

## RUPRO ACTION REQUEST FORM

**RUPRO action requested:**        **Recommend JC approval (has circulated for comment)**

**RUPRO Meeting:** February 02, 2016

**Title of proposal** (*include amend/revise/adopt/approve + form/rule numbers*):

Jury Instructions: Revisions to Criminal Jury Instructions

*Committee or other entity submitting the proposal:*

Judicial Council Advisory Committee on Criminal Jury Instructions

*Staff contact (name, phone and e-mail):* Robin Seeley, 415-865-7710, robin.seeley@jud.ca.gov

*Identify project(s) on the committee's annual agenda that is the basis for this item:*

Approved by RUPRO: yes

Project description from annual agenda: Compliance with Rule of Court 10.59

*If requesting July 1 or out of cycle, explain:*

**Additional Information:** (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on February 26, 2016

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Title	Agenda Item Type
Jury Instructions: Revisions to Criminal Jury Instructions	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
<i>Judicial Council of California Criminal Jury Instructions</i>	February 26, 2016
Recommended by	Date of Report
Advisory Committee on Criminal Jury Instructions	January 20, 2016
Hon. Sandy R. Kriegler, Chair	Contact
	Robin Seeley, 415-865-7710
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### **Executive Summary**

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

### **Recommendation**

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective February 26, 2016, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. Once approved by the Judicial Council, the revised instructions will be published in the next official edition of the *Judicial Council of California Criminal Jury Instructions*.

A table of contents and the proposed revisions to the criminal jury instructions are attached at pages 5–108.

## Previous Council Action

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

The council approved the last *CALCRIM* release at its August 2015 meeting.

## Rationale for Recommendation

The committee recommends proposed revisions to the following instructions: 207, 334, 335, 336, 361, 375, 548, 625, 703, 736, 840, 841, 935, 938, 985, 1300, 1400, 1401, 1863, 2300, 2302, 2352, 2542, and 3472.

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

### **Citation updates to CALCRIM Nos. 207, 334, 335, 336, 361, 736, 1300, 1400, 1401, 1863, and 2542**

Eleven of the 24 instructions in this proposal simply had the citations of newly decided cases added to the notes. Because these revisions do not change the language of the instructions, they tend to be uncontroversial.

### **CALCRIM No. 548, Murder: Alternative Theories**

In order to avoid any potential confusion between different theories vs. different degrees of murder, the committee decided to add the underlined text to CALCRIM No. 548:

:

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory[, but you must unanimously agree whether the murder is in the first or second degree].

The brackets around the new language indicate that it is optional, to be given in the court's discretion.

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<sup>1</sup> 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."

### **CALCRIM No. 703, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder**

In response to *People v. Banks* (2015) 61 Cal.4th 788, 807–809 (189 Cal.Rptr.3d 208, 351 P.3d 330), the committee revised this instruction to include the factors to consider in determining whether the defendant was a “major participant” in a special circumstances felony murder in which he or she was not the actual killer.

### **CALCRIM Sexual Battery series, Nos. 935, 938**

*People v. Andrews* (2015) 234 Cal.App.4th 590, 602, held that the court has a sua sponte duty to instruct on the defense of actual and reasonable but mistaken belief in the victim’s consent in sexual battery cases. The committee therefore added that defense to the sexual battery instructions.

### **CALCRIM Possession for Sale instructions, Nos. 2302, 2352**

In response to a comment from a deputy district attorney, the committee revised these instructions to make clear that the defendant need not have possessed the controlled substance with the intent to sell it personally. The requisite intent may include intending that someone else actually sell it.

### **Comments, Alternatives Considered, and Policy Implications**

The proposed additions and revisions to *CALCRIM* circulated for comment from November 9 to December 28, 2015. One comment was received and then withdrawn. Therefore no comment chart is provided. The current proposal is uncontroversial, so the dearth of comments is not surprising.

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, amend, and add topics to *CALCRIM* and to submit its recommendations to the council for approval. The proposed revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee considered no 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 Judicial Council. The council’s contract with West Publishing provides additional royalty revenue.

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 council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions

freely available for use and reproduction by parties, attorneys, and the public, the council provides a broad public license for their noncommercial use and reproduction.

### **Attachments**

1. Full text of revised *CALCRIM* instructions, including table of contents, at pages 5–108

# CALCRIM Proposed Revisions

Instruction Number	Instruction Title
207	Proof Need Not Show Actual Date
334, 335, 336	Accomplice Testimony Series and In-Custody Informant
361	Failure to Explain or Deny Adverse Testimony
375	Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.
548	Murder: Alternative Theories
625	Voluntary Intoxication: Effects on Homicide Crimes
703	Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder
736, 1400, 1401, 2542	Criminal Street Gang Series
840, 841	Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition; Simple Battery: Against Spouse, Cohabitant, or Fellow Parent
935, 938	Sexual Battery Series
985	Brandishing Imitation Firearm
1300	Criminal Threat
1863	Defense to Theft or Robbery: Claim of Right
2300, 2302, 2352	Sale, Transportation for Sale, etc., of Controlled Substance; Possession for Sale of Controlled Substance, Possession for Sale of Marijuana
3472	Right to Self-Defense: May Not Be Contrived

## 207. Proof Need Not Show Actual Date

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**It is alleged that the crime occurred on [or about] \_\_\_\_\_ <insert alleged date>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day.**

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*New January 2006; Revised February 2014*

### BENCH NOTES

#### *Instructional Duty*

The court has no sua sponte duty to give this instruction. This instruction should not be given: (1) when the evidence demonstrates that the offense was committed at a specific time and place and the defendant has presented a defense of alibi or lack of opportunity; or (2) when two similar offenses are charged in separate counts. (*People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705], overruled on other grounds in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 [263 Cal.Rptr. 513, 781 P.2d 547]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].)

### AUTHORITY

- [Instructional Requirements](#) ▶ Pen. Code, § 955; *People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].
- [This Instruction Correctly States the Law](#) ▶ *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304 [188 Cal.Rptr.3d 811].

#### *Secondary Sources*

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[2] (Matthew Bender).

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

**208–219. Reserved for Future Use**



### 334. Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice

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Before you may consider the (statement/ [or] testimony) of \_\_\_\_\_ <insert name[s] of witness[es]> as evidence against (the defendant/ \_\_\_\_\_ <insert names of defendants>) [regarding the crime[s] of \_\_\_\_\_ <insert name[s] of crime[s] if corroboration only required for some crime[s]>], you must decide whether \_\_\_\_\_ <insert name[s] of witness[es]> (was/were) [an] accomplice[s] [to (that/those) crime[s]]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if:

**1.** He or she personally committed the crime;

**OR**

**1.2.** He or she knew of the criminal purpose of the person who committed the crime;

**AND**

**2.3.** He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;]/ [or] participate in a criminal conspiracy to commit the crime).

The burden is on the defendant to prove that it is more likely than not that \_\_\_\_\_ <insert name[s] of witness[es]> (was/were) [an] accomplice[s].

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice.]

[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]

**[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/she) understood:**

- 1. The nature and effect of the criminal conduct;**
- 2. That the conduct was wrongful and forbidden;**

**AND**

- 3. That (he/she) could be punished for participating in the conduct.]**

**If you decide that a (declarant/ [or] witness) was not an accomplice, then supporting evidence is not required and you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.**

**If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of \_\_\_\_\_ <insert charged crime[s]> based on his or her (statement/ [or] testimony) 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[s], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice 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.**

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*New January 2006; Revised January 2007, April 2010* *[insert date of council approval]*

## **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]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].)

“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].) When 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, do not give this instruction. Give CALCRIM No. 335, *Accomplice Testimony: No 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 codefendants 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 this instruction, 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 below.)

In a multiple codefendant case, if the corroboration requirement does not apply to all defendants, insert the names of the defendants for whom corroboration is required where indicated in the first sentence.

If the witness was an accomplice to only one or some of the crimes he or she testified about, the corroboration requirement only applies to those crimes and not to other crimes he or she may have testified about. (*People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [331 P.2d 1040].) In such cases, the court may insert the specific crime or crimes requiring corroboration in the first sentence.

Give the bracketed paragraph that begins with “A person who lacks criminal intent” when the evidence suggests that the witness did not share the defendant’s specific criminal intent, e.g., witness was an undercover police officer or an unwitting assistant.

Give the bracketed paragraph that begins with “You may not conclude that a child under 14 years old” on request if the defendant claims that a child witness’s testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209 [55 P.2d 223].)

## 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].
- Defendant’s Burden of Proof ▶ *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration ▶ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].

- Accomplice Includes Co-perpetrator ▶ *People v. Felton* (2004) 122 Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].
- 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].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].

### ***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).

## RELATED ISSUES

### ***Out-of-Court Statements***

The out-of court statement of a witness *may* constitute “testimony” within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams* (1997) 16 Cal.4th 153, 245 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People v. Belton* (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485].) The Supreme Court has quoted with approval the following summary of the corroboration requirement for out-of-court statements:

‘[T]estimony’ within the meaning of . . . section 1111 includes . . . all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. [Citation.] On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as ‘testimony’ and hence need not be corroborated under . . . section 1111.

(*People v. Williams, supra*, 16 Cal.4th at p. 245 [quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218 [43 Cal.Rptr.2d 526] [quotation marks, citations, and italics removed]; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1230 [283 Cal.Rptr. 144, 812 P.2d 163] [out-of-court statement admitted as excited utterance did not require corroboration].) The court must determine whether the out-of-court statement requires corroboration and, accordingly, whether this instruction is appropriate. The court should also determine whether the statement is testimonial, as defined in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], and whether the *Crawford* holding effects the corroboration requirement of Penal Code section 1111.

### ***Incest With a Minor***

Accomplice instructions are not appropriate in a trial for incest with a minor. A minor is a victim, not an accomplice, to incest. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see CALCRIM No. 1180, *Incest*.)

### ***Liable to Prosecution When Crime Committed***

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469 [110 Cal.Rptr. 906, 516 P.2d 298].) However,

the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [270 Cal.Rptr. 817, 793 P.2d 23].)

***Threats and Fear of Bodily Harm***

A person who is induced by threats and fear of bodily harm to participate in a crime, other than murder, is not an accomplice. (*People v. Brown* (1970) 6 Cal.App.3d 619, 624 [86 Cal.Rptr. 149]; *People v. Perez* (1973) 9 Cal.3d 651, 659–660 [108 Cal.Rptr. 474, 510 P.2d 1026].)

***Defense Witness***

“[A]lthough an accomplice witness instruction must be properly formulated . . . , there is no error in giving such an instruction when the accomplice’s testimony favors the defendant.” (*United States v. Tirouda* (9th Cir. 2005) 394 F.3d 683, 688.)

### **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.**

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## 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].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
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### *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

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**View the (statement/ [or] testimony) of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such (a 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.**

*<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.]**

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*New January 2006; Revised August 2012* ***[insert date of 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.
- [In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other](#) ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].

### ***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).

### 361. Failure to Explain or Deny Adverse Testimony

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**If the defendant failed in (his/her) testimony to explain or deny evidence against (him/her), and if (he/she) could reasonably be expected to have done so based on what (he/she) knew, you may consider (his/her) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt.**

**If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.**

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

#### BENCH NOTES

##### ***Instructional Duty***

No authority imposes a duty to give this instruction sua sponte. This instruction should only be given when the defendant testifies and the privilege against self-incrimination has not been successfully invoked. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181]; *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1118 [196 Cal.Rptr. 450].)

Before an instruction on this principle may be given, the trial court **must** ascertain as a matter of law: (1) if a question was asked that called for an explanation or denial of incriminating evidence; (2) if the defendant knew the facts necessary to answer the question or if some circumstance precluded the defendant from knowing such facts; and (3) if the defendant failed to deny or explain the incriminating evidence when answering the question. (*People v. Saddler* (1979) 24 Cal.3d 671, 682–683 [156 Cal.Rptr. 871, 597 P.2d 130] [instruction erroneously given because there was no evidence that defendant failed to deny or explain incriminating evidence]; *People v. Marsh* (1985) 175 Cal.App.3d 987, 994 [221 Cal.Rptr. 311] [same]; *People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [190 Cal.Rptr.757] [same]; see also *People v. Marks* (1988) 45 Cal.3d 1335, 1346 [248 Cal.Rptr. 874, 756 P.2d 260].)

Contradiction of the state's evidence is not by itself a failure to deny or explain. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346 [248 Cal.Rptr. 874, 756 P.2d 260]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 [180 Cal.Rptr. 76].) Failure to recall is not an appropriate basis for this instruction. (*People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [190 Cal.Rptr.757].)

One court has cautioned against giving this instruction unless both parties agree and there is a significant omission on the part of the defendant to explain or deny adverse evidence. (*People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119–1120 [196 Cal.Rptr. 450].)

## AUTHORITY

- Instructional Requirements ▶ Evid. Code, § 413.
- Cautionary Language ▶ *People v. Saddler* (1979) 24 Cal.3d 671, 683 [156 Cal.Rptr. 871, 597 P.2d 130].
- This Instruction Upheld ▶ [\*People v. Vega\* \(2015\) 236 Cal.App.4th 484, 494-500 \[186 Cal.Rptr.3d 671\]](#); *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1068 [88 Cal.Rptr.3d 749].

### *Secondary Sources*

2 Witkin, California Evidence (4th ed. 2000) Witnesses, §§ 440, 441.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.08[6][a][i], Ch. 83, *Evidence*, § 83.01[2][b], Ch. 85, *Submission to Jury and Verdict*, §§ 85.01[5], 85.04[2][b] (Matthew Bender).

## RELATED ISSUES

### *Bizarre or Implausible Answers*

If the defendant's denial or explanation is bizarre or implausible, several courts have held that the question whether his or her response is reasonable should be given to the jury with an instruction regarding adverse inferences. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr.181]; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392–393 [213 Cal.Rptr. 353].) However, in *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 [245 Cal.Rptr. 750], the court stated, “the test for giving the instruction [on failure to deny or explain] is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear.”

### *Facts Beyond the Scope of Examination*

If the defendant has limited his or her testimony to a specific factual issue, it is error for the prosecutor to comment, or the trial court to instruct, on his or her



failure to explain or deny other evidence against him or her that is beyond the scope of this testimony. (*People v. Tealer* (1975) 48 Cal.App.3d 598, 604–607 [122 Cal.Rptr. 144].)

