition is not mere verbiage. It has instrumental value. The instructions do not need this change, and some pedagogical effectiveness is lost by making it. If the committee nevertheless decides to delete the various references to "beyond a reasonable doubt," we suggest that the new paragraph stating the reasonable doubt standard be placed at both the beginning and the end of the numbered instructions walking the jury through the process of returning a verdict. If it is only at the end, the jury may never get to it, because it is told to stop when it reaches a decision. Some repetition of critical principles is valuable when difficult, indeed intricate, concepts are involved. These instructions have to guide juries in applying the burden of proof in a variety of complex situations, with results that can range from "guilty" to "not guilty" to "hung" on greater, and then the same on lesser, and sometimes then again on still lesser charges.	

Instruction	Commentator	Comment	Response
		Juries cannot follow the lesser included offense instructions holistically: they must proceed analytically, step-by-step, through the various stages in a precise, prescribed order and take action or stop at certain points if they reach a certain decision. The current instructions, with their repeated mention of the burden of proof and the need for unanimity, help them do this, by making the directions for each step more or less self-contained. Mentioning the burden of proof only once in this complex process, as almost an afterthought, increases the chances the jury will overlook or forget it and so misunderstand its duties. In short, we think the current repetition is not mere verbiage. It has instrumental value. The instructions do not need this change, and some pedagogical effectiveness is lost by making it. If the committee nevertheless decides to delete the various references to "beyond a reasonable doubt," we suggest that the new paragraph stating the reasonable doubt standard be placed at both the beginning and the end of the numbered instructions walking the jury through the process of returning a verdict. If it is only at the end, the jury may never get to it, because it is told to stop when it reaches a decision. [4]Case law is full of examples of errors by	

Instruction	Commentator	Comment	Response
		juries, and even judges, in dealing with included offenses. The bench notes to the instructions mention a number of such cases, and there are many more.	
3517, 3518, 3519	Helios J. Hernandez Riverside County Superior Court Judge	These three instructions are awkward, overly wordy, and very confusing. Boil it down to one instruction. Come up with a recommended verdict form format so that a different jury instruction is not needed for every possible format. Attached is a copy of a modified and simplified CalCrim 3517 that I use. CalCrim 3517 – Lesser Offenses L. Lewis (RIF10004334) (03/22/2011) Some Counts have lesser offenses. If you find defendant guilty of a lesser, it may change which special allegations you need to consider. As you consider those counts with a lesser, you may consider the forms in any order you wish. However, before the Court can accept a verdict of guilty on a lesser crime, the jury must have found the defendant not guilty of the greater crime. For those counts with lessers, you will receive several verdict forms. Remember, any verdict must be unanimous. *Note: Penal Code = P.C.* **Count 1:** 664/187 P.C. (Attempted Murder) *Special Allegations:* 12022.53(c) 186.22(b) **Lesser:** 664/192(a) P.C. (Attempted Voluntary Manslaughter)	This comment addresses proposed changes beyond the scope of the current proposal. The committee will consider them at its next scheduled meeting.

Instruction	Commentator	Comment	Response
		Special Allegations: 12022.5 186.22(b) **Count 2:** 245(a)(2) P.C. (Assault with a Firearm) *Special Allegations:* 186.22(b) **Lessers:** None **Count 3:** 245(a)(1) P.C. (Assault with a Deadly Weapon or by Means of Force Likely to Produce Great Bodily Injury) *Special Allegations:* 186.22(b) **Lessers:** None **Count 4:** 12021 P.C. (Ex Felon with a Firearm) *Special Allegations*: None **Lessers:** None **Count 5:** 186.22(a) P.C. (Active Participation in a Gang) *Special Allegations:* None **Lessers:** None	
3517, 3518, 3519	Tamara Zuromskis Nevada County Deputy Public Defender	I have reviewed the proposed jury instruction and wish to comment. I strongly oppose changing 3517, 3518 and 3519 to remove the language "beyond a reasonable doubt" within each element and replacing that language with a catch-all provision at the end that says, "whenever I say 'prove' I mean 'prove beyond a reasonable doubt' unless otherwise specified." The fact that each element, not just each charge, must be proven beyond a	The committee disagrees with this comment because of feedback it has received from the trial bench that jurors find the repetition of the phrase "beyond a reasonable doubt" tedious and stultifying (potentially 13 times in CALCRIM No. 3517). Moreover, the jury will hear CALCRIM No. 103 and CALCRIM No. 220 on reasonable doubt, both of which state that "Whenever I tell you the People must prove something, I mean

Instruction	Commentator	Comment	Response
		reasonable doubt is a subtle point that jurors might not understand unless it's spelled out specifically. Jury instructions should be thorough; we should not try to shorten them up at the expense of not clearly explaining the law or watering down the standard of proof. Thanks.	they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." The same language has been added to the end of each of these instructions.
3517, 3518, 3519	Los Angeles County Public Defender – Appellate Branch By: Albert Menaster, Head Deputy	Proposed CALCRIM numbers 3517, 3518, and 3519 deal with lesser and greater crimes. Each instruction contains a series of numbered options discussing what to do upon a finding of guilty. Previously each numbered option stated that a finding of guilty in that category required a determination that "the People have proved beyond a reasonable doubt" the crime being charged. In the proposed instructions, the reasonable doubt language has been deleted. Instead, each proposed instruction contains merely a note at the end of the list of numbered options stating, "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." Reasonable doubt is a crucial concept, the foundation on which any finding of guilt must be based. (See, e.g., *People* v. *Flores* (2007) 147 Cal. App. 4th 199, in which convictions for multiple counts of lewd acts and sexual assaults on a child were reversed. Although the trial court had instructed all jurors regarding the reasonable doubt standard during voir dire and provided the instruction on circumstantial evidence, including that	The committee disagrees with this comment because of feedback it has received from the trial bench that jurors find the repetition of the phrase "beyond a reasonable doubt" tedious and stultifying (potentially 13 times in CALCRIM No. 3517). Moreover, the jury will hear CALCRIM No. 103 and CALCRIM No. 220 on reasonable doubt, both of which state that "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." The same language has been added to the end of each of these instructions.

Instruction	Commentator	Comment	Response
		"each fact which is essential to complete a set of circumstances necessary to establish a defendant's guilt [must be] proved beyond a reasonable doubt," (CALJIC No. 2.01), this "did *not* effectively inform the jury that the prosecution had the burden to prove each element of the charged offense(s) beyond a reasonable doubt." *(Id.* at p. 216, emphasis original; see also *People* v. *Vann* (1974) 12 Cal.3d 220.) Such failure amounted to federal constitutional error on the part of the trial court, was not harmless, and "therefore requires reversal per se of Flores's convictions." *(Flores* at p. 215.)) Deleting the mention of reasonable doubt in each subsection and simply stating it once at the end is confusing, leads to unnecessary ambiguity, and minimizes the significance of reasonable doubt in determining guilt. Each numbered option in the proposed CALCRIM instructions mirrors the language of the others; there is a great deal of repetition. To then limit the reasonable doubt language to one reference at the end could easily lead the jurors to believe that reasonable doubt only applies to the last section read. One might logically assume, given the repetition of all the other verbiage, that if the court meant reasonable doubt to apply to each option, then the court would have mentioned it each time. It is far better, especially with such an essential component, to risk repetition of the reasonable doubt	

Instruction	Commentator	Comment	Response
		language rather than to leave it out and risk the likelihood that the instruction could be misunderstood.	
3517/3518/3519	Orange County Public Defender By: Sharon Petrosino, Senior Assistant Public Defender	Disagree with proposed changes. Comments: There is no legal justification for changing the instructions. Furthermore, the phrase "beyond a reasonable doubt" clarifies the People's burden of proof and should not be deleted.	The committee disagrees with this comment because of feedback it has received from the trial bench that jurors find the repetition of the phrase "beyond a reasonable doubt" tedious and stultifying (potentially 13 times in CALCRIM No. 3517). Moreover, the jury will hear CALCRIM No. 103 and CALCRIM No. 220 on reasonable doubt, both of which state that "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." The same language has been added to the end of each of these instructions.