### 375. Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.

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*<Introductory Sentence Alternative A—evidence of other offense admitted>*

**[The People presented evidence that the defendant committed ((another/other) offense[s]/the offense[s] of \_\_\_\_\_ <insert description of alleged offense[s]>) that (was/were) not charged in this case.]**

*<Introductory Sentence Alternative B—evidence of other act admitted>*

**[The People presented evidence (of other behavior by the defendant that was not charged in this case/that the defendant \_\_\_\_\_ <insert description of alleged conduct admitted under Evid. Code, § 1101(b)>).]**

**You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the (uncharged offense[s]/act[s]). Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.**

**If the People have not met this burden, you must disregard this evidence entirely.**

**If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether ~~or not~~:**

*<Select specific grounds of relevance and delete all other options.>*

*<A. Identity>*

**[The defendant was the person who committed the offense[s] alleged in this case](./; or)**

*<B. Intent>*

**[The defendant acted with the intent to \_\_\_\_\_ <insert specific intent required to prove the offense[s] alleged> in this case](./; or)**

*<C. Motive>*

**[The defendant had a motive to commit the offense[s] alleged in this case](./; or)**

<D. Knowledge>

[The defendant knew \_\_\_\_\_ <insert knowledge required to prove the offense[s] alleged> when (he/she) allegedly acted in this case](./; or)

<E. Accident>

[The defendant's alleged actions were **not** the result of mistake or accident](./; or)

<F. Common Plan>

[The defendant had a plan [or scheme] to commit the offense[s] alleged in this case](./; or)

<G. Consent>

[The defendant reasonably and in good faith believed that \_\_\_\_\_ <insert name or description of complaining witness> consented](./; or)

<H. Other Purpose>

[The defendant \_\_\_\_\_ <insert description of other permissible purpose; see Evid. Code, § 1101(b)>.]

[In evaluating this evidence, consider the similarity or lack of similarity between the uncharged (offense[s]/ [and] act[s]) and the charged offense[s].]

Do not consider this evidence for any other purpose [except for the limited purpose of \_\_\_\_\_ <insert other permitted purpose, e.g., determining the defendant's credibility>].

[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]

If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ <insert charge[s]> [or that the \_\_\_\_\_ <insert allegation[s]> has been proved]. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

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| New January 2006; Revised April 2008 [insert date of council approval](#)

## BENCH NOTES

### *Instructional Duty*

The court must give this instruction on request when evidence of other offenses has been introduced. (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].) The court is only required to give this instruction **sua sponte** in the “occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.” (*People v. Collie, supra*, 30 Cal.3d at pp. 63–64.)

**Do not** give this instruction in the penalty phase of a capital case. (See CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes*.)

If evidence of uncharged conduct is admitted **only** under Evidence Code section 1108 or 1109, **do not** give this instruction. (See CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*; CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*; and CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person*.)

If the court admits evidence of uncharged conduct amounting to a criminal offense, give introductory sentence alternative A and select the words “uncharged offense[s]” where indicated. If the court admits evidence under Evidence Code section 1101(b) that does not constitute a criminal offense, give introductory sentence alternative B and select the word “act[s]” where indicated. (*People v. Enos* (1973) 34 Cal.App.3d 25, 42 [109 Cal.Rptr. 876] [evidence tending to show defendant was “casing” a home admitted to prove intent where burglary of another home charged and defendant asserted he was in the second home by accident].) The court is not required to identify the specific acts to which this instruction applies. (*People v. Nicolas* (2004) 34 Cal.4th 614, 668 [21 Cal.Rptr.3d 612, 101 P.3d 509].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1101(b), then the court must specify for the jury what evidence it may consider under section 1101(b). (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771], superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742].) In alternative A, insert a description of the uncharged offense allegedly shown by the 1101(b) evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then the court may

give the alternative “another offense” or “other offenses” without specifying the uncharged offenses.

The court must instruct the jury on what issue the evidence has been admitted to prove and delete reference to all other potential theories of relevance. (*People v. Swearington* (1977) 71 Cal.App.3d 935, 949 [140 Cal.Rptr. 5]; *People v. Simon* (1986) 184 Cal.App.3d 125, 131 [228 Cal.Rptr. 855].) Select the appropriate grounds from options A through H and delete all grounds that do not apply.

When giving option F, the court may give the bracketed “or scheme” at its discretion, if relevant.

The court may give the bracketed sentence that begins with “In evaluating this evidence” at its discretion when instructing on evidence of uncharged offenses that has been admitted based on similarity to the current offense. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].) For example, when the evidence of similar offenses is admitted to prove common plan, intent, or identity, this bracketed sentence would be appropriate.

Give the bracketed sentence beginning with “Do not conclude from this evidence that” on request if the evidence is admitted only under Evidence Code section 1101(b). Do not give this sentence if the court is also instructing under Evidence Code section 1108 or 1109.

The paragraph that begins with “If you conclude that the defendant committed” has been included to prevent jury confusion regarding the standard of proof. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013 [130 Cal.Rptr.2d 254, 62 P.3d 601] [instruction on section 1108 evidence sufficient where it advised jury that prior offense alone not sufficient to convict; prosecution still required to prove all elements beyond a reasonable doubt].)

## AUTHORITY

- Evidence Admissible for Limited Purposes ▶ Evid. Code, § 1101(b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 422 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Degree of Similarity Required ▶ *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].

- Analysis Under Evidence Code Section 352 Required ▶ *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 426–427 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Instructional Requirements ▶ *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 790 [155 Cal.Rptr. 152].
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Potential Conflict With Circumstantial Evidence Instruction ▶ *People v. James* (2000) 81 Cal.App.4th 1343, 1358–1359 [96 Cal.Rptr.2d 823].

### *Secondary Sources*

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 74–95.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, Evidence, § 83.12[1][c] (Matthew Bender).

## **RELATED ISSUES**

### ***Circumstantial Evidence—Burden of Proof***

Evidence of other offenses is circumstantial evidence that the defendant committed the offense charged. (See *People v. James* (2000) 81 Cal.App.4th 1343, 1358, fn. 9 [96 Cal.Rptr.2d 823].) Courts have recognized a potential conflict between the preponderance standard required to prove uncharged offenses and the reasonable doubt standard required to prove each underlying fact when the case is based primarily on circumstantial evidence. (See *People v. Medina* (1995) 11 Cal.4th 694, 763–764 [47 Cal.Rptr.2d 165, 906 P.2d 2]; *People v. James, supra*, 81 Cal.App.4th at p. 1358, fn. 9.) The court must give the general circumstantial evidence instruction (CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*) “only when the prosecution relies on circumstantial evidence to prove the defendant’s guilt from a pattern of incriminating circumstances, not when circumstantial evidence serves solely to corroborate direct evidence.” (*People v. James, supra*, 81 Cal.App.4th at p. 1359.) Thus, if evidence of other offenses is offered to corroborate direct evidence that the defendant committed the crime, no conflict exists. However, when the prosecution’s case rests substantially or entirely on circumstantial evidence, there will be a conflict between this instruction and CALCRIM No. 223. (*People v. James, supra*, 81 Cal.App.4th at p. 1358, fn. 9; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101

Cal.Rptr.2d 624]; *People v. Jeffries* (2000) 83 Cal.App.4th 15, 23–24, fn. 7 [98 Cal.Rptr.2d 903].) No case has determined how this conflict should be resolved. If this issue arises in a particular case, the court should consider the authorities cited and determine whether it is necessary to modify this instruction. (*People v. Younger, supra*, 84 Cal.App.4th at p. 1382; *People v. Jeffries, supra*, 83 Cal.App.4th at p. 24, fn. 7.)

### ***Issue in Dispute***

The “defendant’s plea of not guilty does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution’s burden of proof.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Rowland* (1992) 4 Cal.4th 238, 260 [14 Cal.Rptr.2d 377, 841 P.2d 897].) The defense may seek to “narrow the prosecution’s burden of proof” by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106 [256 Cal.Rptr. 647].) “[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness.” (*People v. Scheid* (1997) 16 Cal.4th 1, 16–17 [65 Cal.Rptr.2d 348, 939 P.2d 748].) However, an offer to stipulate may make the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [101 Cal.Rptr.2d 825] [observing that offer “not to argue” the issue is insufficient].) The court must also consider whether there could be a “reasonable dispute” about the issue. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422–423 [27 Cal.Rptr.2d 666, 867 P.2d 777] [evidence of other offense not admissible to show intent to rape because if jury believed witness’s account, intent could not reasonably be disputed]; *People v. Bruce, supra*, 208 Cal.App.3d at pp. 1103–1106 [same].)

### ***Subsequent Offenses Admissible***

Evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom* (1994) 7 Cal.4th 414, 422–423, 425 [27 Cal.Rptr.2d 666, 867 P.2d 777].)

### ***Offenses Not Connected to Defendant***

Evidence of other offenses committed in the same manner as the alleged offense is not admissible unless there is sufficient evidence that the defendant committed the uncharged offenses. (*People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006–1007 [12 Cal.Rptr.2d 838] [evidence of how auto-theft rings operate inadmissible]; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 242 [63 Cal.Rptr.2d 769] [evidence from police database of similar sexual offenses committed by unknown assailant inadmissible].)

## 548. Murder: Alternative Theories

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The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.

Each theory of murder has different requirements, and I will instruct you on both.

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory [, but you must unanimously agree whether the murder is in the first or second degree].

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*New January 2006; Revised August 2014* [insert date of council approval]

### BENCH NOTES

#### *Instructional Duty*

This instruction is designed to be given when murder is charged on theories of malice and felony murder to help the jury distinguish between the two theories. This instruction should be given after the court has given any applicable instructions on defenses to homicide and **before** CALCRIM No. 520, *Murder With Malice Aforethought*.

~~The court may need to modify the final sentence of this instruction if the prosecution relies on mutually exclusive theories of homicide that support different degrees of murder. (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880].)~~

If there is evidence of multiple acts from which the jury might conclude that the defendant killed the decedent, the court may be required to give CALCRIM No. 3500, *Unanimity*. (See *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300–302 [209 Cal.Rpt. 503] [error not to instruct on unanimity where evidence that the victim was killed either by blunt force or by injection of cocaine].) Review the Bench Notes for CALCRIM No. 3500 discussing when a unanimity instruction is required.

### AUTHORITY

- Unanimity on Degrees of Crime and Lesser Included Offenses. ▶ [Pen. Code §](#)



1157; *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880]; *People v. Aikin* (1971) 19 Cal.App.3d 685, 704 [97 Cal.Rptr. 251], disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 512 [119 Cal.Rptr. 225].

- Alternate Theories May Support Different Degrees of Murder. ▶ *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880].

**625. Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 29.4)**

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**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 with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,] [[or] the defendant was unconscious when (he/she) acted[,] [or the defendant \_\_\_\_\_ <insert other specific intent required in a homicide charge or other charged offense>.]**

**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.**

**You may not consider evidence of voluntary intoxication for any other purpose.**

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*New January 2006; Revised August 2014*

**BENCH NOTES**

***Instructional Duty***

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [61 Cal.Rptr.2d 39]; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57 [5 Cal.Rptr.2d 495, 825 P.2d 388].) Such an instruction is a “pinpoint” instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra*, 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

If the defendant is charged with a homicide crime that has as an element an additional specific intent requirement other than intent to kill, include the required

intent in the last bracketed portion of the second sentence. For example, if the defendant is charged with torture murder, include “whether the defendant intended to inflict extreme and prolonged pain.” Or, if the defendant is charged with felony-murder, insert intent to commit the felony where indicated. Similarly, if the defendant is also charged with a nonhomicide crime with a specific intent requirement, include that intent requirement. For example, if the defendant is charged with murder and robbery, include “whether the defendant intended to ~~take property by force or fear~~permanently deprive the owner of the property.”

## AUTHORITY

- Voluntary Intoxication Defined. ▶ Pen. Code, § 29.4(c).
- Unconsciousness Not Required. ▶ *People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- No Sua Sponte Duty to Instruct. ▶ *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Evidence of Intoxication Inapplicable to Implied Malice. ▶ Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].
- Applies to Attempted Murder. ▶ *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].
- Voluntary Intoxication Relevant to Knowledge. ▶ *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39].
- This Instruction Upheld. ▶ *People v. Turk* (2008) 164 Cal.App.4th 1361, 1381 [80 Cal.Rptr.3d 473]; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [60 Cal.Rptr.3d 677].

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, §§ 26–30.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice, Ch. 73, Defenses and Justifications*, §§ 73.01[4], 73.04 (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][e], [f], [2][b], [3][c] (Matthew Bender).

## RELATED ISSUES

### ***General Instruction on Voluntary Intoxication***

This instruction is a specific application of CALCRIM No. 3426, *Voluntary Intoxication*, to homicide.

### ***Unconsciousness***

Unconsciousness (as defined in CALCRIM No. 3425, *Unconsciousness*) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

### ***Not Applicable in Murder Cases Based Exclusively on Implied Malice***

This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice, because voluntary intoxication can only negate *express* malice. (Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

**703. Special Circumstances: Intent Requirement for Accomplice  
After June 5, 1990—Felony Murder (Pen. Code, § 190.2(d))**

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If you decide that (the/a) defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[s] of \_\_\_\_\_ <insert felony murder special circumstance[s]>, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life.

In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove either that the defendant intended to kill, or the People must prove all of the following:

1. The defendant's participation in the crime began before or during the killing;
2. The defendant was a major participant in the crime;

AND

3. When the defendant participated in the crime, (he/she) acted with reckless indifference to human life.

[A person *acts with reckless indifference to human life* when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death.]

[The People do not have to prove that the actual killer acted with intent to kill or with reckless indifference to human life in order for the special circumstance[s] of \_\_\_\_\_ <insert felony-murder special circumstance[s]> to be true.]

[If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find (this/these) special circumstance[s] true, you must find either that the defendant acted with intent to kill or you must find that the defendant acted with reckless indifference to human life and was a *major participant* in the crime.] **[When you decide whether the defendant was a major participant, consider all the evidence. Among the factors you may consider are:**

1. What role did the defendant play in planning the criminal enterprise that led to the death[s]?
2. What role did the defendant play in supplying or using lethal weapons?
3. What awareness did the defendant have of particular dangers posed by the nature of the crime, any weapons used, or past experience or conduct of the other participant[s]?
4. Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder?
5. Did the defendant's own actions or inactions play a particular role in the death?
6. What did the defendant do after lethal force was used?
7. *<insert any other relevant factors.>*

No one of these factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant was a major participant. ]

If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she) acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance[s] of \_\_\_\_\_ *<insert felony murder special circumstance[s]>* to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant].

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*New January 2006; Revised April 2008* *<insert date of council approval>*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. (*Ibid.*)

Proposition 115 modified the intent requirement of the special circumstance law, codifying the decisions of *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], and *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127]. The current law provides that the actual killer does not have to act with intent to kill unless the special circumstance

specifically requires intent. (Pen. Code, § 190.2(b).) If the felony-murder special circumstance is charged, then the People must prove that a defendant who was not the actual killer was a major participant and acted with intent to kill or with reckless indifference to human life. (Pen. Code, § 190.2(d); *People v. Banks* (2015) 61 Cal.4th 788, 807-809 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *People v. Estrada* (1995) 11 Cal.4th 568, 571 [46 Cal.Rptr.2d 586, 904 P.2d 1197].)

Use this instruction for any case in which the jury could conclude that the defendant was an accomplice to a killing that occurred after June 5, 1990, when the felony-murder special circumstance is charged.

Give the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice.

If the jury could convict the defendant either as a principal or as an accomplice, the jury must find intent to kill or reckless indifference if they cannot agree that the defendant was the actual killer. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) In such cases, the court should give both the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer, and the bracketed paragraph that begins with “[I]f you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer . . . .”

The court does not have a sua sponte duty to define “reckless indifference to human life.” (*People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197].) However, this “holding should not be understood to discourage trial courts from amplifying the statutory language for the jury.” (*Id.* at p. 579.)

The court may give the bracketed definition of reckless indifference if requested. In *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330], the court identified certain factors to guide the jury about whether the defendant was a major participant, but stopped short of holding that the court has a sua sponte duty to instruct on those factors. The trial court should determine whether the *Banks* factors need be given.

Do not give this instruction if accomplice liability is not at issue in the case.

## AUTHORITY

- Accomplice Intent Requirement, Felony Murder ▶ Pen. Code, § 190.2(d).

- Reckless Indifference to Human Life ▶ *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Constitutional Standard for Intent by Accomplice ▶ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant ▶ *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330]

### *Secondary Sources*

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, §§ 453, 460.

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



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

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

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

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

AND

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

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

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

*<If criminal street gang has already been defined>*

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

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

[A *criminal street gang* is 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.**

**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 by two or more persons.]

[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.]

[Other instructions explain what is necessary for the People to prove that a member of the gang [or the defendant] committed \_\_\_\_\_ <insert crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>.]

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*New January 2006; Revised August 2006, June 2007, February 2014* [*insert date of council approval*]

## BENCH NOTES

### *Instructional Duty*

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

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.”].)

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, supra*, 26 Cal.4th at pp. 322–323; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

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

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

### ***Related Instructions***

CALCRIM No. 562, *Transferred Intent*.

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

## **AUTHORITY**

- Special Circumstance ▶ Pen. Code, § 190.2(a)(22).

- Active Participation Defined ▶ 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, supra*, 97 Cal.App.4th at pp. 1464–1465.
- Transferred Intent Under Penal Code Section 190.2(a)(22) ▶ *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e), (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].
- Felonious Criminal Conduct Defined ▶ *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].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.4th 309, 355 P.3d 480].

### *Secondary Sources*

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, § 443.

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

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

## **RELATED ISSUES**

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

The criminal street gang special circumstance applies when a participant in a criminal street gang intends to kill one person but kills someone else by mistake. *People v. Shabazz* (2006) 38 Cal.4th 55, 66 [40 Cal.Rptr.3d 750, 130 P.3d 519]; see CALCRIM No. 562, *Transferred Intent*.

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

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

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

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

**AND**

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

**OR**

- b. aiding and abetting a felony offense.

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

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

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

<If criminal street gang has already been defined.>

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

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

1. That has a common name or common identifying sign or symbol;
2. That has, as one or more of its primary activities, the commission of \_\_\_\_\_ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

**AND**

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

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

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

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

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

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

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

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

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

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

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

**AND**

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

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

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*New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013, February 2014, August 2014* *[insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

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

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more

specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

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

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

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

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

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

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

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

### ***Defenses—Instructional Duty***

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

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

### ***Related Instructions***

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

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

## **AUTHORITY**

- Elements. ▶ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined. ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. ▶ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined. ▶ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].

- Felonious Criminal Conduct Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony. ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143]; *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].
- Temporal Connection Between Active Participation and Felonious Criminal Conduct. ▶ *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates. ▶ *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464-1465 [119 Cal.Rptr.2d 272].
- Conspiracy to Commit This Crime. ▶ *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.4th 309, 355 P.3d 480].

### *Secondary Sources*

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

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

## COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same

occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran*, *supra*, 97 Cal.App.4th at 1458 [original italics].) The “felonious criminal conduct” need not be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54–59 [119 Cal.Rptr.3d 415, 244 P.3d 1062].)

## LESSER INCLUDED OFFENSES

### *Predicate Offenses Not Lesser Included Offenses*

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

## RELATED ISSUES

### *Conspiracy*

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

### *Labor Organizations or Mutual Aid Activities*

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

### *Related Gang Crimes*

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

***Unanimity***

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

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

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

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

To prove this allegation, the People must prove that:

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

**AND**

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

<If criminal street gang has already been defined.>

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

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

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

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



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

AND

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

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

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

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

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

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

<Give Alternative 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 Alternative 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,  
February 2013, August 2013, February 2014 [\[insert date of council approval\]](#)

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing 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 pp. 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*, *supra*, 26 Cal.4th at pp. 322–323; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

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

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

The court may bifurcate the trial on the gang enhancement, at its discretion. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.)

### ***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, 244 P.3d 1062].
- Specific Intent Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran, supra*, 97 Cal.App.4th at pp. 1464–1465.
- 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, supra*, 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138 [150 Cal.Rptr.3d 533].

- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.4th 309, 355 P.3d 480].

### *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 10-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang may not apply in some sentencing situations involving the crime of murder.

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

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

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

**To prove this allegation, the People must prove that:**

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

**AND**

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

**OR**

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

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

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

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

**A *criminal street gang* is 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 Alternative 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 Alternative 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30).>

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

**AND**

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

- 2. At least one of those crimes was committed after September 26, 1988;**
- 3. The most recent crime occurred within three years of one of the earlier crimes;**

**AND**

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

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

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

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

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

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

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

To decide whether a member of the gang [or the defendant] committed \_\_\_\_\_ <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

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

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

AND

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

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

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

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

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

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

**AND**

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

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

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

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*New January 2006; Revised August 2006, June 2007, December 2008, February 2012, August 2013, February 2014* *insert date of council approval*

## **BENCH NOTES**

### ***Instructional Duty***

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

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

with a verdict form on which the jury will indicate if the sentencing factor has been proved.

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

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 316, 323–324.)

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

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

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

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

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

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

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

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

#### ***Defenses—Instructional Duty***

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

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

#### ***Related Instructions***

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

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

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

## **AUTHORITY**

- Factors ▶ Pen. Code, §§ 25400(c)(3), 25850(c)(3) Sentencing Factors, Not Elements ▶ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Elements of Gang Factor ▶ Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran, supra*, 97 Cal.App.4th at pp. 1464–1465.
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132–1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81–85 [192 Cal.Rptr.4th 309, 355 P.3d 480].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 31–46, 203–204, 249–250.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][d], 144.03[2] (Matthew Bender).

## RELATED ISSUES

### ***Gang Expert Cannot Testify to Defendant’s Knowledge or Intent***

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

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

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

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

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

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The defendant is charged [in Count \_\_] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child/someone with whom (he/she) had, or previously had, an engagement or dating relationship 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)/someone with whom (he/she) had, or previously had, an engagement or dating relationship);

[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 (spouses/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.]

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*New January 2006; Revised June 2007, August 2012, August 2014, February 2015* [*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).

The amendment to Penal Code section 273.5(b) adding “someone with whom the offender has, or previously had, an engagement or dating relationship as defined in Penal Code section 243(f)(10)” to the list of potential victims became effective on January 1, 2014.

## 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(d).
- 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* (4th ed. 2012) Crimes Against the Person, §§64–67.

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].)

**841. Simple Battery: Against Spouse, Cohabitant, or Fellow Parent  
(Pen. Code, § 243(e)(1))**

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The defendant is charged [in Count \_\_] with battery against [his/her] ([former] spouse/~~former~~-cohabitant/fiancé[e]/a person with whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/the (mother/father) of (his/her) child) [in violation of Penal Code section 243(e)(1)].

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

1. The defendant willfully [and unlawfully] touched \_\_\_\_\_  
<insert name of complaining witness> in a harmful or offensive manner;

[AND]

2. \_\_\_\_\_ <insert name of complaining witness> is (the/a) (defendant's [former] spouse/defendant's ~~former~~ cohabitant/defendant's fiancé[e]/person with whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/(mother/father) of the defendant's child)(;/.)

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

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

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

[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.]

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under the 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>.]

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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.)

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

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

Give the third bracketed sentence that begins with “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 with “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].)

## AUTHORITY

- Elements ▶ Pen. Code, § 243(e)(1).
- Willfully Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- 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].
- Dating Relationship Defined ▶ Pen. Code, § 243(f)(10).
- 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, § 19.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.12[2] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Simple Battery ▶ Pen. Code, §§ 242, 243(a).

## RELATED ISSUES

See the Related Issues section of CALCRIM No. 960, *Simple Battery*.

**842–849. Reserved for Future Use**



**935. Sexual Battery: Felony (Pen. Code, §§ 242, 243.4(a) & (d))**

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The defendant is charged [in Count \_\_\_] with sexual battery [in violation of Penal Code section 243.4].

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

1. The defendant [or an accomplice] unlawfully restrained \_\_\_\_\_  
<insert name of complaining witness>;

<Alternative 2A—defendant touched>

- [2. While \_\_\_\_\_ <insert name of complaining witness> was restrained, the defendant touched an intimate part of \_\_\_\_\_  
<insert name of complaining witness>;]

<Alternative 2B—caused complaining witness to touch>

- [2. While \_\_\_\_\_ <insert name of complaining witness> was restrained, the defendant (caused \_\_\_\_\_ <insert name of complaining witness> to touch (his/her) own intimate part/ [or] caused \_\_\_\_\_ <insert name of complaining witness> to touch the intimate part of defendant [or someone else]);]

3. The touching was done against \_\_\_\_\_'s <insert name of complaining witness> will;

AND

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

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

Contact must have been made with \_\_\_\_\_'s <insert name of complaining witness> bare skin. This means that:

1. The defendant must have touched the bare skin of \_\_\_\_\_'s  
<insert name of complaining witness> intimate part;

OR

2. \_\_\_\_\_'s <insert name of complaining witness> **bare skin must have touched the defendant's** [or \_\_\_\_\_'s <insert name or description of third person>] **intimate part either directly or through (his/her) clothing.**

Someone is *unlawfully restrained* when his or her liberty is controlled by words, acts, or authority of another and the restraint is against his or her will. Unlawful restraint requires more than just the physical force necessary to accomplish the sexual touching. [A person does not unlawfully restrain someone if he or she only uses lawful authority for a lawful purpose.]

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

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

**<Defense: Reasonable Belief in Consent>**

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

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

**BENCH NOTES**

### ***Instructional Duty***

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

The court has a **sua sponte** duty to instruct on the defense of mistaken but honest and reasonable belief in consent if there is substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. (See *People v. Andrews* (2015) 234 Cal.App.4th 590, 602 [184 Cal.Rptr.3d 183]; following *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

Give either alternative 2A or 2B depending on the evidence in the case. The committee has concluded that the direct touching requirement for felony sexual battery is satisfied when (1) the defendant forces the alleged victim to touch the defendant’s intimate parts through the defendant’s clothing with the alleged victim’s bare skin; (2) the defendant forces the alleged victim to touch any part of the defendant with the victim’s unclothed intimate part, whether the defendant’s body is clothed or not; or (3) the defendant touches the alleged victim’s bare intimate part either directly or through clothing. If a defendant is only charged under Penal Code section 243.4(a), the defendant must touch the victim’s intimate part, not the other way around. (*People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].)

The committee omitted the word “masturbate” from the elements because the plain language of Penal Code section 243.4(d) requires only that the victim be compelled to touch him- or herself, and a further finding of whether that act of touching was actually masturbation is unnecessary.

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

If the court gives the bracketed phrase “or an accomplice” in element 1, the court must also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

### **AUTHORITY**

- Elements ▶ Pen. Code, §§ 242, 243.4(a) & (d).

- Intimate Part ▶ Pen. Code, § 243.4(g)(1).
- Touches Defined ▶ Pen. Code, § 243.4(f).
- Otherwise Lawful Restraint for Unlawful Purpose ▶ *People v. Alford* (1991) 235 Cal.App.3d 799, 803–804 [286 Cal.Rptr. 762].
- Sexual Abuse Defined ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467] [discussing Pen. Code, § 289].
- Specific Intent Crime ▶ *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Caused to Masturbate ▶ *People v. Reeves* (2001) 91 Cal.App.4th 14, 50 [109 Cal.Rptr.2d 728].
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

### *Secondary Sources*

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 26, 74–76.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.22[1] (Matthew Bender).

## **LESSER INCLUDED OFFENSES**

- Assault ▶ Pen. Code, § 240.
- Misdemeanor Sexual Battery ▶ Pen. Code, § 243.4(e)(1).

## **COMMENTARY**

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

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

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

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

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

1. The defendant touched an intimate part of \_\_\_\_\_ <insert name of complaining witness>;
2. The touching was done against \_\_\_\_\_'s <insert name of complaining witness> will;

AND

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

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

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

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

**<Defense: Reasonable Belief in Consent>**

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

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

## BENCH NOTES

### *Instructional Duty*

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

The court has a **sua sponte** duty to instruct on the defense of mistaken but honest and reasonable belief in consent if there is substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. (See *People v. Andrews* (2015) 234 Cal.App.4th 590, 602 [184 Cal.Rptr.3d 183]; following *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

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

## AUTHORITY

- Elements ▶ Pen. Code, § 243.4(e)(1).
- Touches Defined ▶ Pen. Code, § 243.4(e)(2).
- Intimate Part Defined ▶ Pen. Code, § 243.4(g)(1).
- Consent Defined ▶ Pen. Code, §§ 261.6, 261.7.
- Specific-Intent Crime ▶ *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Defendant Must Touch Intimate Part of Victim ▶ *People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].

Defendant Need Not Touch Skin ▶ *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [40 Cal.Rptr.2d 391].

## LESSER INCLUDED OFFENSES

Neither sexual battery nor attempted sexual battery are lesser included offenses of sexual battery by fraudulent representation. *People v. Babaali* (2009) 171 Cal.App.4th 982.

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 26.

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

### COMMENTARY

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

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

**939–944. Reserved for Future Use**



**985. Brandishing Imitation Firearm (Pen. Code, § 417.4)**

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The defendant is charged [in Count \_\_] with brandishing an imitation firearm [in violation of Penal Code section 417.4].

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

1. The defendant drew or exhibited an imitation firearm in a threatening manner against another person;
2. The defendant's act caused someone to fear bodily harm to himself or herself or someone else;

[AND]

3. That fear of harm was reasonable(;/.)

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

[AND]

4. When the defendant drew or exhibited the imitation firearm, (he/she) was not acting (in self-defense/ [or] in defense of someone else).]

An *imitation firearm* is a device[, or a toy gun, replica of a firearm, or BB device,] that is so substantially similar to a real firearm in color and overall appearance that a reasonable person would believe that it is a real firearm. [A *BB device* is an instrument that expels a projectile, such as a BB or other pellet, ~~not exceeding 6 mm caliber~~ either 6 millimeters or 8 millimeters in caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun that expels a projectile 10 millimeters or less in caliber.]

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

**BENCH NOTES**

***Instructional Duty***

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

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

## AUTHORITY

- Elements ▶ Pen. Code, § 417.4.
- Imitation Firearm ▶ Pen. Code, § 16700.
- BB Device Defined ▶ Pen. Code, § 16250.
- Reasonable Person Must Be Placed in Fear ▶ *In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].
- Person Placed in Fear May Be Bystander ▶ *In re Michael D.* (2002) 100 Cal.App.4th 115, 120–123 [121 Cal.Rptr.2d 909].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

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

## RELATED ISSUES

### ***Reasonable Person Who Fears Harm May Be Bystander***

Penal Code section 417.4 requires not “only the presence of another person against whom the imitation firearm is displayed or exhibited, but also some person’s knowledge of, and a reaction to, the perpetrator’s action.” (*In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].) Thus, someone must be placed in fear as a result of the defendant’s conduct; however, this does not have to be the person against whom the object is exhibited. (*Id.* at pp. 120–123.) The term “reasonable person,” as used in the statute “refers to anyone who witnesses the actions of the perpetrator, not just to the person against whom the device is drawn or exhibited.” (*Id.* at p. 123.)

**986–999. Reserved for Future Use**

**1300. Criminal Threat (Pen. Code, § 422)**

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The defendant is charged [in Count \_\_\_] with having made a criminal threat [in violation of Penal Code section 422].

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

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to \_\_\_\_\_ <insert name of complaining witness or member[s] of complaining witness's immediate family>;
2. The defendant made the threat (orally/in writing/by electronic communication device);
3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to \_\_\_\_\_ <insert name of complaining witness>];
4. The threat was so clear, immediate, unconditional, and specific that it communicated to \_\_\_\_\_ <insert name of complaining witness> a serious intention and the immediate prospect that the threat would be carried out;
5. The threat actually caused \_\_\_\_\_ <insert name of complaining witness> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

6. \_\_\_\_\_'s <insert name of complaining witness> fear was reasonable under the circumstances.

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

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

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

*Sustained fear* means fear for a period of time that is more than momentary, fleeting, or transitory.

[An immediate ability to carry out the threat is not required.]

[An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

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

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*New January 2006; Revised August 2006, June 2007, February 2015*

## BENCH NOTES

### *Instructional Duty*

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

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

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

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining “immediate family” should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If instructing on attempted criminal threat, give the third element in the bench notes of CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].

## AUTHORITY

- Elements ▶ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances ▶ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threat Not Required to Be Unconditional ▶ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- Conditional Threat May Be True Threat, Depending on Context ▶ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].
- Immediate Ability to Carry Out Threat Not Required ▶ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear ▶ *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024 [109 Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].

- Verbal Statement, Not Mere Conduct, Is Required ▶ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].
- Attempted Criminal Threats ▶ *People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538]-.
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter ▶ *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 24–30.

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

## COMMENTARY

This instruction uses the current nomenclature “criminal threat,” as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called “terrorist threat”]. (See also Stats. 2000, ch. 1001, § 4.)

## LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ▶ See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

## RELATED ISSUES

### ***Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat***

In *In re George T.* (2004) 33 Cal.4th 620, 628–629 [16 Cal.Rptr.3d 61, 93 P.3d 1007], a minor gave two classmates a poem containing language that referenced school shootings. The court held that “the text of the poem, understood in light of the surrounding circumstances, was not ‘as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.’ ” (*Id.* at p. 638.)

### ***Related Statutes***

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

### ***Unanimity Instruction***

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4 [102 Cal.Rptr.2d 269]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539 [70 Cal.Rptr.2d 878].)

### ***Whether Threat Actually Received***

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

### **1863. Defense to Theft or Robbery: Claim of Right (Pen. Code, § 511)**

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**If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery).**

**The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it.**

**In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.**

**[The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.]**

**[The claim-of-right defense does not apply to offset or pay claims against the property owner of an undetermined or disputed amount.]**

**[The claim-of-right defense does not apply if the claim arose from an activity commonly known to be illegal or known by the defendant to be illegal.]**

**If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of \_\_\_\_\_ <insert specific theft crime>.**

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*New January 2006; Revised October 2010, August 2015*

### **BENCH NOTES**

#### ***Instructional Duty***

There is a split in authority about whether the trial court must instruct **sua sponte** on the defense of claim of right. (See *People v. Russell* (2006) 144 Cal.App.4th 1415, 1429 [51 Cal.Rptr.3d 263] [**sua sponte** duty when claim of right supported]; but see *People v. Hussain* (2014) 231 Cal.App.4th 261, 268-269 [179



Cal.Rptr.3d 679] [no **sua sponte** duty to instruct on claim of right], following *People v. Anderson* (2011) 51 Cal.4th 989, 998 [125 Cal.Rptr.3d 408, 252 P.3d 968] [no **sua sponte** duty to instruct on accident].)

## AUTHORITY

- Defense. ▶ Pen. Code, § 511; *People v. Tufunga* (1999) 21 Cal.4th 935, 952, fn. 4 [90 Cal.Rptr.2d 143, 987 P.2d 168]; [\*People v. Anderson\* \(2015\) 235 Cal.App.4th 93, 102 \[185 Cal.Rptr.3d 128\]\[third parties\]](#). *People v. Romo* (1990) 220 Cal.App.3d 514, 517, 518 [269 Cal.Rptr. 440].
- Good Faith Belief. ▶ *People v. Stewart* (1976) 16 Cal.3d 133, 139–140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4, 10–11 [160 Cal.Rptr. 692].
- No Concealment of Taking. ▶ *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848–1849 [52 Cal.Rptr.2d 765].
- Not Available to Recover Unliquidated Claims. ▶ *People v. Holmes* (1970) 5 Cal.App.3d 21, 24–25 [84 Cal.Rptr. 889].
- Not Available to Recover From Notoriously or Known Illegal Activity. ▶ *People v. Gates* (1987) 43 Cal.3d 1168, 1181–1182 [240 Cal.Rptr. 666, 743 P.2d 301].
- Claim of Right Defense Available to Aiders and Abettors ▶ *People v. Williams* (2009) 176 Cal.App.4th 1521, 1529 [98 Cal.Rptr.3d 770].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Property §§ 36, 38.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.10[1][b], Ch. 143, *Crimes Against Property*, § 143.01[1][d] (Matthew Bender).

### **1864–1899. Reserved for Future Use**

**2300. Sale, Transportation for Sale, etc., of Controlled Substance  
(Health & Saf. Code, §§ 11352, 11379)**

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The defendant is charged [in Count \_\_] with  
(selling/furnishing/administering/giving away/transporting for  
sale/importing) \_\_\_\_\_ <insert type of controlled substance>, a controlled  
substance [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant (sold/furnished/administered/gave away/transported  
for sale/imported into California) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a  
controlled substance;

[AND]

<If the controlled substance is not listed in the schedules set forth in  
sections 11054 through 11058 of the Health and Safety Code, give  
paragraph 4B and the definition of analog substance below instead of 4A.>

**4A. The controlled substance was** \_\_\_\_\_ <insert type of controlled  
substance>(;/.)

**4B. The controlled substance was an analog of** \_\_\_\_\_ <insert type  
of controlled substance>(;/.)

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND]

5. The controlled substance was in a usable amount.]

[In order to prove that the defendant is guilty of this crime, the People must  
prove that \_\_\_\_\_ <insert name of analog drug> is an analog of  
\_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled  
substance:

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

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

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another **for sale**, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported for sale/imported).]

[A person does not have to actually hold or touch something to (sell/furnish/administer/transport it for sale/import/give it away) [it]. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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*New January 2006; Revised October 2010, February 2014, August 2014* [\[insert date of council approval\]](#)

## BENCH NOTES

### *Instructional Duty*

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

Transportation of a controlled substance requires a “usable amount.” (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

## AUTHORITY

- Elements. ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering. ▶ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. ▶ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Knowledge. ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount. ▶ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].
- Usable Amount. ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance. ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance. ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

## *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–102.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1] (Matthew Bender).

## **LESSER INCLUDED OFFENSES**

- Simple Possession Is Not a Lesser Included Offense of This Crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984 [64 Cal.Rptr.3d 926]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)
- Possession for Sale Is Not a Lesser Included Offense of This Crime. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)

Note: In reviewing the appropriateness of sentencing enhancements, *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

## **RELATED ISSUES**

### ***Transportation***

Transportation does not require personal possession by the defendant. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129] [abrogated in part by statute on other grounds].) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved “from one location to another,” but the movement may be minimal. (*Id.* at p. 684.)

**2302. Possession for Sale of Controlled Substance (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5)**

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The defendant is charged [in Count \_\_\_\_] with possession for sale of \_\_\_\_\_ <insert type of controlled substance>, a controlled substance [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. When the defendant possessed the controlled substance, (he/she) intended **(to sell it/ for that someone else sell it)**;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 5B and the definition of analog substance below instead of paragraph 5A.>*

**5A. The controlled substance was \_\_\_\_\_ <insert type of controlled substance>;**

**5B. The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>;**

**AND**

**6. The controlled substance was in a usable amount.**

**[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:**

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

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

*Selling* for the purpose of this instruction means exchanging \_\_\_\_\_  
<insert type of controlled substance> for money, services, or anything of value.

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

---

*New January 2006; Revised October 2010, February 2014* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

## AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.

- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- This Instruction Is Correct ▶ *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [66 Cal.Rptr.3d 668].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis, supra*, 57 Cal.4th at p. 362, fn. 5.
- Specific Intent to Sell Personally or That Another Will Sell Required ▶ *People v. Parra* (1999) 70 Cal. App. 4<sup>th</sup> 222, 226 [70 Cal.App.4th 222] and *People v. Consuegra* (1994) 26 Cal. App. 4<sup>th</sup> 1726, 1732, fn. 4 [32 Cal.Rptr.2d 288].

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 81–93.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[c], [e] (Matthew Bender).

## **LESSER INCLUDED OFFENSES**

- ~~Simple Possession of a Controlled Substance ▶ *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465]~~
- Possession of cocaine for sale is not necessarily included offense of selling cocaine base ▶ *People v. Murphy* (2005) 134 Cal.App.4th 1504, 1508 [36 Cal.Rptr.3d 872]).



**2352. Possession for Sale of Marijuana (Health & Saf. Code, §§ 11018, 11359)**

---

The defendant is charged [in Count \_\_\_\_] with [unlawfully] possessing for sale marijuana, a controlled substance [in violation of Health and Safety Code section 11359].

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

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. When the defendant possessed the controlled substance, (he/she) intended (to sell it/ **[or] that someone else sell it**);
5. The controlled substance was marijuana;

AND

6. The controlled substance was in a usable amount.

*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.

*A usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

*[Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted

therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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*New January 2006; Revised December 2008, October 2010, February 2015* *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.

When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11359.
- “Marijuana” defined ▶ Health & Saf. Code, § 11018.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally ▶ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].
- Specific Intent to Sell Personally or That Another Will Sell Required ▶ *People v. Parra* (1999) 70 Cal. App. 4<sup>th</sup> 222, 226 [70 Cal.App.4th 222] and *People v. Consuegra* (1994) 26 Cal. App. 4<sup>th</sup> 1726, 1732, fn. 4 [32 Cal.Rptr.2d 288].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 90.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[e], [3][a], [a.1] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▶ Health & Saf. Code, § 11357, *People v. Walker* (2015) 237 Cal.App.4th 111 [187 Cal.Rptr.3d 606] [duty to instruct extends to infraction for possessing less than 28.5 g] [reversible error not to instruct on simple possession of marijuana, an infraction, in case charged as possession of marijuana for sale].

**2353–2359. Reserved for Future Use**

### 3472. Right to Self-Defense: May Not Be Contrived

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**A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.**

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

#### BENCH NOTES

##### *Instructional Duty*

The court may give this instruction on request when supported by the evidence. (*People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596].) The California Supreme Court has held that language in CALJIC No. 5.55, which is similar to this instruction, correctly states California law on self-defense and imperfect self-defense. (*People v. Enraca* (2012) 53 Cal.4<sup>th</sup> 735, 761-762 [269 P.3d 543]; *People v. Hinshaw* (1924) 194 Cal. 1, 26[227 P. 156]). However, a Court of Appeal has held that this instruction does not accurately state California law where a defendant uses force intending only to provoke a fistfight and the victim responds with deadly force. (*People v. Ramirez* (2015) 233 Cal.App.4<sup>th</sup> 267, 276 [183 Cal.Rptr.3d 267]). The court should modify this instruction if necessary.

#### AUTHORITY

- Instructional Requirements ▶ *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596]; *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 743–744 [62 P.2d 783]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].

##### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 75.

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

### 3473. Reserved for Future Use

## RUPRO ACTION REQUEST FORM

**RUPRO action requested:**        **Submit to JC (without circulating for comment)**

**RUPRO Meeting:** February 2, 2016

**Title of proposal** (*include amend/revise/adopt/approve + form/rule numbers*):

Judicial Council Forms: Technical Changes to Reflect Federal Poverty Guidelines (Revise forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132)

*Committee or other entity submitting the proposal:*

Judicial Council staff

*Staff contact (name, phone and e-mail):* Anne M. Ronan, 415-865-8933 [anne.ronan@jud.ca.gov](mailto:anne.ronan@jud.ca.gov)

*Identify project(s) on the committee's annual agenda that is the basis for this item:*

Approved by RUPRO:

Project description from annual agenda:

*If requesting July 1 or out of cycle, explain:*

This is a technical change to several forms to reflect the changes made this week to the federal poverty guidelines. Those changes go into effect immediately, so the forms need to be revised as soon as possible in order to be in compliance with the law.

**Additional Information:** (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)



## Judicial Council of California · Administrative Office of the Courts

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

[www.courts.ca.gov](http://www.courts.ca.gov)

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: February 26, 2016

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Title	Agenda Item Type
Judicial Council Forms: Technical Changes to Reflect Federal Poverty Guidelines	Action required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Revise forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132	March 1, 2016
Recommended by	Date of Report
Judicial Council staff	January 21, 2016
Susan R. McMullan, Attorney, Legal Services	Contact
	Anne M. Ronan, 415-865-8933 <a href="mailto:anne.ronan@jud.ca.gov">anne.ronan@jud.ca.gov</a>
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	Heather Anderson, 415-865-7691 <a href="mailto:heather.anderson@jud.ca.gov">heather.anderson@jud.ca.gov</a>

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## Executive Summary

Four Judicial Council forms containing figures based on the federal poverty guidelines need to be revised to reflect the changes in those guidelines recently published by the federal government.

## Recommendation

Staff of the Judicial Council recommends that the Judicial Council, effective March 1, 2016, revise the following documents to reflect 2016 increases in the federal poverty guidelines:

- *Request to Waive Court Fees* (form FW-001),
- *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC)
- *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO), and

- *Financial Declaration—Juvenile Dependency* (form JV-132).

The revised forms are attached at pages 5–15.

### **Previous Council Action**

The council last revised the *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO) on March 1, 2015, to streamline the financial statement on the request form, revise the list of items to be included in all fee waivers, and make other minor revisions. The forms were also revised at that time to reflect the last change in the federal poverty guidelines.

The council revised the *Financial Declaration—Juvenile Dependency* (form JV-132) at the same time to reflect the change in the poverty guidelines.

The *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC) was newly adopted in September 2015.

### **Rationale for Recommendation**

Judicial Council forms containing figures based on the federal poverty guidelines need to be revised to reflect the changes in those guidelines recently published by the federal government.

#### **Fee Waiver forms**

The eligibility of indigent litigants to proceed without paying filing fees or other court costs is determined by California Government Code section 68632. Among other things, section 68632(b) provides that a fee waiver shall be granted to litigants whose household monthly income is 125 percent or less of the current poverty guidelines established by the United States Department of Health and Human Services (HHS).

The Judicial Council has adopted rules of court and forms for litigants to obtain fee waivers. Three of the forms, *Request to Waive Court Fees* (form FW-001) *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC), and *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO), contain figures based on the monthly poverty guidelines. The tables in item 5b on the general fee waiver application form, in item 8(b) for the probate fee waiver form, and on page 1 of the appellate court information sheet provide monthly income figures on which a court may base a decision to grant a fee waiver in accordance with Government Code section 68632.

#### **Juvenile form**

The Judicial Council has established a program under Welfare and Institutions Code section 903.47 to collect reimbursement of the cost of court-appointed counsel in dependency proceedings from liable persons found able to pay. Under the statewide standard adopted by the council, an otherwise liable person is presumed to be unable to pay reimbursement if that



person's monthly household income is 125 percent or less of the current federal poverty guidelines established by the HHS.

*Financial Declaration—Juvenile Dependency* (form JV-132) contains figures based on the poverty guidelines. The table in item 3 provides monthly income levels below which an individual is presumed to be unable to pay reimbursement for the cost of court-appointed counsel.

### **Revisions required**

The monthly income figures currently on the four forms reflect 125 percent of the 2015 poverty guidelines established by the HHS. The HHS released revised federal poverty guidelines on January 25, 2016.<sup>1</sup> As a result, these items on the Judicial Council forms must be revised to reflect the 2016 federal poverty guideline revisions.

To determine the new monthly income figures for the forms, the federal poverty guidelines must be multiplied by 125 percent and divided by 12.<sup>2</sup> The new figures are reflected in the revised tables on the forms attached here.

### **Comments, Alternatives Considered, and Policy Implications**

These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Staff monitors revisions to the poverty guidelines and ensures that the forms are revised as necessary and submitted to the council. Revised forms FW-001, FW-001 (GC), APP-015/FW-015-INFO, and JV-132 should take effect immediately to ensure that litigants are provided with accurate monthly income guidelines on which a court may base a decision regarding fee waivers or financial liability. This rapid change to the forms is necessary because the revised poverty guidelines take effect immediately upon release. Once adopted by the Judicial Council, the revised forms will be distributed to the courts and forms publishers and posted to the California Courts website.

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<sup>1</sup> See Annual Update of the HHS Poverty Guidelines, 81 *Fed. Reg.* 4036 (January 25, 2016), attached at pages 16-17.

<sup>2</sup> The Computation Sheet is attached at page 18. The monthly income figures in the tables on the forms have always slightly exceeded 125% of the poverty guidelines because they were rounded up to the nearest cent. Therefore the language on the form reflected this slight excess, in stating that the item should be checked if the household income was "less than" the amount in the chart. This year, however, the monthly figures (as calculated in (C) on the computation chart) are exactly 125% of the poverty guidelines and, therefore, did not require rounding. For that reason, in order for the forms to correctly reflect existing law, the language in the appropriate items has been changed to state that they should be checked if the household income is "not more than" the amounts in the chart. This new terminology does not reflect a change in the substantive legal standard.

## **Implementation Requirements, Costs, and Operational Impacts**

If a court provides free copies of these forms to parties, it will incur costs to print or duplicate the revised forms. However, the revisions are required to make the forms consistent with current law.

### **Attachments**

1. Form FW-001, at pages 5–6.
2. Form FW-001-GC, at pages 7–10.
3. Form APP-015/FW-015-INFO, at pages 11–12.
4. Form JV-132, at pages 13–15.
5. Excerpt from Federal Register, at pages 16–17
6. Computation Sheet, at page 18

Clerk stamps date here when form is filed.

If you are getting public benefits, are a low-income person, or do not have enough income to pay for your household's basic needs and your court fees, you may use this form to ask the court to waive your court fees. The court may order you to answer questions about your finances. If the court waives the fees, you may still have to pay later if:

- You cannot give the court proof of your eligibility,
Your financial situation improves during this case, or
You settle your civil case for \$10,000 or more. The trial court that waives your fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge you any collection costs.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

1 Your Information (person asking the court to waive the fees):

Name:
Street or mailing address:
City: State: Zip:
Phone number:

2 Your Job, if you have one (job title):

Name of employer:
Employer's address:

3 Your Lawyer, if you have one (name, firm or affiliation, address, phone number, and State Bar number):

a. The lawyer has agreed to advance all or a portion of your fees or costs (check one): Yes No

b. (If yes, your lawyer must sign here) Lawyer's signature:
If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

4 What court's fees or costs are you asking to be waived?

- Superior Court (See Information Sheet on Waiver of Superior Court Fees and Costs (form FW-001-INFO).)
Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See Information Sheet on Waiver of Appellate Court Fees (form APP-015/FW-015-INFO).)

5 Why are you asking the court to waive your court fees?

- I receive (check all that apply; see form FW-001-INFO for definitions): Food Stamps Supp. Sec. Inc. SSP Medi-Cal County Relief/Gen. Assist. IHSS CalWORKS or Tribal TANF CAPI
My gross monthly household income (before deductions for taxes) is not more than the amount listed below. (If you check 5b, you must fill out 7, 8, and 9 on page 2 of this form.)

Table with 6 columns: Family Size, Family Income, Family Size, Family Income, Family Size, Family Income. Rows show income thresholds for family sizes 1-6.

c. I do not have enough income to pay for my household's basic needs and the court fees. I ask the court to: (check one and you must fill out page 2):

- wave all court fees and costs
wave some of the court fees
let me make payments over time

6 Check here if you asked the court to waive your court fees for this case in the last six months. (If your previous request is reasonably available, please attach it to this form and check here:)

I declare under penalty of perjury under the laws of the State of California that the information I have provided on this form and all attachments is true and correct.

Date:

Print your name here

Sign here



Your name: \_\_\_\_\_

If you checked 5a on page 1, do not fill out below. If you checked 5b, fill out questions 7, 8, and 9 only. If you checked 5c, you **must** fill out this entire page. If you need more space, attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

**7**  Check here if your income changes a lot from month to month. If it does, complete the form based on your average income for the past 12 months.

**8 Your Gross Monthly Income**

a. List the source and amount of **any** income you get each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

- (1) \_\_\_\_\_ \$ \_\_\_\_\_
- (2) \_\_\_\_\_ \$ \_\_\_\_\_
- (3) \_\_\_\_\_ \$ \_\_\_\_\_
- (4) \_\_\_\_\_ \$ \_\_\_\_\_

b. Your total monthly income: \$ \_\_\_\_\_

**9 Household Income**

a. List the income of all other persons living in your home who depend in whole or in part on you for support, or on whom you depend in whole or in part for support.

Name	Age	Relationship	Gross Monthly Income
(1) _____	_____	_____	\$ _____
(2) _____	_____	_____	\$ _____
(3) _____	_____	_____	\$ _____
(4) _____	_____	_____	\$ _____

b. Total monthly income of persons above: \$ \_\_\_\_\_

**Total monthly income and household income (8b plus 9b):** \$ \_\_\_\_\_

**10 Your Money and Property**

a. Cash \$ \_\_\_\_\_

b. All financial accounts (List bank name and amount):

- (1) \_\_\_\_\_ \$ \_\_\_\_\_
- (2) \_\_\_\_\_ \$ \_\_\_\_\_
- (3) \_\_\_\_\_ \$ \_\_\_\_\_

c. Cars, boats, and other vehicles

Make / Year	Fair Market Value	How Much You Still Owe
(1) _____	\$ _____	\$ _____
(2) _____	\$ _____	\$ _____
(3) _____	\$ _____	\$ _____

d. Real estate

Address	Fair Market Value	How Much You Still Owe
(1) _____	\$ _____	\$ _____
(2) _____	\$ _____	\$ _____

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

Describe	Fair Market Value	How Much You Still Owe
(1) _____	\$ _____	\$ _____
(2) _____	\$ _____	\$ _____

**11 Your Monthly Deductions and Expenses**

a. List any payroll deductions and the monthly amount below:

- (1) \_\_\_\_\_ \$ \_\_\_\_\_
- (2) \_\_\_\_\_ \$ \_\_\_\_\_
- (3) \_\_\_\_\_ \$ \_\_\_\_\_
- (4) \_\_\_\_\_ \$ \_\_\_\_\_

b. Rent or house payment & maintenance \$ \_\_\_\_\_

c. Food and household supplies \$ \_\_\_\_\_

d. Utilities and telephone \$ \_\_\_\_\_

e. Clothing \$ \_\_\_\_\_

f. Laundry and cleaning \$ \_\_\_\_\_

g. Medical and dental expenses \$ \_\_\_\_\_

h. Insurance (life, health, accident, etc.) \$ \_\_\_\_\_

i. School, child care \$ \_\_\_\_\_

j. Child, spousal support (another marriage) \$ \_\_\_\_\_

k. Transportation, gas, auto repair and insurance \$ \_\_\_\_\_

l. Installment payments (list each below):

Paid to:	
(1) _____	\$ _____
(2) _____	\$ _____
(3) _____	\$ _____

m. Wages/earnings withheld by court order \$ \_\_\_\_\_

n. Any other monthly expenses (list each below):

Paid to:		How Much?
(1) _____	\$ _____	
(2) _____	\$ _____	
(3) _____	\$ _____	

**Total monthly expenses (add 11a – 11n above):** \$ \_\_\_\_\_

To list any other facts you want the court to know, such as unusual medical expenses, etc., attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

Check here if you attach another page.

**Important! If your financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010.**

*Clerk stamps date here when form is filed.*

**This form must be used by a guardian or conservator, or by a petitioner for the appointment of a guardian or conservator, to request a waiver of court fees in the guardianship or conservatorship court proceeding or in any other civil action in which the guardian or conservator represents the interests of the ward or conservatee as a plaintiff or defendant.**

If the ward or conservatee (including a proposed ward or conservatee if a petition for appointment of a guardian or conservator has been filed but has not yet been decided by the court) directly receives public benefits or is supported by public benefits received by another for his or her support, is a low-income person, or does not have enough income to pay for his or her household's basic needs and the court fees, you may use this form to ask the court to waive the court fees. The court may order you to answer questions about the finances of the ward or conservatee. If the court waives the fees, the ward or conservatee, his or her estate, or someone with a duty to support the ward or conservatee, may still have to pay later if:

- You cannot give the court proof of the ward's or conservatee's eligibility,
- The ward's or conservatee's financial situation improves during this case, or
- You settle the civil case on behalf of the ward or conservatee for **\$10,000** or more. The trial court that waives fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge the ward or conservatee, or his or her estate, any collection costs.

*Fill in court name and street address:*

**Superior Court of California, County of**

*Fill in case number and name:*

**Case Number:**

**Case Name:**

**1 Your Information** (*guardian or conservator, or person asking the court to appoint a guardian or conservator*):  
Name: \_\_\_\_\_ Phone number: \_\_\_\_\_

Street or mailing address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_

**2 Your Lawyer** (*if you have one*): Name: \_\_\_\_\_

Firm or Affiliation: \_\_\_\_\_ State Bar No.: \_\_\_\_\_  
Address: \_\_\_\_\_ Telephone: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_ E-mail: \_\_\_\_\_

- a. The lawyer has agreed to advance all or a portion of court fees or costs (*check one*): Yes  No
- b. (*If yes, your lawyer must sign here.*) Lawyer's signature: \_\_\_\_\_  
*If your lawyer is not providing legal-aid type services based on your or the ward's or conservatee's low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.*

**3 Ward's or Conservatee's Information** (*file a separate Request for each ward in a multi-ward case*):

Name: \_\_\_\_\_ Age and date of birth (*ward only*): \_\_\_\_\_  
Street or mailing address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_  
Phone number: \_\_\_\_\_

**4 Ward's or Conservatee's Lawyer**, if any: Name: \_\_\_\_\_

Firm or Affiliation: \_\_\_\_\_ State Bar No.: \_\_\_\_\_  
Address: \_\_\_\_\_ Telephone: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_ E-mail: \_\_\_\_\_

**5 Ward or Conservatee's Job** (*job title; if not employed, so state*): \_\_\_\_\_

Name of employer: \_\_\_\_\_  
Employer's address: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_



Name of (Proposed) Ward or Conservatee: \_\_\_\_\_

Case Number: \_\_\_\_\_

**6 What court's fees or costs are you asking to be waived?**

- Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)
- Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO).)

**7**  Check here if you asked the court to waive court fees for this case in the last six months. (If your previous request is reasonably available, please attach it to this form and check here):

**8 Why are you asking the court to waive the ward's or conservatee's court fees?**

- a.  The ward or one or both of the ward's parents, or the conservatee or the conservatee's spouse or registered domestic partner, receive (check all that apply):
- Supplemental Security Income (SSI)  State Supplemental Payment (SSP)  SNAP (Food Stamps)
  - IHSS (In-Home Supportive Services)  CalWORKS or Tribal TANF  Medi-Cal
  - County Relief/General Assistance  CAPI (Cash Assistance Program for Aged, Blind, and Disabled)
- (Names and relationships to ward or conservatee of persons who receive the public benefits listed above): \_\_\_\_\_

b.  The gross monthly income of the ward's or conservatee's household (before deductions for taxes) is **not more** than the amount listed below. (If you check 8b, you **must** fill out items 14, 15, and 16 on page 4 of this form.)\*

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$433.34 for each extra person.
1	\$1,237.50	3	\$2,100.00	5	\$2,962.50	
2	\$1,668.75	4	\$2,531.25	6	\$3,393.75	

- c.  The ward's or conservatee's household does not have enough income to pay for its basic needs and the court fees. I ask the court to (check one, and you **must** fill out items 14, 15, 16, 17, and 18 on page 4):\*
- (i)  Waive all court fees and costs.
  - (ii)  Waive some court fees and costs.
  - (iii)  Let the (proposed) guardian or conservator, on behalf of the (proposed) ward or conservatee, make payments over time.

\*(Do not include income of guardian or conservator living in the household in 8b. or 8c. or count him or her in family size in 8b. unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.)

**Guardians or petitioners for their appointment must complete items 9 and 10.**

**9 Ward's Estate:**  Person only, no estate.  Inventory or petition estimated value:

Source (e.g., gift, inheritance, settlement, judgment, insurance): \_\_\_\_\_ Est. collection date: \_\_\_\_\_

**10 Ward's Parents' Information:**

a. Name of ward's father: \_\_\_\_\_  Deceased (date of death): \_\_\_\_\_  
 Street or mailing address: \_\_\_\_\_  
 City: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_  
 Phone number: \_\_\_\_\_

b. Name of ward's mother: \_\_\_\_\_  Deceased (date of death): \_\_\_\_\_  
 Street or mailing address: \_\_\_\_\_  
 City: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_  
 Phone number: \_\_\_\_\_

c. Ward's parents are (check all that apply):  married  living together  separated  divorced  
 Support order for ward?  No  Yes Payable to (name): \_\_\_\_\_  
 Payor (name): \_\_\_\_\_  
 Court: \_\_\_\_\_ Case Number: \_\_\_\_\_  
 Date of order (if multiple, date of latest): \_\_\_\_\_ Monthly amount: \_\_\_\_\_



Name of (Proposed) Ward or Conservatee: \_\_\_\_\_

Case Number: \_\_\_\_\_

**Conservators or petitioners for their appointment must complete items 11–13.**

**11 Conservatee’s Estate:**  Person only, no estate.

Inventory or petition estimated value: \_\_\_\_\_ Est. collection date: \_\_\_\_\_

**12 Conservatee’s Spouse’s or Registered Domestic Partner’s Information:**

Name of conservatee’s spouse or registered domestic partner: \_\_\_\_\_  Spouse  Partner

Date of marriage or partnership: \_\_\_\_\_  Deceased (*date of death*): \_\_\_\_\_

Street or mailing address: \_\_\_\_\_ Phone number: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Name of employer (*if none, so state*): \_\_\_\_\_

Employer’s address: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

The conservatee’s spouse or partner  is  is not managing or, following appointment of a conservator is planning to manage, some or all of the couple’s community property outside the conservatorship estate.

If you selected “is” above: The income, money, and property shown on page 4  includes  does not include the income and property managed, or expected to be managed, by the spouse/partner outside the estate.

Divorced (*date of final judgment or decree*): \_\_\_\_\_

Court: \_\_\_\_\_

Case Number: \_\_\_\_\_ Support order for conservatee?  No  Yes

Date of support order (*if multiple, date of latest*): \_\_\_\_\_ Monthly amount: \_\_\_\_\_

**13 The Conservatee and Trusts:**

The conservatee:

a.  Is  Is not a trustor or settlor of a trust.

b.  Is  Is not a beneficiary of a trust.

If you selected “Is” to complete any of the above statements, identify and provide, in an attachment to this *Request*, the current address and telephone number of the current trustee(s) of each trust, describe the general terms of and value of each trust and the nature and value of the conservatee’s interest in each trust, and the amount(s) and frequency of any distributions to or for the benefit of the conservatee prior to your appointment as conservator of which you are aware. (*You may use Judicial Council form MC-025 for this purpose.*)

**All applicants who checked item 8b or item 8c on page 2 must continue to and follow the instructions for completion of items 14–16 or items 14-18 at the top of page 4, before signing below.**

**The information I have provided on this form and all attachments about the (proposed) ward or conservatee is true and correct to the best of my information and belief. The information I have provided on this form and all attachments concerning myself is true and correct. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

Date: \_\_\_\_\_

\_\_\_\_\_  
*Print your name here*

\_\_\_\_\_  
*Sign here*



Name of (Proposed) Ward or Conservatee:

Case Number:

If you checked 8a on page 2, do not fill out below. If you checked 8b, you must answer questions 14–16. If you checked 8c, you must answer questions 14–18. If you need more space, attach form MC-025 or attach a sheet of paper, and write "Financial Information" and the ward's or conservatee's name and case number at the top.

14 [ ] Check here if the ward's or conservatee's income changes a lot from month to month. If it does, complete the form based on his or her average income for the past 12 months.

15 Ward's or Conservatee's Gross Monthly Income

a. List the source and amount of any income the ward or conservatee gets each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

- (1) \$
(2) \$
(3) \$
(4) \$
(5) \$

b. Total monthly income: \$

16 Ward's or Conservatee's Household's Income

a. List the income of all other persons living in the ward's or conservatee's home who depend in whole or in part on him or her for support, or on whom he or she depends in whole or in part for support.

Table with columns: Name, Age, Relationship, Gross Monthly Income. Rows 1-10.

b. Total monthly income of persons above: \$

Total monthly income and household income (15b plus 16b): \$

17 Ward's or Conservatee's Household's Money and Property

a. Cash \$

b. All financial accounts (list bank name and amount):

- (1) \$
(2) \$
(3) \$

c. Cars, boats, and other vehicles

Table with columns: Make / Year, Fair Market Value, How Much You Still Owe. Rows 1-3.

d. Real estate

Table with columns: Address, Fair Market Value, How Much You Still Owe. Rows 1-2.

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

Table with columns: Describe, Fair Market Value, How Much You Still Owe. Rows 1-2.

18 Ward's or Conservatee's Household's Monthly Deductions and Expenses

a. List any payroll deductions and the monthly amount below:

- (1) \$
(2) \$
(3) \$
(4) \$

b. Rent or house payment and maintenance \$

c. Food and household supplies \$

d. Utilities and telephone \$

e. Clothing \$

f. Laundry and cleaning \$

g. Medical and dental expenses \$

h. Insurance (life, health, accident, etc.) \$

i. School, child care \$

j. Child, spousal support (another marriage) \$

k. Transportation, gas, auto repair and insurance \$

l. Installment payments (list each below):

Table with columns: Paid to, How Much? Rows 1-3.

m. Wages/earnings withheld by court order \$

n. Any other monthly expenses (list each below): \$

Table with columns: Paid to, How Much? Rows 1-3.

Total monthly expenses (add 18a – 18n above): \$

To list any other facts you want the court to know, such as the (proposed) ward's or conservatee's unusual medical expenses, etc, attach form MC-025 or attach a sheet of paper and write "Financial Information" and the (proposed) ward's or conservatee's name and case number at the top.

Check here if you attach another page. [ ]

Important! If the ward's or conservatee's financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010-GC.

Do not include income of guardian or conservator living in the household in item 16, his or her money and property in item 17, or his or her deductions and expenses in item 18 unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.



## INFORMATION SHEET ON WAIVER OF APPELLATE COURT FEES (SUPREME COURT, COURT OF APPEAL, APPELLATE DIVISION)

If you file an appeal, a petition for a writ, or a petition for review in a civil case, such as a family law case or a case in which you sued someone or someone sued you, you must generally pay a filing fee to the court. If you are a party other than the party who filed the appeal or the petition, you must also generally pay a fee when you file your first document in a case in the Court of Appeal or Supreme Court. You and the other parties in the case may also have to pay other court fees in these proceedings, such as fees to prepare or get a copy of a clerk's transcript in an appeal. However, if you cannot afford to pay these court fees and costs, you may ask the court to issue an order saying you do not have to pay these fees (this is called "waiving" these fees).

1. Who can get their court fees waived? The court will waive your court fees and costs if:

- **You are getting public assistance**, such as Medi-Cal, Food Stamps, Supplemental Security Income (not Social Security), State Supplemental Payment, County Relief/General Assistance, In-Home Supportive Services, CalWORKS, Tribal Temporary Assistance for Needy Families, or Cash Assistance Program for Aged, Blind, and Disabled.
- **You have a low income level**. Under the law you are considered a low-income person if the gross monthly income (before deductions for taxes) of your household is **not more** than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income
1	\$1,237.50	3	\$2,100.00	5	\$2,962.50
2	\$1,668.75	4	\$2,531.25	6	\$3,393.75

*If more than 6 people at home, add \$433.34 for each extra person.*

- **You do not have enough income to pay for your household's basic needs *and* your court fees .**

2. What fees and costs will the court waive? If you qualify for a fee waiver, the Supreme Court, Court of Appeal, or Appellate Division will waive the filing fee for the notice of appeal, a petition for a writ, a petition for review, or the first document filed by a party other than the party who filed the appeal or petition, and any court fee for participating in oral argument by telephone. The trial court will also waive costs related to the clerk's transcript on appeal, the fee for the court to hold in trust the deposit for a reporter's transcript on appeal under rule 8.130(b) or rule 8.834(b) of the California Rules of Court, and the fees for making a transcript or copy of an official electronic recording under rule 8.835. If you are the appellant (the person who is appealing the trial court decision), the fees waived include the deposit required under Government Code section 68926.1 and the costs for preparing and certifying the clerk's transcript and sending the original to the reviewing court and one copy to you. If you are the respondent (a party other than the appellant in a case that is being appealed), the fees waived include the costs for sending you a copy of the clerk's transcript. You can also ask the trial court to waive other necessary court fees and costs.

The court **cannot** waive the fees for preparing a reporter's transcript in a civil case. A special fund, called the Transcript Reimbursement Fund, may help pay for the transcript. (See <http://www.courtreportersboard.ca.gov/consumers/index.shtml#trf> and Business and Professions Code sections 8030.2 and following for more information about this fund.) If you are unable to pay the cost of a reporter's transcript, a record of the oral proceedings can be prepared in other ways, by preparing an agreed statement or, in some circumstances, a statement on appeal or settled statement.

3. How do I ask the court to waive my fees?

- **Appeal in Limited Civil Case (civil case in which the amount of money claimed is \$25,000 or less)**. In a limited civil case, if the trial court already issued an order waiving your court fees *and that fee waiver has not ended* (fee waivers automatically end 60 days after the judgment), the fees and costs identified in item 2 above are already waived; just give the court a copy of your current fee waiver. If you do not already have an order waiving your fees or you had a fee waiver but it has ended, you must complete and file a *Request to Waive Court Fees* (form FW-001). If you are the appellant (the party who is appealing), you should check both boxes in item 4 on FW-001 and file the completed form with your notice of appeal. If you are the respondent (a party other than the appellant in a case that is being appealed), the completed form should be filed in the court when the fees you are requesting to be waived, such as the fee for the clerk's transcript or telephonic oral argument, are due.

- **Writ Proceeding in Limited Civil Case (civil case in which the amount of money claimed is \$25,000 or less).** If you want the Superior Court to waive the fees in a writ proceeding in a limited civil case, you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box. The completed form should be filed with your petition for a writ.
- **If You Are a Guardian or Conservator.** If you are a guardian or conservator or a petitioner for the appointment of a guardian or conservator, special rules apply to your request for a fee waiver on an appeal from an order in the guardianship or conservatorship proceeding or in a civil action in which you are a party acting on behalf of your ward or conservatee. Complete and submit a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC) to request a fee waiver. See California Rules of Court, rule 7.5.
- **Appeal in Other Civil Cases.** If you want the court to waive fees and costs in an appeal in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than \$25,000), you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box to ask the Court of Appeal to waive the fee for filing the notice of appeal or, if you are a respondent (a party other than the one who filed the appeal), the fee for the first document you file in the Court of Appeal. Check both boxes if you also want the trial court to waive your costs for the clerk's transcript (if the trial court already issued an order waiving your fees *and that fee waiver has not ended*, you do not need to check the first box; the fees and costs identified in item 2 above are already waived, just give the court a copy of your current fee waiver). If you are the appellant, the completed form should be submitted with your notice of appeal (if you check both boxes in item 4, the court may ask for two signed copies of this form). If you are the respondent, the completed form should be submitted at the time the fee you are asking the court to waive is due. For example, file the form in the trial court with your request for a copy of the clerk's transcript if you are asking the court to waive the transcript fee or file the form in the Court of Appeal with the first document you file in that court if you are asking the court to waive the fee for filing that document. To request waiver of a court fee for telephonic oral argument, you should file the completed form in the Court of Appeal when the fee for telephonic oral argument is due.
- **Writ Proceeding in Other Civil Cases.** If you want the Supreme Court or Court of Appeal to waive the fees and costs in a writ proceeding in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than \$25,000), you must complete a *Request to Waive Court Fees* (form FW-001). If you are the petitioner (the party filing the petition), the completed form should be submitted with your petition for a writ in the Supreme Court or Court of Appeal clerk's office. If you are a party other than the petitioner, the completed form should be filed with first document you file in the Supreme Court or Court of Appeal.
- **Petition for Review.** If you want to request that the Supreme Court waive the fees in a petition for review proceeding, you must complete a *Request to Waive Court Fees* (form FW-001) or a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC). If you are the petitioner, you should submit the completed form with your petition for review. If you are a party other than the petitioner, the completed form should be filed with first document you file in the Supreme Court.

#### IMPORTANT INFORMATION!

- **Fill out your request completely and truthfully.** When you sign your request for a fee waiver, you are declaring under penalty of perjury that the information you have provided is true and correct.
- **The court may ask you for information and evidence.** You may be ordered to go to court to answer questions about your ability to pay court fees and costs and to provide proof of eligibility. Any initial fee waiver you are granted may be ended if you do not go to court when asked. You may be ordered to repay amounts that were waived if the court finds you were not eligible for the fee waiver.
- **If you receive a fee waiver, you must tell the court if there is a change in your finances.** You must tell the court immediately if your finances improve or if you become able to pay court fees or costs during this case (file form FW-010 with the court). You may be ordered to repay any amounts that were waived after your eligibility ended. If the trial court waived your fees and costs and you settle your case for \$10,000 or more, the trial court will have a lien on the settlement in the amount of the waived fees.
- **The fee waiver ends.** The fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case or when the court finds that you are not eligible for a fee waiver.

# CONFIDENTIAL

JV-132

ATTORNEY OR PARTY WITHOUT ATTORNEY: _____ STATE BAR NO.: _____ NAME: FIRM NAME: STREET ADDRESS: CITY: _____ STATE: _____ ZIP CODE: _____ TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: ATTORNEY FOR ( <i>name</i> ): _____	<b>FOR COURT USE ONLY</b>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILDREN'S NAMES:	
<b>FINANCIAL DECLARATION—JUVENILE DEPENDENCY</b>	CASE NUMBER:

**1. Personal Information:**

Name:		Social Security Number:	
Other names used:			
Relationship to Child: <input type="checkbox"/> Mother <input type="checkbox"/> Father		I.D. or Driver's License Number:	
<input type="checkbox"/> Other Responsible Person ( <i>specify</i> ):			
Address:		Date of Birth:	Age:
City:	Zip:	Phone:	Alternate Phone:
Marital Status: <input type="checkbox"/> Married <input type="checkbox"/> Single <input type="checkbox"/> Domestic partner <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed			
Name of Spouse/Partner:		Number of dependents living with you:	
Names and ages of dependents:			

2. I receive (*check all that apply*):  Medi-Cal  SNAP (food stamps)  SSI  SSP  
 County Relief/General Assistance  CalWORKS or Tribal TANF (*Temporary Assistance to Needy Families*)  
 IHSS (*In-Home Supportive Services*)  CAPI (*Case Assistance Program for Aged, Blind, and Disabled*)

3.  My gross monthly household income (*before deductions for taxes*) is **not more** than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$433.34 for each extra person.
1	\$1,237.50	3	\$2,100.00	5	\$2,962.50	
2	\$1,668.75	4	\$2,531.25	6	\$3,393.75	

4.  I have been reunified with my child(ren) under a court order (attached).

5.  I am receiving court-ordered reunification services.

CHILDREN'S NAMES:	CASE NUMBER:
RESPONSIBLE PERSON'S NAME:	

**6. Employment:**

Your Employment				Your Spouse/Partner's Employment			
Employer:				Employer:			
Address:				Address:			
City and Zip Code:		Phone:		City and Zip Code:		Phone:	
Type of Job:				Type of Job:			
How long employed:	Working now?	Monthly salary:	Take home pay:	How long employed:	Working now?	Monthly salary:	Take home pay:
If not now employed, who was your last employer? <i>(Name, Address, City, and Zip Code):</i>				If not now employed, who was this person's last employer? <i>(Name, Address, City, and Zip Code):</i>			
Phone number of last employer:				Phone number of last employer:			

**7. Other Monthly Income and Assets:**

Other Income	Assets: What Do You Own?
Unemployment .....\$	Cash ..... \$
Disability ..... \$	Real Property/Equity ..... \$
Social Security ..... \$	Cars and Other Vehicles ..... \$
Workers' Compensation ..... \$	Life Insurance ..... \$
Child Support Payments ..... \$	Bank Accounts <i>(list below)</i> ..... \$
Foster Care Payments .....\$	Stocks and Bonds ..... \$
Other Income ..... \$	Business Interest ..... \$
Total \$	Other Assets ..... \$
	Total \$
	Name and branch of bank:
	Account numbers:

CHILDREN'S NAMES:	CASE NUMBER:
RESPONSIBLE PERSON'S NAME:	

8. Expenses:

Monthly Household Expenses	Reunification Plan: Monthly Cost of Required Services
Rent or Mortgage Payment ..... \$	Parenting Classes ..... \$
Car Payment ..... \$	Substance Abuse Treatment ..... \$
Gas and Car Insurance ..... \$	Therapy/Counseling ..... \$
Public Transportation ..... \$	Medical Care/Medications ..... \$
Utilities (Gas, Electric, Phone, Water, etc.)... \$	Domestic Violence Counseling ..... \$
Food ..... \$	Batterers' Intervention ..... \$
Clothing and Laundry ..... \$	Victim Support ..... \$
Child Care ..... \$	Regional Center Programs ..... \$
Child Support Payments ..... \$	Transportation ..... \$
Medical Payments ..... \$	In-Home Services ..... \$
Other Necessary Monthly Expenses ..... \$	Other ..... \$
Total \$	Total \$

9. Loan/Expense Payments (other than mortgage or car loan):

Name of lender and type of loan/expense	Monthly payment	Balance owed
	\$	\$
	\$	\$
	\$	\$
	\$	\$

I declare under penalty of perjury under the laws of the State of California that the above information is true and correct.

Date:

\_\_\_\_\_

(TYPE OR PRINT NAME)

\_\_\_\_\_

(SIGNATURE OF DECLARANT)

**FOR FINANCIAL EVALUATION OFFICER USE ONLY**

TOTAL INCOME	\$	COST OF LEGAL SERVICES	\$
TOTAL EXPENSES	\$	MONTHLY PAYMENT	\$
NET DISPOSABLE INCOME	\$	TOTAL COST ASSESSED	\$

The above-named responsible person is presumed unable to pay reimbursement for the cost of legal services in this proceeding and is eligible for a waiver of liability because

- he or she receives qualifying public benefits
- his or her household income falls below 125% of the current federal poverty guidelines
- he or she has been reunified with the child(ren) under a court order and payment of reimbursement would harm his or her ability to support the child(ren).

Date:

\_\_\_\_\_

(TYPE OR PRINT NAME)

\_\_\_\_\_

(SIGNATURE OF FINANCIAL EVALUATION OFFICER)

are working to improve language accessibility within their states; and

- Recommendations for state-specific capacity building for the 20 states intended to enhance statewide language access, which will include the development of language access plans.

An objective review of was conducted that assessed the grantee's application using criteria related to the project's approach, the organization's capacity, and the development of costs for the project's budget.

**Statutory Authority:** Section 310 of the Family Violence Prevention and Services Act, as amended by Section 201 of the CAPTA Reauthorization Act of 2010, Pub. L. 111-320.

**Christopher Beach,**

Senior Grants Policy Specialist, Division of Grants Policy, Office of Administration.

[FR Doc. 2016-01329 Filed 1-22-16; 8:45 am]

BILLING CODE 4184-32-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Office of the Secretary**

**Annual Update of the HHS Poverty Guidelines**

**AGENCY:** Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** This notice provides an update of the Department of Health and Human Services (HHS) poverty guidelines to account for last calendar year's increase in prices as measured by the Consumer Price Index.

**DATES:** *Effective Date:* January 25, 2016, unless an office administering a program using the guidelines specifies a different effective date for that particular program.

**ADDRESSES:** Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services, Washington, DC 20201.

**FOR FURTHER INFORMATION CONTACT:** For information about how the guidelines are used or how income is defined in a particular program, contact the Federal, state, or local office that is responsible for that program. For information about poverty figures for immigration forms, the Hill-Burton Uncompensated Services Program, and the number of people in poverty, use the specific telephone numbers and addresses given below.

For general questions about the poverty guidelines themselves, contact Kendall Swenson, Office of the Assistant Secretary for Planning and

Evaluation, Room 422F.5, Humphrey Building, Department of Health and Human Services, Washington, DC 20201—telephone: (202) 690-7507—or visit <http://aspe.hhs.gov/poverty/>.

For information about the percentage multiple of the poverty guidelines to be used on immigration forms such as USCIS Form I-864, Affidavit of Support, contact U.S. Citizenship and Immigration Services at 1-800-375-5283.

For information about the Hill-Burton Uncompensated Services Program (free or reduced-fee health care services at certain hospitals and other facilities for persons meeting eligibility criteria involving the poverty guidelines), contact the Health Resources and Services Administration Information Center at 1-800-275-4772. You also may visit <http://www.hrsa.gov/gethealthcare/affordable/hillburton/>.

For information about the number of people in poverty, visit the Poverty section of the Census Bureau's Web site at <http://www.census.gov/hhes/www/poverty/poverty.html> or contact the Census Bureau's Customer Service Center at 1-800-923-8282 (toll-free) and <https://ask.census.gov> for further information.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 673(2) of the Omnibus Budget Reconciliation Act (OBRA) of 1981 (42 U.S.C. 9902(2)) requires the Secretary of the Department of Health and Human Services to update the poverty guidelines at least annually, adjusting them on the basis of the Consumer Price Index for All Urban Consumers (CPI-U). The poverty guidelines are used as an eligibility criterion by the Community Services Block Grant program and a number of other Federal programs. The *poverty guidelines* issued here are a simplified version of the *poverty thresholds* that the Census Bureau uses to prepare its estimates of the number of individuals and families in poverty.

As required by law, this update is accomplished by increasing the latest published Census Bureau poverty thresholds by the relevant percentage change in the Consumer Price Index for All Urban Consumers (CPI-U). The guidelines in this 2016 notice reflect the 0.1 percent price increase between calendar years 2014 and 2015. After this inflation adjustment, the guidelines are rounded and adjusted to standardize the differences between family sizes. In rare circumstances, the rounding and standardizing adjustments in the formula result in small decreases in the poverty guidelines for some household

sizes even when the inflation factor is not negative. In order to prevent a reduction in the guidelines in these rare circumstances, a minor adjustment was implemented to the formula beginning this year. In cases where the year-to-year change in inflation is not negative and the rounding and standardizing adjustments in the formula result in reductions to the guidelines from the previous year for some household sizes, the guidelines for the affected household sizes are fixed at the prior year's guidelines. As in prior years, these 2016 guidelines are roughly equal to the poverty thresholds for calendar year 2015 which the Census Bureau expects to publish in final form in September 2016.

The poverty guidelines continue to be derived from the Census Bureau's current official poverty thresholds; they are not derived from the Census Bureau's new Supplemental Poverty Measure (SPM).

The following guideline figures represent annual income.

**2016 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA**

Persons in family/household	Poverty guideline
1 .....	\$11,880
2 .....	16,020
3 .....	20,160
4 .....	24,300
5 .....	28,440
6 .....	32,580
7 .....	36,730
8 .....	40,890

For families/households with more than 8 persons, add \$4,160 for each additional person.

**2016 POVERTY GUIDELINES FOR ALASKA**

Persons in family/household	Poverty guideline
1 .....	\$14,840
2 .....	20,020
3 .....	25,200
4 .....	30,380
5 .....	35,560
6 .....	40,740
7 .....	45,920
8 .....	51,120

For families/households with more than 8 persons, add \$5,200 for each additional person.

## 2016 POVERTY GUIDELINES FOR HAWAII

Persons in family/household	Poverty guideline
1 .....	\$13,670
2 .....	18,430
3 .....	23,190
4 .....	27,950
5 .....	32,710
6 .....	37,470
7 .....	42,230
8 .....	47,010

For families/households with more than 8 persons, add \$4,780 for each additional person.

Separate poverty guideline figures for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in the 1966–1970 period. (Note that the Census Bureau poverty thresholds—the version of the poverty measure used for statistical purposes—have never had separate figures for Alaska and Hawaii.) The poverty guidelines are not defined for Puerto Rico or other outlying jurisdictions. In cases in which a Federal program using the poverty guidelines serves any of those jurisdictions, the Federal office that administers the program is generally responsible for deciding whether to use the contiguous-states-and-DC guidelines for those jurisdictions or to follow some other procedure.

Due to confusing legislative language dating back to 1972, the poverty guidelines sometimes have been mistakenly referred to as the “OMB” (Office of Management and Budget) poverty guidelines or poverty line. In fact, OMB has never issued the guidelines; the guidelines are issued each year by the Department of Health and Human Services. The poverty guidelines may be formally referenced as “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).”

Some federal programs use a percentage multiple of the guidelines (for example, 125 percent or 185 percent of the guidelines), as noted in relevant authorizing legislation or program regulations. Non-Federal organizations that use the poverty guidelines under their own authority in non-Federally-funded activities also may choose to use a percentage multiple of the guidelines.

The poverty guidelines do not make a distinction between farm and non-farm families, or between aged and non-aged units. (Only the Census Bureau poverty thresholds have separate figures for aged

and non-aged one-person and two-person units.)

Note that this notice does not provide definitions of such terms as “income” or “family,” because there is considerable variation in defining these terms among the different programs that use the guidelines. These variations are traceable to the different laws and regulations that govern the various programs. This means that questions such as “Is income counted before or after taxes?”, “Should a particular type of income be counted?”, and “Should a particular person be counted as a member of the family/household?” are actually questions about how a specific program applies the poverty guidelines. All such questions about how a specific program applies the guidelines should be directed to the entity that administers or funds the program, since that entity has the responsibility for defining such terms as “income” or “family,” to the extent that these terms are not already defined for the program in legislation or regulations.

Dated: January 21, 2016.

**Sylvia M. Burwell,**

*Secretary of Health and Human Services.*

[FR Doc. 2016–01450 Filed 1–22–16; 8:45 am]

**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Microbiology, Infectious Diseases and AIDS Initial Review Group; Microbiology and Infectious Diseases Research Committee.

*Date:* February 18–19, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The Ritz-Carlton Hotel, Plaza II, 1150 22nd Street NW., Washington, DC 20037.

*Contact Person:* Frank S. De Silva, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room #3E72A, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC 9834, Bethesda, MD 20892934, (240) 669–5023, [fdesilva@niaid.nih.gov](mailto:fdesilva@niaid.nih.gov).

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; “Comprehensive Resources for HIV Microbicides and Biomedical Prevention (N01)”.

*Date:* February 18, 2016.

*Time:* 10:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health Room 3F100, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* Jay R. Radke, Ph.D., AIDS Review Branch, Scientific Review Program, Division of Extramural Activities, Room #3G11B, National Institutes of Health, NIAID, 5601 Fishers Lane, MSC–9823, Bethesda, MD 20892–9823, (240) 669–5046, [jay.radke@nih.gov](mailto:jay.radke@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 19, 2016.

**Natasha M. Copeland,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016–01313 Filed 1–22–16; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Submission for OMB Review; 30-Day Comment Request; Media-Smart Youth Leaders Program

**SUMMARY:** Under the provisions of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on October 16, 2015, pages 62541–62542, and allowed 60 days for public comment. One public comment was received. The purpose of this notice is to allow an additional 30 days for public comment. The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, National Institutes of Health, may not conduct or

### Computation Sheet

<b>Number in Family</b>	<b>2016 Federal Poverty Guidelines (A)</b>	<b>125% of Poverty Guidelines (B) (B = A x 125%)</b>	<b>2016 California Monthly Income (C) (C = B / 12)</b>
1	\$11,880.00	\$14,850.00	\$1,237.50
2	16,020.00	20,025.00	1,668.75
3	20,160.00	25,200.00	2,100.00
4	24,300.00	30,375.00	2,531.25
5	28,440.00	35,550.00	2,962.50
6	32,580.00	40,725.00	3,393.75
Each additional person	4,160.00	5,200.00	433.34





## JUDICIAL COUNCIL OF CALIFORNIA

2255 North Ontario Street, Suite 220 • Burbank, California 91504-3187

Telephone 818-558-3060 • Fax 818-558-3114 • TDD 415-865-4272

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### MEMORANDUM

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Date	Action Requested
January 29, 2016	Please review and consider request
To	Deadline
Judicial Council Rules and Projects Committee	N/A
Hon. Harry E. Hull, Jr., Chair	Contact
From	Douglas C. Miller
Probate and Mental Health Advisory Committee	(818) 558-4178
Hon. John H. Sugiyama, Chair	douglas.c.miller@jud.ca.gov
Subject	
Revision of the Probate and Mental Health Advisory Committee Annual Agenda for 2016	

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The Probate and Mental Health Advisory Committee requests authority to revise its Annual Agenda for 2016, approved by RUPRO on December 10, 2015, to add a project to develop and propose adoption of a new Judicial Council form, effective January 1, 2017, to be used by conservators to give notice to interested persons of the death of the conservatee.

The proposed new form is specifically required by new Probate Code section 2361, enacted effective January 1, 2016 by Section 3 of Assembly Bill 1085 (Stats. 2015, ch. 92), which provides as follows:

SEC. 3. Section 2361 is added to the Probate Code, to read:

2361. A conservator shall provide notice of a conservatee's death by mailing a copy of the notice to all persons entitled to notice under Section 1460 and by filing a proof of service with the court, unless otherwise ordered by the court.

The form would be a straightforward two-page form, with a proof of service by mail on page two, similar to the *Notice of Hearing* in a probate guardianship or conservatorship (form GC-020). The committee anticipates that only a very modest amount of work would be required to create the form, prepare an Invitation to Comment, circulate the proposal in the spring 2016 comment cycle, and make a recommendation to the Judicial Council in October for the form's adoption, effective January 1, 2017.

The description of this project, No 24 in the revised Annual Agenda, would read as follows:

“Develop and propose adoption of a form for the conservator to use to give notice of the conservatee's death to persons interested in the conservatorship.”

This would be a Priority 1 item, specifically required by the Legislature.



# JUDICIAL COUNCIL OF CALIFORNIA

RULES AND PROJECTS  
COMMITTEE

[www.courts.ca.gov/rupromeetings.htm](http://www.courts.ca.gov/rupromeetings.htm)  
[rupromeetings@jud.ca.gov](mailto:rupromeetings@jud.ca.gov)

## RULES AND PROJECTS COMMITTEE

### MINUTES OF OPEN MEETING

November 18, 2015

12:10 PM

Teleconference

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**Advisory Body Members Present:** Hon. Brian J. Back, Mr. Jake Chatters, Ms. Kimberly Flener, Mr. Patrick M. Kelly, Hon. Martin J. Tangeman, and Hon. Eric C. Taylor.

**Advisory Body Members Absent:** Hon. Harry E. Hull (chair), Hon. Emilie H. Elias, Hon. Dalila C. Lyons, Hon. Brian L. McCabe, and Ms. Debra Elaine Pole.

**Others Present:** Ms. Heather Anderson, Ms. Audrey Fancy, Mr. Bruce Greenlee, Ms. Nicole Giacinti, Mr. Jay Harrell, Ms. Susan McMullan, Mr. Patrick O'Donnell, Ms. Anne Ronan, and Mr. Courtney Tucker

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### DISCUSSION AND ACTION ITEMS

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#### Item 1a

**Civil Jury Instructions: Proposed Revisions and Additions** (Action Required – Recommend for Judicial Council action)

**Action:** The Rules and Projects Committee recommended approval on the Judicial Council's December 11, 2015, consent agenda.

#### Item 1b

**Civil Jury Instructions: Minor Revisions and Additions** (Action Required – Approve for publication)

**Action:** The Rules and Projects Committee approved the minor revisions for publication.

#### Item 2

**Judicial Council Forms: Gun Violence Restraining Orders** (adopt or approve new Judicial Council forms EPO-002, GV-100, GV-100-INFO, GV-109, GV-110, GV-115, GV-116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, GV-800, and GV-800-INFO) (Action Required – Recommend for Judicial Council action)

**Action:** The Rules and Projects Committee recommended approval on the Judicial Council's December 11, 2015, consent agenda.

**Item 3**

**Uniform Bail and Penalty Schedule: 2016 Edition** (Action Required – Recommend for Judicial Council action)

**Action:** The Rules and Projects Committee recommended approval on the Judicial Council's December 11, 2015, consent agenda.

**Item 4**

**Southern California Inter-County Transfer Protocol: Modification of JV-550** (Action Required – Recommend for Judicial Council action)

**Action:** The Rules and Projects Committee recommend approval on the Judicial Council's December 11, 2015, consent agenda.

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**A D J O U R N M E N T**

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There being no further business, the meeting was adjourned.

Approved by the advisory body on enter date.



# JUDICIAL COUNCIL OF CALIFORNIA

RULES AND PROJECTS  
COMMITTEE

[www.courts.ca.gov/ruprometings.htm](http://www.courts.ca.gov/ruprometings.htm)  
[ruprometings@jud.ca.gov](mailto:ruprometings@jud.ca.gov)

## RULES AND PROJECTS COMMITTEE

### MINUTES OF OPEN MEETING

November 24, 2015

12:10 PM

Teleconference

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**Advisory Body Members Present:** Hon. Harry E. Hull (chair), Hon. Brian J. Back, Mr. Jake Chatters, Ms. Kimberly Flener, Hon. Brian L. McCabe, and Hon. Martin J. Tangeman.

**Advisory Body Members Absent:** Hon. Emilie H. Elias, Mr. Patrick M. Kelly, Hon. Dalila C. Lyons, Ms. Debra Elaine Pole, and Hon. Eric C. Taylor

**Others Present:** Hon. Heather Anderson, Mr. Jay Harrell, Ms. Susan McMullan, Mr. Doug C. Miller, Ms. Anne Ronan

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#### DISCUSSION AND ACTION ITEMS

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##### Item 1a

**Civil Forms: Disability Access Litigation forms** (Revise Judicial Council forms DAL-005, DAL-010, DAL-012) (Action Required – Recommend for Judicial Council action)

**Action:** The Rules and Projects Committee recommended approval on the Judicial Council's December 11, 2015, consent agenda.

##### Item 1b

**Civil Forms: Disability Access Litigation forms** (Approve form DAL-002 and revise forms DAL-001, DAL-005, DAL-010, and DAL-012) (Action Required – Approve for circulation)

**Action:** The Rules and Projects Committee approved the proposal for circulation.

##### Item 2a

**Probate Conservatorship: Conservatee's Capacity to Vote** (Revise Judicial Council forms GC-310, GC-320, GC-330, and GC-331) (Action Required —Recommend for Judicial Council action)

**Action:** The Rules and Projects Committee recommended approval on the Judicial Council's December 11, 2015, consent agenda.

##### Item 2b

**Probate Conservatorship: Conservatee's Capacity to Vote** (Revise Judicial Council forms GC-310, GC-320, GC-330, and GC-331) (Action Required – Approve for circulation)

**Action:** The Rules and Projects Committee approved the proposal for circulation.

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**A D J O U R N M E N T**

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There being no further business, the meeting was adjourned.

Approved by the advisory body on enter date.



# JUDICIAL COUNCIL OF CALIFORNIA

RULES AND PROJECTS  
COMMITTEE

[www.courts.ca.gov/ruprometings.htm](http://www.courts.ca.gov/ruprometings.htm)  
[ruprometings@jud.ca.gov](mailto:ruprometings@jud.ca.gov)

## RULES AND PROJECTS COMMITTEE

### MINUTES OF OPEN MEETING

December 10, 2015

12:30 PM

**Advisory Body Members Present:** Harry E. Hull, Jr. (Chair), Hon. Brian J. Back (Vice-Chair), Mr. Jake Chatters, Hon. Emilie H. Elias, Mr. Patrick M. Kelly, Hon. Dalila C. Lyons, Hon. Brian L. McCabe, Hon. Martin J. Tangeman, and Hon. Eric C. Taylor.

**Advisory Body Members Absent:** Ms. Kimberly Flener and Ms. Debra Elaine Pole.

**Chairs Present:** Hon. Tricia Ann Bigelow, Hon. Jerilyn L. Borack, Hon. Raymond Cadei, Hon. Gail Dekeron, Mr. Rick Feldstein, Hon. Raymond J. Ikola, Hon. Mark Juhas, and Hon. John H. Sugiyama.

**Others Present:** Ms. Heather Anderson, Mr. Arturo Castro, Ms. Christine Cleary, Ms. Kerry Doyle, Mr. Audrey Fancy, Ms. Nicole Giacinti, Ms. Diana Glick, Mr. Bruce Greenlee, Mr. Jay Harrell, Ms. Frances Ho, Ms. Tracy Kenny, Ms. Camilla Kieliger, Ms. Tara Lundstrom, Ms. Susan McMullan, Mr. Doug C. Miller, Mr. Patrick O'Donnell, Ms. Anne Ronan, Ms. Robin Seeley, Ms. Gabrielle Selden, Mr. Corby Sturges, Mr. Courtney Tucker, and Ms. Julia Weber.

#### OPEN MEETING

##### Call to Order and Roll Call

The chair called the meeting to order at 12:30 PM, and roll call was taken.

#### DISCUSSION AND ACTION ITEMS (ITEMS X-X)

##### Item 1

##### Civil and Small Claims Advisory Committee Annual Agenda (Action required)

**Action:** The Rules and Project Committee approved the annual agenda.

##### Item 2

##### Civil Procedures: Revision of Wage Garnishment Form Instructions (revise forms WG-002 and WG-030) (Action required – approval for circulation for comment)

**Action:** The Rules and Project Committee approved to circulate for comment.

**Item 3**

**Civil Procedures: Expedited Jury Trials** (adopt new rule 3.1546, amend rules 3.1545–3.1552, and renumber rule 3.1553; adopt new form EJT-003 and EJT-004; approve new forms EJT-005, and EJT-018; revise and renumber forms EJT-001 and EJT-022A; and revise EJT-020) (Action required – approval for circulation for comment)

**Action:** The Rules and Project Committee approved to circulate for comment.

**Item 4**

**Civil and Small Claims Advisory Committee and Family and Juvenile Law Advisory Committee Protective Order Continuance Forms** (Action required – approval for circulation for comment)

**Action:** The Rules and Project Committee approved to circulate for comment.

**Item 5**

**Family and Juvenile Advisory Committee Annual Agenda** (Action required)

**Action:** The Rules and Project Committee approved the annual agenda.

**Item 6**

**Domestic Violence Restraining Orders: New and Updated Forms to Reflect Recent Legislative Changes** (approve Forms DV-805, DV-815, DV-900, DV-901 and Revise Forms DV-100, DV-110, DV-120, DV-120-INFO and DV-130) (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment.

**Item 7**

**Family Law: Special Immigrant Juvenile Findings** (adopt rule 5.130) (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment with the following modifications:

1. Revise subdivision (e) to eliminate the language suggesting that the court must make a completely separate set of findings for each child, and
2. Revise subdivision (f) to indicate more clearly that only records that include information about a child's immigration status need to be kept confidential.

**Item 8**

**Family Law: Changes to Petition and Response** (revise forms FL-100 and FL-120) (Action required – approval for circulation for comment)

**Action:** The Rules and Project Committee approved to circulate for comment.



**Item 9**

**Juvenile Law: Psychotropic Medication** (amend rule 5.640; approve forms JV-218, JV-219, JV-220(B), and JV-224; revise forms JV-220, JV-220(A), JV-221, and JV-223; revise form JV-219-INFO and renumber as JV-217-INFO) (Action required – approval for circulation for comment)

**Action:** The Rules and Project Committee approved to circulate for comment.

**Item 10**

**Juvenile Law: Sealing of Records** (adopt rule 5.840; amend rule 5.830; adopt forms JV-591, JV- 595, JV-595-INFO, JV-596, and JV-596-INFO; revise forms JV-590 and JV-600) (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment.

**Item 11**

**Juvenile: Dependency Petition for Commercially Sexually Exploited Children** (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment.

**Item 12**

**Juvenile Law: Delinquency Defense Attorney Qualifications** (adopt rule 5.664) (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment.

**Item 13**

**Family Law: Signatures by Local Child Support Agencies on Electronically Filed Pleadings (Implementation of AB 1519)** (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment.

**Item 14**

**Juvenile Law: Notice of Juvenile Hearings via Electronic Mail (Implementation of AB 879)** (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate with the following modifications:

Request specific comments on whether the form should be optional or mandatory and revise the footer to read “mandatory” rather than “optional”.

**Item 15**

**Probate and Mental Health Advisory Committee Annual Agenda** (Action required)

**Action:** The Rules and Projects Committee approved the annual agenda.

**Item 16**

**Forms for adult guardianships** (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment.

**Item 17**

**Traffic Advisory Committee Annual Agenda** (Action required)

**Action:** The Rules and Projects Committee approved the annual agenda.

**Item 18**

**Criminal Law Advisory Committee Annual Agenda** (Action required)

**Action:** The Rules and Projects Committee approved the annual agenda.

**Item 19**

**Appellate Advisory Committee Annual Agenda** (Action required)

**Action:** The Rules and Projects Committee approved the annual agenda.

**Item 20**

**Advisory Committee on Criminal Jury Instructions Annual Agenda** (Action required)

**Action:** The Rules and Projects Committee approved the annual agenda.

**Item 21**

**Advisory Committee on Civil Jury Instructions Annual Agenda** (Action required)

**Action:** The Rules and Projects Committee approved the annual agenda.

**Item 22**

**Court Records: Records Sampling and Destruction** (Action required – approval for circulation for comment)

**Action:** The Rules and Projects Committee approved to circulate for comment.

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**A D J O U R N M E N T**

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There being no further business, the meeting was adjourned at 3:00 PM.

Approved by the advisory body on enter date.